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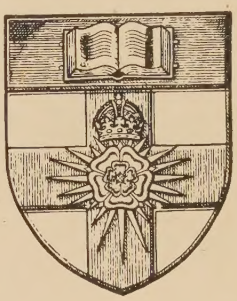

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ERRATA

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Page 149: Headnote, line 12. Delete "no."

Page 166: For *Dennis Lloyd* read *David Lloyd*.

Page 370: *Oscar Chess Ltd.* v. *Williams*. Counsel for the defendant should read *Breuan Rees*, and not as printed.

Page 482: line 2 of headnote should read "issue of 10,000 "preference shares," and not as printed.

Page 512: The reference to *Ebbs* v. *James Whitson & Co. Ltd.* in the headnote should read [1952] 2 Q.B. 877; [1952] 1 T.L.R. 1428; [1952] 2 All E.R. 192, and not as printed.

Page 594: *McClelland* v. *Northern Ireland General Health Services Board*. The London agents for the respondent board were *Hewlett & Co.*, and not as printed.

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6. —— *Divorce—Marriage settlement—Test of—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 24, 25.
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9. —— *Maintenance — Agreement — Consideration — Wife in desertion — Covenant by husband to pay weekly sum — Covenant by wife to maintain herself to indemnify husband against debts and not to pledge his credit—Subsequent decree of divorce on ground of wife's desertion—Action by wife for arrears accrued due before decree nisi—Whether any consideration for husband's promise.*
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12. —— *Maintenance — Divorce — Remarriage—Wife's affidavit concealing remarriage—"Conduct of the parties"—"Circumstances of the case"—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 19 (2) (3) *and* 28 (3).
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17. —— *Practice (in matrimonial causes)—Divorce — Originating summons — Marriage certificate—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 2.
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18. —— *Practice — Pleading — Ancillary relief — Petition or answer — Remedy where application for ancillary relief omitted—Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940 (*L.* 27)), *rr.* 3 (3), 44 (1)—*Matrimonial Causes (Amendment) Rules*, 1957 (*S.I.* 1957, *No.* 176 (*L.* 2)), *rr.* 4, 16.
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19. —— *Practice — Pleading — Petition—Address of petitioner—Application for leave to omit address—Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940 (*L.* 27)), *r.* 4 (1) (*d*)—*Matrimonial Causes (Amendment) Rules*, 1957 (*S.I.* 1957, *No.* 176 (*L.* 2)), *r.* 5.
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20. —— *Practice — Pleading — Petition—Prayer for discretion—Phraseology—Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940 (*L.* 27)), *r.* 4 (3).
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21. —— *Practice—Service of petition—Disclosure of addresses by Government Departments—Maintenance.*
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23. —— *Property—Proceedings under Married Women's Property Act*, 1882, *s.* 17—*Proceedings involving inquiries as to existence of property and unascertained debts not maintainable—Jurisdiction—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 17.
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2. —— *Case stated — Procedural error in—Departure from ordinary principles of justice—Evidence given by co-defendant incriminating defendant—Refusal by justices to allow cross-examination of co-defendant—Defendant convicted and co-defendant acquitted—Decision given after departure from ordinary principles of justice and procedure wrong in law—Decision of justices quashed—Question of law to be answered in favour of defendant—Court no power to order retrial—Summary Jurisdiction Act*, 1857 (20 & 21 *Vict. c.* 43), *s.* 6—*Magistrates' Courts Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 55), *s.* 87.
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4. —— *Warrant—Indorsement—Warrant of arrest issued in Dublin for execution in London—Endorsement pinned on to warrant—Whether valid—Indictable Offences Act,* 1848 (11 *&* 12 *Vict. c.* 42), *s.* 12.

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2. —— *Act of* 1954 — *Business premises (Security of tenure)—Notice of opposition to new tenancy — Form — Notice by joint landlords of intention to demolish and reconstruct the "whole of the" premises—Application to court for new tenancy—Death of one landlord — Hearing of application before grant of probate—Evidence by surviving landlord and named executor of intention to demolish and reconstruct substantial part of premises — Sufficiency of landlords' objection — Competence of witnesses — Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 25 (1) (6), 26 (6), 30 (1) (*f*).

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4. —— *Assignment or underletting of lease —Consent—Residential flat—Covenant not to assign or underlet without consent, such consent not to be unreasonably withheld—Proviso to covenant that tenant offer to landlord surrender of lease before asking for consent to assign—Effect of proviso—Separate covenant —Whether void—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 19 (1) (*a*).

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5. —— *Business premises (Security of tenure)—Landlord's intention to reconstruct—"Substantial work of reconstruction"—Meaning—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

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7. —— *Rent restriction — Death of tenant —"Residing with"—Daughter subtenant of two rooms with joint use of kitchen—Whether member of tenant's family "residing with" her—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*).

* Edmunds *v.* Jones

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8. —— *Rent restriction — Death of tenant —"Residing with"—Grand-daughter and her husband occupying one room of three-roomed flat and sharing use of kitchen—Grand-daughter not subtenant — Whether member of tenant's family "residing with" her—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*).

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9. —— *Rent restriction—Death of tenant—Two applicants qualified by residence — Son and stepdaughter of tenant — Reference by county court judge to registrar as arbitrator—Documentary evidence of tenant's wish for son to succeed rejected by arbitrator—Material evidence — Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*)—*County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 89 (3).

* Trayfoot *v.* Lock - C.A. 1 W.L.R. **351**

10. —— *Rent restriction—Possession application—Perjury by applicant—Reasonableness —Finding by judge of greater hardship on landlord—Order refused on account of landlord's perjury on another issue — Whether proper exercise of discretion—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3 (1), *Sch. I* (*h*).

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* Yelland *v.* Taylor - C.A. 1 W.L.R. **459**

11. —— *Rent restriction — Premises within the Acts—Sublease—Dwelling-house—Rateable value £101—Whole house let at £16 a year—Part of house then sublet at £150 a year—Headlease terminated — Subtenants claiming protection of the Rent Acts—Effect of statutory provisions—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (3)—*Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 41—*Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 15 (1).

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12. —— *Rent tribunal—Furnished premises — Lodger — Reference by paying guest or lodger — Jurisdiction of tribunal — Exclusive occupation of one room as a residence—Landlord's right of access at all times—Whether tribunal has jurisdiction to entertain reference —Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2 (1).

* Regina *v.* Battersea, Wandsworth, Mitcham and Wimbledon Rent Tribunal. *Ex parte* Ambalal Parikh

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2. —— *Costs—Divorce—Costs of interlocutory application reserved inter partes to trial judge—Direction by trial judge for legal aid taxation—Effect of Legal Aid and Advice Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *Sch.* 3, *para.* 4 (1)—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *reg.* 18 (3) (*as amended by S.I.* 1954, *No.* 166).
* PAICE *v.* PAICE - Sachs J. 1 W.L.R. **1011**

3. —— *Costs—Divorce—Defended petition — Security for costs ordered — Wife's case abandoned at conclusion of her evidence — Wife's nil contribution as assisted person — Legal aid fund in no better position to obtain costs than a wife—No order against husband for costs incurred by wife.*
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2. —— Justices—Variation. See HUSBAND AND WIFE.

MASTER AND SERVANT—*Contract of service — Implied term — Duration of service — Officer of statutory board—Advertisement inviting applications for post — Employment expressed to be "permanent and pensionable" —Contract providing for termination in certain contingencies—Right to terminate employment in circumstances not specified.*
* MCCLELLAND *v.* NORTHERN IRELAND GENERAL HEALTH SERVICES BOARD
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3. —— Defective tackle — Knowledge of defect. See FACTORY—Crane.

4. —— *Employment of servant of another —Employment pro hac vice—Dock worker—National Dock Labour Board — No contract between board and master stevedores—Transfer of servant from harbour authority to master stevedores — Liability for injury to servant.*
* GIBB *v.* UNITED STEEL COMPANIES LTD.
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5. —— Negligence. See VICARIOUS LIABILITY.

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6. —— *Theft of servant's goods—Liability of master—Resident house physician—Claim against hospital authorities for loss by theft of personal effects—Whether relation of parties that of boarding-house keeper and boarder or master and servant.*
Contract—Implied term—Contract of service. Boarding house. Negligence (Hospital).
* EDWARDS *v.* WEST HERTS GROUP HOSPITAL MANAGEMENT COMMITTEE
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2. —— *Patients' estates—Originating summons — Form — Management of Patients' Estates Rules,* 1934 (*S.R. & O.,* 1934, *No.* 269, *L.*2), *Sch., Form A, para.* 3 (ii).
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11. —— *"Social welfare" — Recreation — Miners' welfare holiday camp — Trustees occupying premises used for "purpose of a "holiday centre . . . for the benefit of" coal miners, their dependants and invitees—Provision of cost-price holidays—Organization not established or conducted for profit—Not prima facie charitable — Whether "social "welfare"—Rating and Valuation (Miscellaneous Provisions) Act*, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

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* DERBYSHIRE MINERS' WELFARE COMMITTEE *v.* SKEGNESS URBAN DISTRICT COUNCIL
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12. —— *"Social welfare" — Theosophical Society—Objects of society not wholly charitable — Rating and Valuation (Miscellaneous Provisions) Act*, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.

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8. —— *Income tax — Capital or income receipt—Sale of "know-how" by manufacturing chemists to Burmese Government—To aid establishment of pharmaceutical industry in Burma — Whether receipt of company's trade or proceeds of sale of capital asset—Depreciation of capital asset—Meaning of "know-how"—Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 123 (*Sched. D, Case I*).

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11. —— *Income tax—Non-resident—Trade within United Kingdom—Contracts made in United Kingdom for sale of goods manufactured there — United Kingdom company assessed as agent of foreign company — Whether authorized regular agent of foreign company carrying on trade or business within the United Kingdom—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, para.* 1 (*a*) (iii); *All Schedules Rules, rr.* 5, 10.

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12. —— *Income tax—War damage—Value payments — Property dealing company — Whether profits or gains for income tax purposes—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D., Case I—War Damage Act*, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 36, 66, 79 — *War Damage (Public Utility Undertakings, etc.) Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 36), *s.* 28 (1) (4).

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Ord. 22, r. 4 1040
Ord. 24, r. 4 1247
Ord. 45, r. 1 1102
Ord. 48A, rr. 3, 8 1164
Ord. 49, r. 5 102
Ord. 51 1203
Ord. 53A, r. 19 (*a*) 1251
Ord. 55, r. 5A 813
Ord. 55A, r. 6 104
Ord. 58, r. 18 (5) 317
Ord. 65, r. 1 877
R.S.C. (Appeals), 1955, Ord. 58, r. 3 (2) 1182

THE
WEEKLY LAW REPORTS

Volume I

Containing those cases of value to practitioners which are not intended to be included in The Law Reports and also practice notes and directions.

[QUEEN'S BENCH DIVISION.]

* CADOGAN AND ANOTHER *v.* HENTHORNE AND OTHERS.

1956
Nov. 7, 8.

Hallett J.

[1955 C. No. 2091.]

Landlord and Tenant—Rent restriction—Premises within the Acts—Sublease—Dwelling-house—Rateable value £101*—Whole house let at* £16 *a year—Part of house then sublet at* £150 *a year—Headlease terminated—Subtenants claiming protection of the Rent Acts—Effect of statutory provisions—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (3) *—Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 41*—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 15 (1).

The lessee of premises, under an 80-year lease, of which the rateable value was £101 and for which he paid a rent of £16 a year, sublet the basement and ground floor to the defendants at a rent of £150 a year. The headlease expired on December 24, 1954. In an action by the landlords for possession, the sublessees claimed that they were protected in their possession of the basement and ground floor by the Rent Acts. Although prior to 1954 the sublessees' claim to protection by virtue of section 15 (3) of the Act of 1920 [1] would have been defeated both because the rateable value of the whole of the premises let to the headlessee exceeded £100 and he paid a rent which was less than two-thirds of the rateable value (section 12 (7) of the Act of 1920), nevertheless, the sublessees contended that they were protected by section 15 (3) because the exceptions which would otherwise have taken them outside the ambit of the Acts had been eliminated by

[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3): "Where the interest of a "tenant of a dwelling-house to which "this Act applies is determined, either "as the result of an order or judg-"ment for possession or ejectment, or "for any other reason, any sub-tenant "to whom the premises or any part "thereof have been lawfully sublet "shall, subject to the provisions of "this Act, be deemed to become the "tenant of the landlord on the same "terms as he would have held from "the tenant if the tenancy had "continued."

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section 41 of the Housing Repairs and Rents Act, 1954,[2] and section 15 (1) of the Landlord and Tenant Act, 1954.[3] It was conceded by the landlords that the effect of section 15 (1) was to provide that a sublessee was not to be deprived of the benefit of the Rent Acts by reason only that the rent payable by the head-lessee was less than two-thirds of the rateable value. On the question of the construction of section 41:—

Held, that section 41 was to be read as if the notional separate lettings were both made to the tenant of the superior letting, and, accordingly, although the rateable value of the whole of the premises was £101, the rateable value of the notional separate letting of the basement and ground floor was less than £100 and, therefore, that part of the premises was within the Rent Acts, and, accordingly, by virtue of that provision, section 15 (1) of the Landlord and Tenant Act, 1954, and section 15 (3) of the Act of 1920, the subtenants were entitled to the protection of the Rent Acts and to remain in possession.

Cow v. *Casey* [1949] 1 K.B. 474; 65 T.L.R. 84; [1949] 1 All E.R. 197 and *Knightsbridge Estates Trust Ltd.* v. *Deeley* [1950] 2 K.B. 228; 66 T.L.R. (Pt. 1) 867; [1950] 1 All E.R. 577 considered.

ACTION.

The plaintiffs, William Gerald Charles Earl Cadogan and Cadogan Settled Estates Co., claimed possession of premises, No. 1, Rawlings Street, Chelsea, consisting of a basement, ground floor and three upper floors, and mesne profits at the rate of £250 per annum from December 25, 1954, until delivery up of possession from the defendants, Leslie Stapleton Henthorne, Leopold J. Pascal and Lucette N. Borgaud de la Forgière.

By a lease dated May 18, 1883, the plaintiffs let the premises to a Mr. Wright for a term of 80 years, expiring on June 24, 1952, at a rent of £4 a year. By an underlease dated June 22, 1883, Mr. Wright let the premises to a Mr. Seymour for a term expiring on June 23, 1952, at a rent of £16 1s. a year. On September 16, 1912, the underlease was assigned to a Miss Brownlow. On July 15, 1944, Miss Brownlow sublet the ground floor and basement of the premises for a term of three years to the second and third defendants. That subletting terminated in 1947, and on July 17, 1947, Miss Brownlow again let the ground floor and basement to

[2] Housing Repairs and Rents Act, 1954, s. 41: "Where a dwelling-house "to which the Act of 1920 applies "(hereinafter referred to as 'the sub-"'let part') forms part of premises, "not being such a dwelling-house, "which have been let as a whole on "a superior letting, then from the "coming to an end of the superior "letting the operation of the Rent "Acts in relation to the sublet part "shall be the same as if in lieu of "the superior letting there had been "separate lettings of the sublet part "and the remainder of the premises, "for the like purposes as under the "superior letting, and at rents equal "to the just proportion of the rent "under the superior letting."

[3] Landlord and Tenant Act, 1954, s. 15 (1): "For the purposes of sub-"section (3) of section 15 of the Act "of 1920 (which provides that, where "the interest of a tenant comes to an "end for any reason, a subtenant to "whom the premises or any part have "been lawfully sublet shall be deemed "to become the tenant of the superior "landlord), the interest of a tenant "under a long tenancy shall, notwith-"standing the provisions of subsection "(7) of section twelve of that Act, "not be disregarded by reason only "that the rent payable in respect of "the tenancy is one falling within "the said subsection (7)."

the same defendants for a term of five years less two days from June 24, 1947, at £150 a year. Miss Brownlow died on October 18, 1949, and on June 6, 1950, her personal representative assigned the underlease to the first defendant, Henthorne. In the ordinary course the leases would have expired in June 1952, the lease on June 24, the underlease on June 23 and the subletting on June 22, but by virtue of the provisions of the Leasehold Property (Temporary Provisions) Act, 1951, as extended, the three defendants all became entitled, notwithstanding that their tenancies would otherwise have expired, to remain in possession of their respective parts until December 24, 1954. The rateable value of the whole of the premises at the material date, which was April 6, 1939, was £101.

By a specially indorsed writ dated May 18, 1955, the plaintiffs claimed possession of the premises and mesne profits from December 25, 1954, until delivery up of possession.

Judgment was signed against the first defendant, Henthorne, in 1955, and the action accordingly proceeded against the second and third defendants.

By their defence the second and third defendants alleged that the ground floor and basement was at all material times a dwelling-house to which the Rent Acts, 1920 to 1939, applied. They further alleged that they were entitled to remain in possession by virtue of the combined effect of section 41 of the Housing Repairs and Rents Act, 1954, section 15 of the Landlord and Tenant Act, 1954, and the Rent Acts, 1920 to 1939. The defendants did not dispute that the plaintiffs were now their landlords of the basement and ground floor and were ready and willing to pay to the plaintiffs all the rent that was due in respect thereof from December 25, 1954, and had offered to pay the plaintiffs, but they had refused to accept any rent and stated that they did not recognize the defendants as their tenants.

By their reply the plaintiffs admitted that the defendants had offered to pay them rent and that they had refused to accept it, but otherwise they joined issue with the defendants in their defence.

Harold Heathcote-Williams Q.C. and *Patrick Medd* for the plaintiff landlords.

Lionel A. Blundell for the defendant subtenants.

The cases cited in argument are referred to in the judgment.

HALLETT J. stated the facts and continued: It is common ground that at common law the termination of a lease otherwise than by a surrender brings to an end the sublettings. Therefore, the termination, at the end of the extended period, of Henthorne's lease would, at common law, have brought to an end the subtenancy of the other two defendants. Accordingly, in order to justify the retention of possession by the subtenants

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they must point to some statutory provision which justifies that retention. The subtenants have relied on three statutory provisions, section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, section 15 of the Landlord and Tenant Act, 1954, and section 41 of the Housing Repairs and Rents Act, 1954, contending that the combined effect of those provisions is to give them the protection which they claim.

[His Lordship read section 15 (3) of the Act of 1920, and continued:] Henthorne's interest was determined by the effluxion of time, and had he been the tenant of a dwelling-house to which the Act of 1920 applied, then the other two defendants, as subtenants to whom a part of the premises had been lawfully sublet, would be deemed to be the tenants of the landlords, namely the plaintiffs, on the same terms as they would have held from Henthorne if the tenancy had continued. The crucial words, for the purposes of the present case, are "... the "interest of a tenant of a dwelling-house to which this Act "applies. ..."

By section 7 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938: "If any question arises in any "proceedings whether the principal Acts apply to a dwelling-"house, it shall be deemed to be a dwelling-house to which those "Acts apply unless the contrary is shown." The effect of that subsection was considered in *Ford* v. *Langford*,[1] where the court held that the provisions merely meant that the rateable value of the house was presumed to be within the financial limits prescribed by the Rent Acts and did not mean that there was a presumption against the house being excluded from the Acts on some other ground.

There are various grounds on which the application of the Rent Acts to a dwelling-house may be excluded, but in the present case I am concerned only with two of them. The first of these arises by virtue of section 3 (1) of the Rent and Mortgage Interest Restrictions Act, 1939, by which the Rent Acts apply to a dwelling-house in the Metropolitan Police district only if the rateable value on April 6, 1939, did not exceed £100. On that day the rateable value of these premises as a whole was £101 and therefore this dwelling-house which was let to Henthorne was not a dwelling-house to which the Act of 1920 applied. The result of that, if section 15 (3) stood alone, was that the subtenants would not derive protection thereunder, from having to give up possession. The position was considered in *Cow* v. *Casey*,[2] where it was held that as the dwelling-house, which was the subject of the original demise, was not a dwelling-house to which the Rent Acts applied, the subtenant was not protected from ejectment and became a trespasser when his subtenancy determined.

The other ground on which it was contended, and indeed conceded, that in the present case the dwelling-house of which

[1] 65 T.L.R. 138; [1949] 1 All E.R. 483.

[2] [1949] 1 K.B. 474; 65 T.L.R. 84; [1949] 1 All E.R. 197.

Henthorne was the tenant was not a dwelling-house to which the Act of 1920 applied arises from the provisions of section 12 (7) of the Act of 1920 which reads: "Where the rent payable in "respect of any tenancy of any dwelling-house is less than two-"thirds of the rateable value thereof, this Act shall not apply "to that rent or tenancy . . . and this Act shall apply in respect "of such dwelling-house as if no such tenancy existed or ever "had existed." In *Knightsbridge Estates Trust Ltd.* v. *Deeley*[3] it was held that where the rent of a dwelling-house was less than two-thirds of the rateable value, the tenancy was not within the Rent Acts and that, accordingly, the subtenants could not avail themselves of the concluding provisions of section 15 (3) of the Act of 1920.

In the present case the rateable value of the dwelling-house of which Henthorne was tenant was, at the appropriate time, above £100, and the rent which he had to pay, namely £16 1s. a year, was very much less than two-thirds of that rateable value. Accordingly, it is conceded by Mr. Blundell that if section 15 (3) stood alone, the subtenants could not rely upon that section for two reasons which, in this particular case, would be cumulative: namely, the reason in *Cow* v. *Casey*,[4] that the rateable value is too high, and the reason in *Knightsbridge Estates*[5] that the rent is too low.

Mr. Blundell, however, contended that the application of section 15 (3) to the present case had been fundamentally affected by two further Acts of Parliament, which were passed on July 30, 1954, while the term of the lease as extended by the Leasehold Property (Temporary Provisions) Act, 1951, as extended, was still running. Those Acts were the Housing Repairs and Rents Act, 1954, which came into operation on August 30, 1954, and the Landlord and Tenant Act, 1954, which came into operation on October 1, 1954.

The Landlord and Tenant Act, 1954, is concerned, among other things, with the "protection of residential tenants on "termination of long tenancies at low rents"—I read those words from the sidenote to section 1. "Long tenancy" is defined in section 2 (4) as meaning "a tenancy granted for a "term of years certain exceeding 21 years" and by subsection (5) of the same section: "the expression 'tenancy at a low rent' "means a tenancy the rent payable in respect whereof . . . is "less than two-thirds of the rateable value of the property com-"prised in the tenancy." Section 1 of the Act provides: "On "the termination in accordance with the provisions of this Part "of this Act of a tenancy to which this section applies the tenant "shall be entitled to the protection of the Rent Acts subject to "and in accordance with those provisions." Henthorne was not entitled, as is apparent, to derive any benefit from those sections and the subtenants were not entitled to derive benefit

[3] [1950] 2 K.B. 228; 66 T.L.R. (Pt. 1) 867; [1950] 1 All E.R. 577.
[4] [1949] 1 K.B. 474.
[5] [1950] 2 K.B. 228.

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from them, because they had not got a long tenancy. Accordingly, it is only on section 15, as far as that Act is concerned, that any reliance is placed by the subtenants. Section 15 (1) provides: "For the purposes of section 15 (3) of the Act of 1920 "... the interest of a tenant under a long tenancy shall, notwith-"standing the provisions of section 12 (7) of that Act, not be "disregarded by reason only that the rent payable in respect of "the tenancy is one falling within the said subsection (7)."

Now the interest of Henthorne was the interest of a tenant under a long tenancy, and one of the reasons why it is alleged that his tenancy should be disregarded for the purposes of section 15 (3) of the Act of 1920 was that his rent was what is described, in the second of the Acts of 1954, as a low rent. Accordingly section 15 of that Act of 1954, as Mr. Heathcote-Williams agrees, has the effect of disposing of one of the two grounds (namely, that the rent was less than two-thirds of the rateable value) on which it could be contended for the plaintiffs that section 15 (3) of the Act of 1920 had no application to the present case and could not avail the subtenants. In other words, if the tenancy in the *Knightsbridge* case [6] had been a long tenancy and if the Landlord and Tenant Act, 1954, had been passed before that case was heard, it would have been decided differently. However, that leaves untouched the other ground on which it is submitted, on behalf of the landlords, that Henthorne's interest in the dwelling-house in question was not an interest in a dwelling-house to which the Rent Acts applied: the other ground being that the rateable value of that house was such as to take it out of the scope of the Rent Acts.

The real contest in this case, is as to the true construction and effect of a few lines in section 41 of the Housing Repairs and Rents Act, 1954. The opening lines of this section at first caused me some difficulty, because the dwelling-house referred to in section 15 (3) of the Act of 1920 is the whole dwelling-house, of which part has been sublet to the subtenants claiming protection, whereas in section 41 the dwelling-house referred to is not the whole dwelling-house but the sublet part; in the present case, the basement and ground floor. Then the words: "... forms part of premises, not being such a dwelling-house, "which have been let as a whole on a superior letting ..." show clearly that section 41 is contemplating the very case where the dwelling-house in which the interest of the tenant has been determined is not a dwelling-house to which the Rent Acts apply; in other words, is a dwelling-house to which section 15 (3) of the Act of 1920 does not apply. It is in the last lines of section 41 that one finds the crux of this case.

Mr. Heathcote-Williams, for the plaintiffs, submits that the notional separate lettings of the sublet part and of the remainder of the premises are notional separate lettings of the sublet part to

[6] [1950] 2 K.B. 228.

the present defendants and of the remainder of the premises to Henthorne. Upon this construction, since the notional rent of the sublet part was clearly less than two-thirds of the ascertainable rateable value of that part and since section 15 of the second Act of 1954 only refers to a "low rent" paid by a tenant under a "long tenancy," which the subtenants were not, they could not avail themselves of that section to oust section 12 (7) of the Act of 1920 and gain the protection of section 15 (3) of that Act.

Mr. Blundell, on the other hand, submits that the notional separate lettings referred to in section 41 of the Housing Repairs and Rents Act, 1954, are notional separate lettings of the sublet part and of the remainder of the premises to the person whom I would describe as the original tenant of the whole. Counsel says that the position is the same as if Wright had let by two separate lettings to Henthorne (a) the basement and ground floor and (b) the other three floors of the premises. Counsel agrees that if that had been so and if the whole rent of the premises, namely £16 1s. a year, had been severed into its just proportions attributable respectively to the basement and ground floor and the three upper floors, and if the rateable value had also been severed the result would have been that the rent of each of the two subjects of letting would have been less than two-thirds of the rateable value attributed to those parts of the premises, and that therefore exclusion of the notional separate lettings from the operation of section 15 (3) of the Act of 1920 by virtue of low rent would remain but for section 15 of the Landlord and Tenant Act, 1954. Upon his construction, however, the dwelling-house notionally let separately to the head tenant under a "long tenancy," and let by him in turn to the subtenants under a short tenancy, had clearly a rateable value of less than £100 and so was a dwelling-house to which the Act of 1920 applied, and in respect of which the subtenants could get protection under section 15 (3) of that Act, if section 12 (7) of that Act was, as he submitted, ousted by section 15 of the second Act of 1954.

The crucial question then is: To whom are the separate lettings mentioned in section 41 of the first Act of 1954 deemed to have been made? As regards the argument of counsel for the plaintiffs, there was one feature of the matter that made some impression on me which was that the actual rent paid by the subtenants under the sublease was £150 a year. It seemed an extraordinary artificial result to produce by Mr. Heathcote-Williams's interpretation of section 41, that, for the purposes of the operation of the Rent Acts in relation to the sublet part the rent should be assumed to be not £150, which it in fact was, but an apportioned part of £16 1s., say £7, which it most certainly was not. I realize that in cases concerned with rent restriction to allow oneself to be unduly influenced by the strange results which seem to follow from one construction or another is not very safe, as was indeed pointed out, I think, by the Court of

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Appeal in the *Knightsbridge* case.[7] I think that it is a point which is worth being borne in mind, but I accept that the matter must ultimately depend upon an examination of the actual wording of the enactment and a correct construction of that wording.

Mr. Blundell points out to me certain things in connexion with the wording of section 41 of the first Act of 1954 which, in his submission, point to his interpretation being correct. The first point which makes some impression upon me is in connexion with the words: "... the operation of the Rent Acts in "relation to the sublet part shall be the same as if in lieu of "the superior letting there had been separate lettings. ..." Now the superior letting was a letting to Henthorne, and Mr. Blundell submits that it would not be natural if the words of section 41 were read as supposing that, in lieu of the superior letting to Henthorne, there had been separate lettings of the sublet part to the subtenants and of the remainder of the premises to Henthorne, who was the only other occupier of the premises. Mr. Blundell submits that on Mr. Heathcote-Williams's argument one would have to read it this way: "... the same as if in lieu of the superior letting to Henthorne "there had been separate lettings of the sublet part to the sub-"tenants and the remainder of the premises to Henthorne." Now, says Mr. Blundell, as a matter of construction it is far more natural and probable that what the words mean is: "... shall be the same as if in lieu of the superior letting to "Henthorne there had been separate lettings to Henthorne of "the sublet part and the remainder of the premises, for the like "purposes as under the superior letting, and at rents equal to "the just proportion of the rent under the superior letting."

I find myself very much impressed by that argument. The second argument which Mr. Blundell put to me, which is, perhaps, not quite so easy to follow, is that section 41 is dealing with the case where the superior letting has come to an end, and the subletting would also have come to an end unless saved by the Rent Acts. He says that this is a section to give some subtenants protection, and that it does not speak of the subtenancy as something which is finished; it envisages the possibility of the subtenancy continuing by the words which appear in the middle of the section, namely, "... then from "the coming to an end of the superior letting the operation of "the Rent Acts in relation to the sublet part shall be the same "as if in lieu of the superior letting. ..." Counsel says that that contemplates that what is protecting the subtenant is an alteration in the notional position of his landlord—that is to say, Henthorne—and not a notional alteration of his own position, which is what is envisaged, so he contends, by the interpretation put forward by Mr. Heathcote-Williams.

[7] [1950] 2 K.B. 228.

I have now stated the arguments on the one side and the other, and can summarize the position as I see it, and state my conclusion. In the first place, it is conceded that section 15 (3) of the Act of 1920 would, by itself, not be sufficient to protect these defendants for the two reasons I have given. In the second place, it is conceded that, as regards the low rent the effect of that is, for the purposes of the present case, destroyed by section 15 of the Landlord and Tenant Act, 1954. It is contended, however, that as regards the other ground—namely, the high rateable value—that still prevails to render the protection afforded by section 15 (3) not available to the subtenants. That depends on what is the true construction of section 41. Mr. Heathcote-Williams contends that there is, in between section 41 and section 15, a gap, and that as a result subtenants in a case such as the present are still deprived of the protection of subsection (3) of section 15 of the Act of 1920.

In my judgment, the construction of section 41 for which Mr. Blundell contends is the correct one. The other construction is one that does not fit in at all well with the wording of section 41. I therefore uphold the construction put forward by Mr. Blundell, with the result that, in my judgment, the other ground on which section 15 (3) is sought to be excluded by the plaintiffs is also no longer available, and the defendants are entitled to the protection afforded by the latter part of that subsection. There will be judgment accordingly.

Judgment for the defendants.

Solicitors: *Lee & Pembertons; William Charles Crocker.*

C. J. E.

[COURT OF APPEAL.]

*M. & S. DRAPERS (A FIRM) *v.* REYNOLDS.

C. A.

1956
Oct. 23, 24;
Nov. 8.

Denning,
Hodson and
Morris L.JJ.

[Plaint No. M. 5118.]

Restraint of Trade—Master and servant—Salesman—Collector-salesman bringing in own connexion of customers—Covenant not to sell or canvass or solicit orders from any person inscribed on books of firm as customer during three years preceding determination of employment for period of five years—Restriction unreasonable.

In March, 1953, a collector-salesman entered the employment of a firm of credit drapers, bringing with him a connexion of customers acquired in previous employments. On August 11, 1955, the salesman and the firm entered into a written agreement determinable by two weeks' notice on either side and providing for the salesman a weekly wage of £10. Clause 8 provided: "For a period "of five years following the determination of this agreement the "servant shall not . . . sell or canvass or solicit orders . . . by way

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"of the business of a credit draper from any person whose name "shall have been inscribed on the books of the firm as a customer "during the three years immediately preceding such determination "upon whom the servant has called in the course of his duties for "the firm." On May 17, 1956, the salesman left the firm's employment, and thereafter sold goods by way of the business of a credit draper to persons whose names were on the firm's books as customers during the three years before he left. The firm as covenantees sought to enforce the covenant against him:—

Held, that the covenant was unreasonably restrictive, having regard to the firm's business and the salesman's employment, to the duration of the restriction, and to the circumstance that a large proportion of the customers covered by the covenant were persons who had formed the salesman's connexion before he entered the firm's employment.

Mason v. *Provident Clothing & Supply Co. Ltd.* [1913] A.C. 724; 29 T.L.R. 727, and *Herbert Morris Ltd.* v. *Saxelby* [1916] 1 A.C. 688; 32 T.L.R. 297 applied.

Gilford Motor Co. Ltd. v. *Horne* [1933] 1 Ch. 935 distinguished.

APPEAL from Judge Charlesworth, sitting at Newcastle-upon-Tyne County Court.

In March, 1953, the defendant, Robert Richard Reynolds, entered into the employment of the plaintiff firm, M. & S. Drapers, a credit drapery firm, as a collector salesman, continuing in the employment for over two years without any formal agreement. When he joined the firm he had a connexion with a certain number of customers obtained during his previous employment under other employers in the credit drapery trade; and those customers became customers of the plaintiff firm. As a result there were many householders known to him and to whom he was known, and who might be expected to be responsive to his persuasiveness as a saleman. After he joined the plaintiff firm his work consisted in calling (a) on those householders who formed his own connexion and whom he introduced; (b) on those whose names were on a list given to him by his new employers; and (c) possibly on other householders. His work was to effect sales of drapery on credit terms; payments were made in equal instalments spread over a period of 20 weeks, and each collector salesman called weekly to collect payments due.

On August 11, 1955, the parties entered into a written agreement determinable by two weeks' notice on either side, providing for a weekly wage of £10 to be paid to the defendant. Clause 8 of the agreement provided: "For a period of five years following "the determination of this agreement the servant shall not "directly or indirectly either by himself or as the agent servant "or partner of another person or company sell or canvass or "solicit orders and in either case by way of the business of a "credit draper from any person whose name shall have been "inscribed upon the books of the firm as a customer during the "three years immediately preceding such determination upon "whom the servant has called in the course of his duties for the "firm."

On May 17, 1956, the defendant left the employment of the plaintiffs. After leaving that employment, he sold goods to persons whose names were on the books of the plaintiffs as customers during the three years before he left their employment by way of the business of a credit draper. The plaintiffs sought in the county court to enforce the covenant against him. The plaintiffs, as covenantees, accepted the proposition that, prima facie, the covenant was void and unenforceable unless they could establish that the restraint was reasonable.

The county court judge held that, although it might be that the plaintiff firm had some proprietary rights in their lists of customers, a restriction for as long as five years for a man in the position of the defendant, earning a modest wage and liable to be dismissed on two weeks' notice was quite unreasonable; and he gave judgment for the defendant. The plaintiff firm appealed.

Peter Foster for the plaintiffs.
R. J. Parker for the defendant.

The following cases were cited in the argument: *Herbert Morris Ltd.* v. *Saxelby* [1]; *Mason* v. *Provident Clothing and Supply Co. Ltd.* [2]; *Gilford Motor Co.* v. *Horne* [3]; *Dubowski & Sons* v. *Goldstein* [4]; *Mills* v. *Dunham* [5]; *Haynes* v. *Doman* [6]; *Continental Tyre and Rubber (Great Britain) Co. Ltd.* v. *Heath* [7]; *Fitch* v. *Dewes* [8]; *Attwood* v. *Lamont.* [9]

Cur. adv. vult.

Denning L.J. I will ask Hodson L.J. to give the first judgment.

Hodson L.J. stated the facts and continued: The plaintiffs have appealed, contending that since a proprietary right is established, the protection of which is necessary, the restriction does not necessarily become unreasonable even if it is unlimited in point of time and the notice is short. They maintain, correctly, that they had a legitimate interest to protect and were entitled to take steps to prevent their existing customers from being interfered with or being enticed away.

So far as the question of shortness of notice is concerned, it appears that although the position of the employee has to be considered, the court will not inquire into the adequacy of the consideration or weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed on him by the restraint: see the observations of Lord Parker of Waddington in *Herbert Morris Ltd.* v. *Saxelby.* [1]

[1] [1916] 1 A.C. 688; 32 T.L.R. 297.
[2] [1913] A.C. 724; 29 T.L.R. 727.
[3] [1933] Ch. 935.
[4] [1896] 1 Q.B. 478; 12 T.L.R. 259.
[5] [1891] 1 Ch. 576; 7 T.L.R. 238.
[6] [1899] 2 Ch. 13; 15 T.L.R. 354.
[7] (1913) 29 T.L.R. 308.
[8] [1920] 2 Ch. 159 (C.A.); [1921] 2 A.C. 158; 37 T.L.R. 784 (H.L.).
[9] [1920] 3 K.B. 571; 36 T.L.R. 895.
[1] [1916] A.C. 688, 707; 32 T.L.R. 297.

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On the question of time they rely mainly on the authority of *Mills* v. *Dunham*,[2] *Dubowski & Sons* v. *Goldstein*[3] and *Gilford Motor Co. Ltd.* v. *Horne*.[4]

In the first case there was an agreement for the employment of the defendant as a traveller providing that he was to "call "upon and solicit orders" for all articles in the way of the plaintiffs' business of antiseptic manufacturers and in the case of the determination of the agreement that he should not, either on his own account or for any employer, "call upon, or directly "or indirectly solicit orders from, or in any way deal or transact "business with" anyone who had while the agreement was in force been a customer of the plaintiffs. The defendant was in breach of the agreement and it was held to be enforceable because the restriction did not go beyond what was reasonable although unlimited as to time and although the employment was terminable at one week's notice on either side. It is to be noted that Lindley L.J. was of opinion that the onus was not cast upon the person supporting the covenant to show that it was reasonable.[5] This view is not now accepted: see Lord Parker's observations in *Herbert Morris Ltd.* v. *Saxelby*.[6]

In the second case a similar covenant was held valid in the case of a milk roundsman.

These authorities, prior to 1913, as Atkin L.J. and Younger L.J. pointed out in *Attwood* v. *Lamont*,[7] must be read in the light of the recent decisions of the House of Lords in *Mason* v. *Provident Clothing and Supply Co. Ltd.*[8] and *Herbert Morris Ltd.* v. *Saxelby*.[9]

Since these decisions it has been recognized that as the time of the restriction lengthens and the space of its operation extends, the weight of the onus upon the covenantees grows: see *per* Lord Shaw in *Herbert Morris Ltd.* v. *Saxelby*.[10] In *Mason's* case[11] Lord Moulton described the position of a local canvasser and debt collector such as that of the defendant in this case. He said[11]: "it would be reasonable for the employer to protect "himself against the danger of his former servant canvassing or "collecting for a rival firm in the district in which he had been "employed. If he were permitted to do so before the expiry of "a reasonably long interval he would be in a position to give to "his new employer all the advantages of that personal knowledge "of the inhabitants of the locality, and more especially of his "former customers, which he had acquired in the service of the "respondents and at their expense. Against such a contingency "the master might reasonably protect himself, but I can see no "further or other protection which he could reasonably demand."

These observations of Lord Moulton apply, I think, to this

[2] [1891] 1 Ch. 576; 7 T.L.R. 238.
[3] [1896] 1 Q.B. 478; 12 T.L.R. 259.
[4] [1933] 1 Ch. 935.
[5] [1891] 1 Ch. 576, 586.
[6] [1916] 1 A.C. 688, 707.
[7] [1920] 3 K.B. 571, 580, 582; 36 T.L.R. 895.
[8] [1913] A.C. 724; 29 T.L.R. 727.
[9] [1916] 1 A.C. 688.
[10] Ibid. 715.
[11] [1913] A.C. 724, 743.

case and show that the time of the restriction ought to be taken into account in considering whether or not it is reasonable. In this case there is the added circumstance which has to be taken into account, namely, that a large proportion of the customers covered by the covenant were in fact composed of persons who had formed the connexion of the defendant before he entered the service of the plaintiffs.

The third case, strongly relied on by the plaintiffs, especially as it is a decision of this court given since the two House of Lords cases above mentioned were decided, is *Gilford Motor Co. Ltd.* v. *Horne*.[12] This case concerns a covenant in restraint of trade between a company which bought parts of motor vehicles from manufacturers, assembled the parts on the company's premises, and sold the products under the name of Gilford Motor Vehicles. They also sold separate parts for cash. By agreement dated May 30, 1929, the defendant was appointed managing director for six years from September 1, 1928. Clause 9 of the agreement provided that: "The managing director shall not at any "time while he shall hold the office of a managing director or "afterwards solicit, interfere with or endeavour to entice away "from the company any person, firm or company who at any "time during or at the date of the determination of the employ-"ment of the managing director were customers of or in the "habit of dealing with the company."

In November, 1931, the defendant's employment was terminated by an agreement providing that he was to receive a fixed sum payable in instalments. Shortly afterwards he opened a business for the sale of spare parts of Gilford vehicles. It was held by the Court of Appeal that in the circumstances the covenant was not wider than was reasonably necessary for the protection of the plaintiff company's trade and was therefore enforceable by injunction.

This was a covenant unlimited as to time and is an authority in favour of the appellants, who seek to enforce a covenant against solicitation of customers which is limited to five years, and therefore to that extent an a fortiori case, for the court did not take the view that such a covenant in the case under consideration was so wide as to be unreasonable by reason of the time element. I think, however, the answer to this argument is to be found in the fact that the circumstances of that case were entirely different from those of this case.

The first task of the court, it has been said, in these cases is to ascertain the nature of the master's business and of the servant's employment. The managing director is not regarded in the same light as the traveller or canvasser. Each case must be considered in the light of its own circumstances, and I have come to the conclusion that, paying due regard to the decisions of the House of Lords in *Mason* v. *Provident Clothing Co.*[13] and

[12] [1933] 1 Ch. 935.

[13] [1913] A.C. 724.

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Herbert Morris Ltd. v. *Saxelby*,[14] the decision of the county court judge was right and ought to be affirmed. He considered all the circumstances of the case, recognizing the proprietary right which the plaintiffs were entitled to protect, and held that the restriction for as long as five years against dealing with the plaintiffs' customers on whom he had called during his service with them was, for a man in the position of the defendant, unreasonable. In my opinion the decision was correct in law and I would dismiss the appeal.

MORRIS L.J. stated the facts, and continued: The defendant had been employed by the plaintiffs for over two years four months before the written agreement of August 11, 1955, was entered into. The evidence does not explain why it was then made. But there is no challenge as to its validity beyond that which is involved in denying the claim of the plaintiffs to enforce the covenants contained in clause 8.

The judge's main ground for refusing to enforce restraint on the defendant was that a restriction for as long as five years for a man in the position of the defendant, whose employment at £10 per week was subject to two weeks' notice, was quite unreasonable.

The plaintiffs, accepting the burden of showing that the restrictions were reasonable, submitted that they were so in their scope, and that as the restrictions related only to customers whose names had been on the plaintiffs' books and on whom the defendant had called in the course of his duties, the restrictions would be good even had they been unlimited in time or were unlimited as to space. Incidentally, the words "whose "name shall have been inscribed upon the books of the firm as a "customer during the three years immediately preceding such "determination" appear to be ambiguous. Do these words refer to customers whose names have been put on the books at any time during the three years, or do they refer to customers whose names have been and remained on the books during the three years' period? No point as to ambiguity in reference to these words was, however, taken by either side.

The defendant submitted that the restrictions went beyond any legitimate protection of interest and were too extensive in scope and time, and, furthermore, were unreasonable because they deprived the defendant of his goodwill relationship towards customers whom he had introduced.

The general principles which govern cases of this kind have been authoritatively laid down by the House of Lords in the two leading cases of *Mason* v. *Provident Clothing and Supply Co. Ltd.*[15] and *Herbert Morris Ltd.* v. *Saxelby*.[16]

In the former case, Mason was a canvasser employed by a clothing and supply company having branches all over England.

[14] [1916] 1 A.C. 688.
[15] [1913] A.C. 724.
[16] [1916] 1 A.C. 688.

which carried on business on what was described as a check and credit system. It was held that an agreement by Mason that he would not within three years after the termination of his employment be in the employ of any person, firm or company carrying on or engaged in a business the same as or similar to that of his employers, or assist any person employed or assisting in any such other business within 25 miles of London was unenforceable as being wider than was reasonably necessary for the employers' protection.

It is, I think, clear that a restraint is invalid if imposed in order to prevent competition or the use of personal skill and knowledge acquired by an employee in his employer's business. In *Herbert Morris Ltd.* v. *Saxelby* [17] Lord Shaw of Dunfermline said: "Trade secrets, the names of customers, all such things "which in sound philosophical language are denominated objec- "tive knowledge—these may not be given away by a servant; "they are his master's property, and there is no rule of public "interest which prevents a transfer of them against the master's "will being restrained. On the other hand, a man's aptitudes, "his skill, his dexterity, his manual or mental ability—all those "things which in sound philosophical language are not objective, "but subjective—they may and they ought not to be relinquished "by a servant; they are not his master's property; they are his "own property; they are himself. There is no public interest "which compels the rendering of those things dormant or sterile "or unavailing; on the contrary, the right to use and to expand "his powers is advantageous to every citizen, and may be highly "so for the country at large."

In the same case Lord Parker of Waddington, after referring to the fact that in *Mason's* case [18] the restraint was held bad as being wider than was necessary to protect the employer from injury by misuse of the employee's acquaintance with customers or knowledge of trade secrets, said [19]: "In fact the reason, and "the only reason, for upholding such a restraint on the part of an "employee is that the employer has some proprietary right, "whether in the nature of trade connexion or in the nature of "trade secrets, for the protection of which such a restraint is— "having regard to the duties of the employee—reasonably "necessary."

It appears from the speeches in *Mason's* case [20] that a different and limited restraint might have been enforced. Lord Haldane L.C. said [21]: "Had they been content with asking him "to bind himself not to canvass within the area where he had "actually assisted in building up the goodwill of their business, "or in an area restricted to places where the knowledge he had "acquired in his employment could obviously have been used to "their prejudice, they might have secured a right to restrain him

[17] Ibid. 714.
[18] [1913] A.C. 724.
[19] [1916] 1 A.C. 688, 710.
[20] [1913] A.C. 724.
[21] Ibid. 731, 732.

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"within these limits. He appears, indeed, to have been, in point "of fact, carrying on his canvassing for a similar business very "near to his old place of employment, and it is probable that by a "properly limited clause they could have restrained him from "doing this."

Later Lord Haldane said [22]: "The success of the canvasser "depended, as I have already said, mainly on his natural apti-"tude. No doubt he might acquire, in the course of his "employment, lists of actual or possible customers in the district "in which he had canvassed. I think that under a properly "limited clause the employers would have been entitled to "restrain him from canvassing such customers."

Lord Shaw said [23]: "A very reasonable restriction of a "canvasser in such circumstances as are here disclosed might no "doubt have been that he should not canvass his old customers "or in the limited locality of his former labour."

Lord Moulton said [24]: "Such being the nature of the employ-"ment," (i.e. in that case) "it would be reasonable for the "employer to protect himself against the danger of his former "servant canvassing or collecting for a rival firm in the district "in which he had been employed. If he were permitted to do "so before the expiry of a reasonably long interval he would be "in a position to give to his new employer all the advantages of "that personal knowledge of the inhabitants of the locality, and "more especially of his former customers, which he had acquired "in the service of the respondents and at their expense."

In *Herbert Morris Ltd.* v. *Saxelby* [25] Lord Shaw, in referring to the presumption which the law makes in favour of the free disposal of one's own labour and of the onus on those averring circumstances sufficient to overcome such presumption, said that as the time of restriction lengthens or the space of its operation extends, the weight of that onus grows.

In *Fitch* v. *Dewes* [26] Lord Birkenhead L.C. referred to the old controversy between freedom of contract and certain considerations of public policy. He mentioned two considerations by reference to which a restraining covenant in a contract of service can be measured: First, is it against the public interest? And, second, does that which has been stipulated for exceed what is required for the protection of the covenantee? He further said that the courts had long since determined that they would lay down no hard and fast rule either in relation to time or in relation to space, but that they would treat the question alike of time and of space as one of the elements by the light of which they would measure the reasonableness of the restriction taken as a whole.

Applying these principles to the facts of the present case, I am clearly of the opinion that a period of five years was quite

[22] Ibid. 734.
[23] Ibid 741.
[24] Ibid. 743.
[25] [1916] 1 A.C. 688, 715.
[26] [1921] 2 A.C. 158, 163, 166, 167; 37 T.L.R. 784.

unreasonable as a period of limitation. As the judge pointed out in his judgment in this case, the customers of one credit draper can always be canvassed and are likely to be canvassed by other credit drapers. In a sphere where competition is normally free, since every householder is a potential purchaser, and where successful selling must to some extent depend on the personal abilities of particular salesmen, and also to some extent on the quality or attractiveness of the goods which the salesman's employer can offer, a period of five years' banishment from particular doorsteps seems to me to be in any event of wholly unwarranted duration.

This conclusion, in agreement with that of the judge, is of itself sufficient to dispose of this appeal. Even if, apart from the question as to time, the restriction could otherwise be upheld, it is not for the court to recast the agreement so as in its place to substitute one which the parties never made.

But it was submitted on behalf of the defendant that, apart from the question of time, the restrictions were too wide in that (a) they would prevent the defendant from calling on those customers whom he had introduced to the employers, and in respect of whom his special knowledge and influence were not gained during his employment by or at the expense of the employers; (b) they would prevent him from calling upon customers who from every practical point of view had ceased to be customers of the employers, but on whom he had perhaps unsuccessfully called or called on at an early stage during the three-year period; (c) they would prevent his calling on people who had moved away from the area of the employers' operations.

In the circumstances it becomes unnecessary to express any final view in regard to these contentions. I do not consider that a restriction of the present kind would necessarily be held to be unreasonable merely because it could be shown possibly to extend to one or two cases beyond the range of contemplated protection. But if an employee introduced his friends or his "connexion" as customers, the reasonableness of any restriction that might involve that the employee would after a short time no longer be employed by the employer but yet be debarred from calling on his friends or on those who constituted his own connexion would have to be most carefully considered. Each case must be judged on its own facts in the light of the principles laid down. In the present case the restrictive agreement was not entered into until the defendant had been employed for over two years. It was submitted that this circumstance, coupled with the fact that the defendant had previously been in the employment of other employers, tended to diminish the weight of consideration (a) to which I have referred above. Though there is some force in this, I consider that in this case it was not reasonable to prevent the defendant from calling on those who formed his own connexion and in regard to whom his knowledge

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was not acquired during his service with nor at the expense of the employers.

If a collector salesman who leaves the employment is free immediately to call on behalf of a new competing employer on customers who have outstanding weekly liabilities to the former employer, being customers on whom he recently called, he may persuade them not only to transfer their custom but he may persuade them to incur new financial liabilities which will compete with the existing outstanding ones. The former employer has a legitimate interest to protect. But as regards a salesman's own connexion—if it can be said to continue to exist as such—there are different considerations to be taken into account. While I think that, in accord with what was laid down in *Mason's* case,[27] some reasonable and properly limited restriction could have been devised, I am of opinion that the operation of the clause under consideration extends beyond the limits of what can be justified. I would dismiss the appeal.

DENNING L.J. I entirely agree. During the last 40 years the courts have shown a reluctance to enforce covenants of this sort. They realise that a servant has often very little choice in the matter. If he wants to get or to keep his employment, he has to sign the document which the employer puts before him; and he may do so without fully appreciating what it may involve. Moreover, if these covenants were given full force, they would tend to reduce his freedom to seek better conditions, even by asking for a rise in wages: because if he is not allowed to get work elsewhere, he is very much at the mercy of his employer.

While showing proper reluctance to enforce these covenants, the courts will, however, do so if they are shown to be reasonable as between the parties and as regards the public. In this case I think that the employers might reasonably protect their own trade connexion, that is, the connexion which was properly their own as distinct from the connexion which the traveller brought with him. But I do not see why the employers should be able to forbid him to call on the people whom he already knew before he worked for them—the people whom I will call "his "customers." His knowledge of these people, and his influence with them, were due to his own efforts or at any rate they were nothing to do with these employers. His goodwill with those customers belonged to him, and cannot reasonably be taken from him by a covenant of this kind. Any other view would mean that, soon after employing him, they could dismiss him—at a fortnight's notice—and then prevent him for five years thereafter from calling on his own customers who had been his long before he entered the employment. When I find the clause so wide as to cover "his customers" and is for so long as five years, I think it is an unreasonable restraint of trade. We were referred to the case of *Gilford Motor Co. Ltd.* v.

[27] [1913] A.C. 724.

Horne,[28] but I think that case is quite distinguishable for the reasons given by Hodson L.J. A managing director can look after himself. A traveller is not so well placed to do so. The law must protect him. I agree the appeal should be dismissed.

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Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors:—*Smith & Hudson* for *Waller & Houseman, Newcastle-upon-Tyne; Doyle, Devonshire & Co.* for *T. H. Campbell Wardlaw, Newcastle-upon-Tyne.*

M. M. H.

[28] [1933] 1 Ch. 935.

[CHANCERY DIVISION.]

* WATSON *v.* BURTON.

[1955 W. 378.]

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Nov. 16, 19, 20.
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Vendor and Purchaser—Specific performance—Error in particulars—Misstatement as to area of property—Whether substantial and prejudicial—Clause excluding compensation—Law Society's Conditions of Sale, 1953, *condition* 35.

By an agreement in writing, dated September 14, 1954, a purchaser agreed to purchase from a vendor certain freehold premises. The premises were sold subject to the Law Society's Conditions of Sale, 1953.[1]

The property, which was stated in the particulars to amount to approximately 3,920 square yards, was found to contain approximately only 2,360 square yards.

The purchaser having failed to complete the purchase, the vendor commenced an action for specific performance, relying on condition 35[1] of the Law Society's Conditions of Sale, 1953, and the purchaser counterclaimed for rescission of the contract.

In the period of about two months which elapsed between the discovery of the deficiency in the area and the purchaser's repudiation of the contract, the purchaser paid a deposit, showed several possible subpurchasers over the site, and carried out some small repairs:—

Held, (1) that the parties had made the statement as to the area part of the contract.

[1] By the Law Society's Conditions of Sale, 1953, condition 35: "... the "property or (as the case may be) "each lot is believed to be and shall "be taken as correctly described as "to quantity and otherwise, and any "error, omission or misstatement "found in the contract (whether or "not it materially affects the description of the property) shall not annul "the sale, nor entitle a purchaser to "be discharged from his purchase, "nor shall the vendor, nor any purchaser, claim or be allowed any "compensation in respect thereof: "provided that nothing in this Condition shall entitle the vendor to "compel the purchaser to accept, or "the purchaser to compel the vendor "to convey, property which differs "substantially from the property "agreed to be sold and purchased, "whether in quantity, quality, tenure "or otherwise, if the purchaser or the "vendor respectively would be prejudiced by reason of such difference."

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Observations of Malins V.-C. in *Whittemore* v. *Whittemore* (1869) L.R. 8 Eq. 603 at p. 605 applied.

(2) That a misstatement to the extent of 40 per cent. of the area was "substantial" within the meaning of the proviso to condition 35.

(3) That the purchaser had been prejudiced by the misstatement.

(4) That the purchaser had not by his conduct waived his right to rescind.

(5) That without the purchaser's consent the vendor was not entitled to specific performance with compensation.

Observations in *Rutherford* v. *Acton-Adams* [1915] A.C. 866, 869 applied.

ACTION.

By an agreement in writing dated September 14, 1954, Harold Burton agreed to purchase from Beatrice Ethel Fearn Watson, at the price of £4,500, the freehold premises at Hanley, Stoke-on-Trent, known as the Britannia Works. The agreement provided that the property was sold subject to the Law Society's Conditions of Sale, 1953, in so far as they were not varied by the special conditions contained therein, and that the purchase should be completed on or before October 18, 1954. The purchaser duly paid sums amounting to £450 to a firm of solicitors as stakeholders by way of deposit and in part payment of the purchase price.

The property was described in the particulars of sale as having been for many years occupied as a foundry "but in "addition is very suitable for development for general com-"mercial or industrial purposes in which space is of paramount "importance." The total site area was stated to amount to approximately 3,920 square yards.

The purchaser inspected the property before the date fixed for the sale and at some date after September 14, 1954, caused it to be measured accurately, and the area was found to be approximately 2,360 square yards. He, therefore, failed to complete the purchase, contending that he was prejudiced by the difference between the actual area and the area as stated in the particulars of sale.[1]

An action was commenced by the vendor on February 2, 1955, for specific performance of the agreement of September 14, 1954, alleging that, in breach of contract, the purchaser had failed to complete the purchase of the property and, in consequence, the plaintiff had suffered damage, and stating that the vendor was and at all times had been ready and willing to perform her part of the contract.

The purchaser, by his counterclaim, claimed that he was entitled to rescind the contract and to the return of his deposit.

H. E. Francis for the plaintiff.

G. T. Hesketh for the defendant.

Cases cited in argument not referred to in the judgment: *Magee* v. *Lavell*[2]; *In re Courcier and Harrold's Contract*[3]; *Lamare* v. *Dixon*.[4]

WYNN-PARRY J. The plaintiff in this action is the owner in fee simple of certain lands and premises known as the Britannia Works, Yates Street, Hanley. In the autumn of 1954 she was minded to sell this property by auction. The necessary particulars were prepared by the auctioneers, Messrs. Louis Taylor & Sons, who are well-known auctioneers in Hanley. The particulars, so far as material, read as follows: "Hanley. The "valuable freehold and central commercial and industrial "premises, the Britannia Works, Yates Street, formerly William "Street, Hanley. An extensive property, very near the centre "of the town, and yet in a quiet street which facilitates the "loading and off-loading of vehicles. The whole with vacant "possession on completion." Then comes a statement as to who the auctioneers are, and where and when, namely, September 14, 1954, the property was proposed to be offered by auction, and there follows the name and address of the vendor's solicitors. The next page is headed "Particulars of the Britannia Works, "Yates Street, formerly William Street, Hanley," and then follows what I may describe, with no disrespect, as typical auctioneers' "puff": "This valuable and extensive premises is "situated just off Broad Street, in a first-class position near the "centre of Hanley. For many years it has been occupied as a "foundry, but in addition is very suitable for development for "general commercial or industrial purposes in which space is of "paramount importance. The premises are located in a quiet "street thereby facilitating the loading and off-loading of "vehicles." There follow under the heading "Accommodation" particulars of the various buildings including in each case their measurements. Then there is the statement: "In addition "there is a three-storey warehouse block at the rear," and the particulars end with this very important statement which has given rise to this litigation: "The total site area amounts to "approximately 3,920 square yards."

The statement as to the extent of the site area was inaccurate, because instead of amounting to 3,920 square yards, it has been proved by subsequent measurement—and this is common ground between the parties—to amount to 2,360 square yards, a difference, as Mr. Hesketh pointed out, of nearly 40 per cent. It is, I think, due to Mr. Watson, the plaintiff's son who gave evidence before me, to say how this mistake arose, because there is not and cannot be any suggestion that the misstatement in the particulars is other than an entirely innocent mistake. Previous to the proposed auction, Mr. Watson, acting on behalf of his mother, the plaintiff, was negotiating for the sale of the

[2] (1874) L.R. 9 C.P. 107.
[3] [1923] 1 Ch. 565; 39 T.L.R. 283.
[4] (1873) L.R. 6 H.L. 414.

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premises privately, and in the course of the negotiations it became desirable or necessary to be able to furnish the prospective purchaser with a statement as to the extent of the site. Mr. Watson went to the surveyor's office of the local authority and asked them to let him know what the area was. He came armed with an Ordnance map and a measurement, and calculations were made in the surveyor's office, and he was given the figure of 3,920 square yards. In all good faith he passed that on to Messrs. Louis Taylor & Sons, and when later it became necessary to prepare the particulars, not unnaturally Messrs. Louis Taylor & Sons used this information. That shortly is how this erroneous figure found its way into the particulars of sale.

In due course the defendant became possessed of a copy of the particulars. He was interested, and he made two inspections on two succeeding days of the premises before the auction. He agrees that his first visit lasted an hour and a half, and I accept what Mr. Watson says on this point that the visit on the next day lasted the best part of an hour. The defendant is not clear about the second visit, but is not prepared to deny that he may well have re-visited the premises on the day after his long visit. The defendant, in his evidence, told me that he read the statement as to the total site area being 3,920 square yards in the particulars, and that he relied on that statement in coming to a conclusion as to the figure up to which he would be prepared to go on bidding at the auction. He placed a figure of £1 per square yard as being the right figure for the land, and added £500 for the buildings, arriving at a figure of £4,500.

The defendant went to the auction, and in the event his bid of £4,500 was the highest bid, and the property was knocked down to him at that figure. He signed the contract, but was unable to pay the whole of the deposit, because he was without his cheque book, but the auctioneers, knowing him, were satisfied to accept on account the sum of £40, which he had on him in cash. Subsequently, he paid the balance of the deposit in circumstances to which I shall have to refer later. Almost immediately after the sale he was given a key of the premises. There is some dispute between him and Mr. Watson as to whether or not he was actually given a second key, or whether, as he said, provision was made for him to be able to make use of a second key whenever he desired it; but it does not appear to me to be necessary to resolve that small dispute for the purpose of arriving at a decision in this case.

The defendant told me that his primary objects in buying the property were, first, to be able, if possible, to sell it at a profit, and secondly, if that did not prove practicable, to spend whatever money might be necessary to put the premises in a proper state of repair and then let them, either as a whole, or in lots. He also had in mind, though not as an immediate practical proposition, the hope of selling later on if, as he hoped, the land should rise substantially in value.

In the course of carrying out the first two of his objects he advertised the premises and, as a result, a number of prospective purchasers or tenants visited the premises. One visitor, who apparently was one of a party of two, raised a doubt as to whether the area in fact contained as much as 3,920 square yards, or whether the area was not quite substantially less. There is no suggestion that that person on that occasion had made a detailed or accurate measurement of the area, but he had taken sufficient steps to raise, in his own mind, a considerable doubt as to the extent of the area. The defendant said that he was surprised to hear the suggestion that the area was smaller than as described in the particulars, because he relied on Messrs. Louis Taylor & Sons, as well-known auctioneers, to include only what was accurate in the particulars prepared by them; but he went to see Mr. Steele, a partner in the firm of solicitors who was then acting for both parties, and was sent by him to see Messrs. Louis Taylor & Sons. This was about the end of October, 1954.

Thereafter matters dragged on. The defendant tells me that he was waiting for the plaintiff's representatives to check the measurement of the site, and to get in touch with him saying whether or not they agreed with his measurement of 2,360 square yards, which was the result of his check up, or whether they were going to contend that their figure of 3,920 square yards was correct.

The defendant requested certain work to be done on the premises, and instructed work to be done in circumstances which I shall have to consider in more detail when I come to consider the plaintiff's contention that the defendant has waived any right he might have had to rescind the contract. But what is more important in deciding this case is that on November 30, 1954, a meeting took place at the offices of Messrs. Huntbach & Sons, who at the start were acting as solicitors for both parties. The defendant went to that meeting, and there were also present the plaintiff, and Mr. Watson, and a Mr. Beswick, a solicitor to whom the plaintiff had gone, because it had become apparent that for Messrs. Huntbach & Sons to go on acting for both parties would necessarily cause them considerable embarrassment. The defendant had gone to a firm of solicitors, but when he went to the meeting he was not accompanied by any representative from that firm.

The meeting seems to have opened on a somewhat acrimonious note, because, according to the defendant, the plaintiff's solicitor was uncompromising in his attitude, intimating that either the defendant must complete or he would issue a writ. The defendant told me that his attitude was that, at that time, he would have been willing to complete if the plaintiff, recognizing that there was a substantial misstatement as to the area, had been willing to abate the purchase price by a reasonable figure so as to compensate the defendant for the difference between the stated and

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the actual area. On the plaintiff's behalf consideration of compensation was, at any rate at first, refused, the reason being no doubt because there was incorporated into the contract paragraph 35 of the Law Society's Conditions of Sale, 1953, which provides, so far as material, as follows: [His Lordship read condition 35 and continued:]

The defendant, as he tells me, finding at first a wholly uncompromising attitude adopted on behalf of the plaintiff, intimated that it would be of no use for him to remain, and he made to leave the room, when better counsels prevailed, and a discussion started on the question whether there should be any, and if so what, abatement. In the course of it, according to the defendant (and this was not challenged in cross-examination), he and the plaintiff left the room to have a private talk elsewhere with a view to seeing whether or not they could come to some accommodation. They failed to do so. But according to the defendant —and I accept his evidence on this point—it was pointed out between him and the plaintiff that they knew each other's addresses, and had or could find each other's telephone numbers, and, therefore, they could get into touch with each other later if either thought it desirable with a view in the end to coming to some accommodation. So that the whole matter, as I find, was left in a state of flux as a result of that which happened on November 30, 1954.

Matters dragged on further through the month of December, and on December 31 the defendant, by a letter from his solicitors, terminated or purported to terminate the whole matter. In due course the writ in this action was issued, and it now comes before me.

The first point with which I have to deal is the point raised by Mr. Francis: what is the property comprised in the contract? He has contended that that is a question solely of construing the contract, and that when the contract is properly construed the correct view is that the statement "The total site area amounts "to approximately 3,920 square yards" is no part of the contract and can be rejected under the doctrine of falsa demonstratio non nocet. It is perfectly true that quite a number of statements in the particulars cannot be regarded as part of the contract. For instance, there are those passages which I have read and which I have described as "puff." One would not expect the dimensions of the various buildings to be included in the conveyance designed to complete the contract. But it is not, to my mind, easy to reject the statement as regards the total site area as forming any part of the contract, because, of all the statements in the particulars, that is one which may be said to be the least inapt to be included in a conveyance. No doubt the conveyance could take the form of defining the parcels by reference to a plan, but it would be by no means unusual conveyancing to define them or help to define them by including a reference to the total site

area. I feel great difficulty in rejecting this statement as being nothing but a false description.

In the case of *Whittemore* v. *Whittemore*[1] there was a misstatement as to area, and it was a misstatement of some substance. In the course of his judgment Malins V.-C. said: "I am firmly persuaded that the purchaser would have given "exactly the same price for the property if those words had been "omitted; but as they have been put in I must treat them as "part of the contract." Now, whatever else may be said by way of criticism of the Vice-Chancellor's decision in that case, I cannot find that in any of the later cases that passage has been the subject of criticism, and as, apart from the circumstances and unaided by that statement, I should have been inclined to come to the conclusion here that the statement as to the total site area must be regarded as part of the contract, I feel that I must inevitably do so in view of that statement in the Vice-Chancellor's judgment. I, therefore, conclude that I must proceed on the basis that the parties have made this statement of the area part of the contract.

Then comes the question: what is the effect of this misstatement as to area having regard to condition 35 of the Law Society's Conditions of Sale, 1953? This condition, as will be seen, excludes the right of a purchaser who shows a misstatement of area to compensation. The authorities establish that the court is less inclined, in the exercise of its jurisdiction, to decree specific performance where there has been a misstatement as to area, and the purchaser is unable to claim compensation, than in cases where the condition is adopted which allows him to claim compensation.

Two main questions arise on this proviso. The first is: Does the property which the plaintiff can convey differ materially from the property which has been agreed to be sold? And, secondly, will the defendant or purchaser be prejudiced by the existence of such a difference? The decided cases appear to show that whether or not the difference is a substantial difference is a matter of fact for the court to decide in each case. In the case of *Flight* v. *Booth*[2] Tindal C.J. said, after considering a number of authorities which he found it difficult to reconcile: "In this state of "discrepancy between the decided cases, we think it is, at all "events, a safe rule to adopt, that where the misdescription, "although not proceeding from fraud, is in a material and sub-"stantial point, so far affecting the subject-matter of the contract "that it may reasonably be supposed, that, but for such mis-"description, the purchaser might never have entered into the "contract at all, in such case the contract is avoided altogether, "and the purchaser is not bound to resort to the clause of "compensation. Under such a state of facts, the purchaser may "be considered as not having purchased the thing which was

[1] (1869) L.R. 8 Eq. 603, 605. [2] (1834) 1 Bing.N.C. 370, 377.

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"really the subject of the sale; as in *Jones* v. *Edney*,[3] where the "subject-matter of the sale was described to be 'a free public "'house,' while the lease contained a proviso, that the lessee "and his assigns should take all their beer from a particular "brewery; in which case the misdescription was held to be fatal."

Again, in the modern case of *Jacobs* v. *Revell*[4] Buckley J. had to consider a condition which read: "The property is believed "and shall be taken to be correctly described in the particulars "as to quantity and otherwise . . . and if any error, misstatement, "or omission in the particulars be discovered, the same shall not "annul the sale, nor shall any compensation be allowed by the "vendors to the purchaser in respect thereof." The property sold was described as containing 5 acres, no roods, 26 perches, and was bordering on a lake on Shortwood Common. In fact, the only part of the property to which a good title was shown contained 4 acres and 3 roods. The rest of the property was a strip bordering on a lake, and as to this the only title offered was what purported to be a title by possession for less than 40 years. In the upshot, Buckley J. refused specific performance as to the area to which a good title was shown. In the course of his judgment, having quoted from the judgment of Lord Eldon in *Portman* v. *Mill*,[5] he said[6]: "Here I touch upon the question "as to how far a trivial or substantial error makes a difference. "The condition is not confined to trivial errors; nevertheless, if "you get to a point such as that in *Flight* v. *Booth*,[7] that the "purchaser cannot get what he contracted to buy, the vendor "cannot enforce specific performance." Then having referred to *Whittemore* v. *Whittemore*,[8] to which I have earlier referred, Buckley J. quotes from the judgment of Lindley L.J. in *In re Terry and White's Contract*.[9] In the course of that extract it is said[10]: "For example, it was contended that such conditions as "the third condition in this case only applied to comparatively "trivial and unimportant errors, misstatements, and misdescrip-"tions, and several cases were referred to in support of that "proposition. But when those cases are carefully looked at they "will not be found to warrant so general a statement. The "proposition is only true in certain classes of cases." Then Buckley J. says: "The classes of cases to which his Lordship "there refers are those in which a vendor is seeking to force upon "a purchaser what he did not contract to buy. He was dealing "with the equitable grounds for refusing specific performance." Towards the end of his judgment Buckley J. refers to the judgment of Lord Esher in *In re Fawcett and Holmes, Contract Between*,[11] in which there was a clause allowing compensation[12]:

[3] (1812) 3 Camp. 285.
[4] [1900] 2 Ch. 858.
[5] (1826) 2 Russ. 570.
[6] [1900] 2 Ch. 865.
[7] 1 Bing.N.C. 370.
[8] L.R. 8 Eq. 603.
[9] (1886) 32 Ch.D. 14; 2 T.L.R. 327.
[10] [1900] 2 Ch. 867.
[11] (1889) 42 Ch.D. 150; 5 T.L.R. 515.
[12] [1900] 2 Ch. 868.

"Lord Esher says: 'It is contended on the one side that the "'condition applies, however great the error may be; it is con-"'tended on the other side that the condition only applies where "'the error is trifling. I think that neither view is right.' In "one class of cases the error may be immaterial; but if the vendor "comes to enforce specific performance, he cannot succeed if "what he offers to convey is substantially different from what "he offered to sell." It is true, as I have pointed out, that that was a case providing for an allowance of compensation, but the comment of Buckley J., which I have just read, on what Lord Esher said is, I think, intended to be of general application and to apply also to cases where provision for payment of compensation is excluded.

On that review of the authorities I conclude, as I have said, that the question whether or not the difference is substantial is a matter which is left to the court to decide in each case. On this aspect of the matter I feel difficulty in accepting what Malins V.-C. said in the course of his judgment in *Whittemore* v. *Whittemore*,[13] namely, that conditions of this kind must be construed as intended to cover merely unintentional errors and inaccuracies. The vice-chancellor there was dealing with a case which provided that there should be no compensation, and, finding that the error was substantial, he in effect disregarded the provision that there should be no compensation and himself awarded compensation. Mr. Francis relied on the judgment of Parker J. in *Shepherd* v. *Croft*,[14] but that was a very different case. The misstatement there was not as to area; the misstatement was really negative, because neither the particulars of the contract nor inspection disclosed the existence of a natural underground watercourse which ran through the grounds of the property agreed to be sold. Parker J. found that the purpose of the plaintiff, in entering into the contract, was to acquire a residential property, and that in all the circumstances she got substantially what she had contracted for.

I should have thought that a much nearer case to the present was that of *In re Puckett and Smith's Contract*.[15] There the plaintiff bought the land for building purposes, and this was known to the vendors. The misstatement was that there was no restriction as to the class of houses to be erected, but it was then discovered before the contract was completed that there was an underground culvert for water running across the land which would seriously interfere with the erection of houses, and indeed, as I understand the facts, it would be necessary, before properly developing the land for building, to divert the culvert. It was a case before the Court of Appeal, and in those circumstances the court came to the conclusion that the purchaser could not be said to have got substantially that for which he contracted. Giving the best consideration I can to the misstatement, bearing

[13] L.R. 8 Eq. 603.
[14] [1911] 1 Ch. 521.
[15] [1902] 2 Ch. 258.

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in mind that it is a misstatement as to area which overstates the area by nearly 40 per cent., and bearing in mind that the defendant, as he told me, relied on that statement, I think for the purposes of considering condition 35 of the Law Society's Conditions of Sale, 1953, it must be regarded as a substantial misstatement, with the result that I find that the first condition set out in the proviso to paragraph 35 is proved by the defendant to exist.

Then comes the question, Was the defendant as the purchaser prejudiced? The defendant, as I have said, told me that he relied on that statement. He valued the land at £1 a yard, and the buildings at £500, thus producing approximately the sum of £4,500, which was the highest bid at the auction. I was asked to reject this evidence on the basis that it was most unlikely that the defendant's mind ever worked that way. It is true that an expert who was called on behalf of the plaintiff gave evidence that he would consider it very unlikely, having regard to the nature of the property, and the fact that between the eastern and western borders there is a slope down of 10 feet, that any person would pay more than 12s. 6d. per square yard. Although the defendant has had a certain number of property deals, on examination they do not appear to have been very extensive, and he cannot, and, indeed, does not put himself forward as an expert. Now, contrary to Mr. Francis's contention, it seems to me to be a most natural step for a man to take, who is considering going to an auction to bid for property, to think the matter out with a view to coming to a conclusion, however ill-advised, as to the maximum he will bid at the auction. It is true that, having got to the auction, enthusiasm might run away with him, and he might exceed the limit which he has set upon himself; but that a man should think the matter out and put a limit on his bidding in advance seems to me not merely natural but good sound business sense, and I do not reject, indeed, I accept the defendant's evidence on that aspect of the matter.

The defendant also told me that had he known the actual area of the property in question he would not have bid £4,000, or anything like that figure. Indeed, he told me he would have stopped bidding at about £3,000. I observe that in the statement of facts in *Whittemore* v. *Whittemore* [16] it is stated: "The "purchaser in his affidavit stated that he would not have pur-"chased at that sum"—that was the purchase price—"if he "had known the actual area of the ground." It seems to me that that is a circumstance to which I should give serious consideration. In the present case the defendant contracted for an area of 3,920 square yards, and upon that basis bid up to £4,000. In those circumstances I come to the conclusion that the defendant has proved the second condition in the proviso to paragraph 35 of the Law Society's Conditions of Sale, 1953, namely, that he has been prejudiced by the misstatement.

[16] L.R. 8 Eq. 603, 604.

I must now consider the point raised by the reply and defence to the counterclaim, namely, that the defendant by his conduct has waived any right he might have had to rescind the contract. The matters relied on in this regard are set out in the particulars to the reply. Put shortly they amount to this. The defendant first complained of the error in the particulars about October 27, but, nevertheless, he continued to show various persons over the property with a view to letting or otherwise disposing of it to such persons. It is quite true that in the early part of the material period, that immediately following the signing of the contract, the defendant was busying himself in attracting possible purchasers or lessees, and showing them around, but, according to his evidence to me, after he complained, at any rate after the meeting of November 30, 1954, he neither showed round nor allowed persons to go round the property who had not previously shown interest in it.

The next point made is that the defendant as late as November 26, 1954, in response to a request from Messrs. Huntbach & Sons, paid the balance of the deposit, namely, £410, although the request was contained in the same letter as that which fixed the intended meeting for November 30, 1954. It is true that at first sight it may be said against the defendant, "Why if he was complaining "about the discrepancy in the area, and did not intend to go on "with the matter, should he pay the balance of the deposit?" The defendant explains that by saying that the extent of the area had not yet been agreed and he was still of a mind to go forward with the matter provided that he could obtain a reasonable rebate. That seems to me to be a perfectly reasonable reply to the criticism that he paid the balance of the deposit on November 26, 1954.

The next point taken in the particulars is that on October 29, 1954, the defendant wrote to Mr. Watson and asked that certain work should be done in what had been part of the premises from which machinery had been removed, and that certain repairs should be done to the electric wiring and the plumbing. I think I can deal now with the next point also, which alleged that the defendant demanded that certain damage which had been caused to the roof of the factory by the removal of a cupola should be repaired, and that at his own suggestion he employed two of his men to repair a roof which was leaking. Those acts, looked at against the background which I have painted, are to my mind equivocal at least; they are not so unequivocal as to indicate necessarily that the defendant was waiving his right to rescind. They are quite consistent with his story that his mind was still in a state of flux. He wanted to know what was said on behalf of the plaintiff as to the actual extent of the area involved, and he was not unwilling to go on provided an arrangement could be come to under which he would get proper compensation.

Mr. Francis invited me to take the view that the proper approach to this question of waiver is to be found in Halsbury's

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Laws of England, 2nd ed., vol. 23, p. 110, where it is said: "The "acts and conduct relied upon as evincing the representee's "affirmance must be such as are more consistent, on a reasonable "view of them, with that than with any other theory." I will accept that, but unless I am wholly to reject the defendant's evidence—and I am not willing to do that—I must come to the conclusion that the conduct of the defendant in the respects referred to in the particulars is quite consistent with his intention to try to negotiate a way out of the difficulty which had arisen and is not really consistent with a fixed intention to affirm the contract and forego that claim for compensation which quite clearly he put forward at the meeting on November 30, 1954, and which was left open between him and the plaintiff in the hope that a figure could be arrived at. I come to the conclusion, therefore, on this issue that the defendant cannot be said to have waived his right to rescind.

One last point remains to be dealt with. Mr. Francis said that if all other weapons failed him he would desire to waive that part of paragraph 35 of the Law Society's Conditions of Sale, 1953, which excluded the allowance of any compensation. The question which I have to decide is whether by the unilateral act of the plaintiff in expressing his willingness to allow compensation the defendant purchaser can be compelled on that basis to complete the contract. Mr. Francis relied on the case of *Shepherd* v. *Croft*,[17] to which I have already referred. That was a case where the contract excluded compensation. In the course of his judgment Parker J. said[18]: "In an ordinary case this would, in my "opinion, give rise to a claim for compensation on the part of the "purchaser; but in the present case the eleventh condition of "sale appears to preclude the purchaser from asking for compensation, and might possibly have been relied on by the "vendors as a reason why specific performance should be granted "without compensation. I need not, however, consider the effect "of this condition, because the parties, in the course of the trial, "have agreed that if I am of opinion—which I am— that compensation would be payable in an ordinary case were there no "conditions, then for the purposes of this action I am to treat "condition 11 as struck out of the conditions of sale. That being "the case, it appears to me that the proper order to make is a "decree for specific performance with a reduction of the purchase-"money, which having considered the evidence, I fix at £600." That case, in my opinion, does not assist Mr. Francis's submission, because Parker J. proceeded to make the order solely on the basis that the parties had agreed to vary their bargain by the introduction in effect of a term providing for compensation.

Mr. Hesketh referred to *Rutherford* v. *Acton-Adams*,[19] which was an appeal in the Privy Council from the Court of Appeal in New Zealand. I need not refer to the facts of that case, but only

[17] [1911] 1 Ch. 521.
[18] Ibid. 529.
[19] [1915] A.C. 866.

to a short passage in the judgment, which was delivered by Lord Haldane. Having referred to an examination of the relevant cases which the Committee had made, he said [20]: "The result of "this examination is to satisfy them that the principle which "applies ought to be laid down as follows. In exercising its "jurisdiction over specific performance the Court of Equity looks "at the substance and not merely at the letter of the contract. "If a vendor sues and is in a position to convey substantially "what the purchaser has contracted to get, the court will decree "specific performance with compensation for any small and "immaterial deficiency, provided that the vendor has not, by "misrepresentation or otherwise, disentitled himself to his "remedy. Another possible case arises where a vendor claims "specific performance and where the court refuses it unless the "purchaser is willing to consent to a decree on terms that the "vendor will make compensation to the purchaser, who agrees to "such a decree on condition that he is compensated." As I read that passage it is essential if the course which Mr. Francis in the last resort suggests should be followed that the purchaser should be agreeable to accept some compensation. In the present case the purchaser is not now agreeable to accept any compensation. Therefore this last point fails.

In the result I must dismiss the action with costs, and allow the counterclaim, and make the declarations there asked for and order the plaintiff to pay the costs of the counterclaim.

Judgment for the defendant.

Solicitors: *Peacock & Goddard for R. W. Beswick, Hanley; Doyle, Devonshire & Co. for Moxons, Hanley.*

J. L. D.

[20] [1915] A.C. 866, 869.

[COURT OF APPEAL.]

* WILLIAMS v. GREATREX.

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Oct. 25, 26, 29.
Denning, Hodson and Morris L.JJ.

[Plaint No. M. 757.]

Vendor and Purchaser—Specific performance—Laches—Contract stipulating completion within two years — Time not of the essence — Purchaser entering into possession under contract after paying deposit — Action for specific performance ten years after date of contract.

Laches—Sale of land.

In May, 1946, a landowner agreed to sell to a builder 34 building plots for houses. Clause 3 of the agreement provided: "On notice to the vendor of the purchaser's intention to purchase "any of the said plots and payment of a deposit of 10 per cent. of "the purchase price in respect thereof the vendor will allow the

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"purchaser to enter upon the said plot for the purpose of erecting "any buildings thereon and on payment of the balance of the "purchase money will execute a proper conveyance to the "purchaser of the said plot but so that the purchase of all the "said 34 plots shall be completed within two years from the date "hereof."

In October, 1946, the purchaser paid deposits on plots 3 and 4 and was given a receipt by the solicitors then acting for both parties. He then entered on the land and did much work on and in connexion with it, including the construction of a solid boundary fence around the plots. Unknown to the purchaser, the vendor never cashed the cheque for the amount of the deposits.

In April, 1947, the vendor came on to the land and in abusive terms ordered the purchaser off. The purchaser thereafter stopped the building work, partly because he had failed to obtain the building licences then necessary and partly because of the vendor's behaviour in this and other respects; and he took no step to require completion of the contract until the present proceedings, though in 1948 he put up a garage and shed on the land and in 1955 built a road to serve the plots. In December, 1955, when building licences were no longer required, a third party entered on the land to carry out work on the basis of a purported sale of the land to him by the vendor. In 1956 the purchaser brought an action for specific performance of the agreement of May, 1946:—

Held, (1) that clause 3 by its terms showed that the contract for the sale and purchase of 34 plots within two years was severable and provided for the completion of a number of separate contracts, one in respect of each plot.

(2) That this was an agreement for the sale of land simpliciter and not a commercial transaction; accordingly, time was not of its essence and the failure of the parties to complete within the stipulated two years was not a bar to the present action.

(3) That the purchaser, having paid the deposits on and having entered into possession of the land, became the equitable owner of the land under a contract binding on the vendor such that the vendor could not now object to specific performance on the ground of laches unless he could show that he had not acquiesced in the purchaser's acts of possession or that the purchaser had abandoned the contract; and that the evidence showed sufficient acquiescence by him and no abandonment by the purchaser. Accordingly, despite the lapse of time, the purchaser was entitled to specific performance on payment of the balance of the price and interest thereon for the intervening years.

Stickney v. *Keeble* [1915] A.C. 386 and *Crofton* v. *Ormsby* (1806) 2 Sch. & Lef. 583 applied.

Per Hodson L.J. The principle to be applied in this case is the same as that applied in the cases where a tenant has been in possession under a lease and paying rent for years and requires only a formal document, namely, the lease; each case must depend on how much it is necessary for the man who is seeking specific performance to do to establish the possession, and the nature of the possession which he can establish must depend on the subject-matter; here the fence was a sufficient intimation that this purchaser was claiming possession of the land.

APPEAL from Judge Temple Morris, sitting at Cardiff and Barry County Court.

On May 28, 1946, the defendant, Reginald Greatrex, who owned a considerable area of land then part of a farm at Barry,

entered into an agreement in writing with the plaintiff, Harold Jack Williams, a builder, to sell to him 34 plots of land for building over the following two years.

By clause 1 of the agreement, the vendor agreed to sell and the purchaser agreed to buy all the land. Clause 2 provided that the purchaser should erect on the piece or parcel of land not less than 34 bungalows or houses and should pay the vendor £100 in respect of each plot fronting the road, and £80 in respect of any other plot. Clause 3 provided: "On notice to the vendor of the "purchaser's intention to purchase any of the said plots and "payment of a deposit of 10 per cent. of the purchase price in "respect thereof the vendor will allow the purchaser to enter on "the said plot for the purpose of erecting any buildings thereon "and on payment of the balance of the purchase money will "execute a proper conveyance to the purchaser of the said plot "but so that the purchase of all the said 34 plots shall be com-"pleted within two years from the date hereof."

The contract was executed on May 28, 1946. The purchaser had already built two houses on plots 1 and 2, and conveyances in respect of those plots were duly executed in June, 1946.

In October, 1946, the purchaser through his solicitors paid £20 by cheque to the vendor as a deposit on the purchase of plots 3 and 4, and a receipt was given to that effect, the solicitors at that time acting for both purchaser and vendor.

The receipt, dated October 11, 1946, stated: "Further "acknowledgment of receipt of £20 being deposits on purchase "of plots 3 and 4."

The vendor, however, did not cash the cheque, but put it into his pocket and kept it for ten years. After the deposits had been paid, the purchaser entered on plots 3 and 4 and did much work. He had already been to great expense in carrying a sewer up to the edge of the land in anticipation of developing the whole estate, but in addition he put in foundations of houses on plots 3 and 4, built up walls to a height of three feet at the back and six feet in front; and he put a concrete post and wire fence round the whole of the plots at a cost of something like £520. He began the building, despite the fact that he had not at that date obtained written licences from the local authority as required at that date under the Defence Regulations; but he had had an oral intimation from the local authority surveyor that he could begin the work involved.

In April, 1947, the vendor ordered the purchaser off the land, the circumstances being described as follows by the county court judge: "On a Sunday in the early spring of 1947 . . . the "defendant came on to the land and ordered the plaintiff off the "land, and he said, accompanied by a lot of bad language, that "the plaintiff was not a builder, never had any intention of "building on the land, and that neither the land nor the "bungalows belonged to him." The purchaser thereupon stopped his building, partly because of the vendor's antagonistic and

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obstructive attitude, and partly because he was unable to obtain the grant of building licences, despite the fact that he continued to apply for licences until July, 1947. Towards the end of 1948, however, he put up a garage and a shed on the land, and there was some evidence that he used the garage; apart from that, little or nothing was done until 1955.

Meanwhile, after the incidents of April, 1947, when the vendor had ordered the purchaser off the land, the conveyances in respect of plots 1 and 2 were found to need some slight rectification and were sent to the vendor for the rectification to be initialled by him. He refused to initial the documents, and proceedings had to be taken against him in the county court to compel him to hand over the conveyances, which he continued to refuse to initial. In 1953, it was discovered that the whole of the land comprising the 34 plots and other land was subject to a charge in favour of the bank, and although the bank was willing to release plots 1 and 2 from the charge to clear the purchaser's title, the vendor refused to release them, and a further action was brought against him in the Chancery Division to compel him to do so.

In 1955, the purchaser entered on plots 3 and 4 to carry out further work. By that time the necessity for building licences had ceased to exist, and he was being approached by members of the public who wished to find plots of land for building. He put in a service road, and erected another garage on the plots, the original one having fallen down. One D. B. Williams approached the purchaser about buying the land and was told that there were difficulties about it which might mean a legal action and that the purchaser could not sell to him. Williams thereupon approached the vendor, and on December 5, 1955, entered into a contract with the vendor whereby the vendor agreed to sell him plots 3 and 4 for £450—more than twice as much as the purchase price of 1946. Williams entered on the land and started to pull down the old brick work of 1946. The purchaser thereupon brought an action against the vendor early in 1956, asking for specific performance of the contract of May, 1946, and for conveyances of plots 3 and 4 to him by the vendor.

On July 20, 1956, the county court judge made an order declaring that the agreement made on May 28, 1946, by which the vendor agreed to sell and the purchaser agreed to purchase plots numbers 3 and 4, ought to be specifically performed and carried into execution within a period of six weeks from the date of the order. A stay of execution was granted on terms that the vendor paid £150 into court within 28 days of the date of the order. The vendor appealed.

D. Meurig Evans and *David Howells* for the vendor.
David Pennant for the purchaser.

The following cases were cited in the argument: *Fisher Ltd.* v. *Eastwoods Ltd.*[1]; *Tilley* v. *Thomas*[2]; *Harold Wood Brick Co. Ltd.* v. *Ferris*[3]; *Mills* v. *Haywood*[4]; *Lehmann* v. *McArthur*[5]; *Clarke* v. *Moore*[6]; *Sharp* v. *Milligan*[7]; *Shepheard* v. *Walker*[8]; *Stickney* v. *Keeble*[9]; *Crofton* v. *Ormsby*.[10]

DENNING L.J. This is an action for specific performance of a contract made ten years ago. Ten years is a very long time to wait before bringing an action for specific performance, and we must closely examine the facts to see whether the claim should now be admitted.

[His Lordship stated the facts set out above, and, referring to the troubles over plots 1 and 2, continued:] Those two plots have only a slight bearing on the case. They show that the vendor was a most difficult man who refused to implement his contracts as he should have done. Having said that, I put those plots on one side and turn to the plots which concern us particularly, namely, plots 3 and 4.

[His Lordship, referring to the vendor's act in putting the uncashed cheque for £20 into his pocket for some 10 years, continued:] But that cannot alter the fact that the cheque was received. Thereupon a subcontract came into being in respect of plots 3 and 4, which I regard as a binding contract separate from the main contract and sufficient in itself, whereby the vendor agreed to allow the purchaser to enter on the said plots for the purpose of erecting any buildings thereon.

It is said by Mr. Meurig Evans that time was of the essence of the contract of May, 1946, and that if the purchase of any plots was not completed within the two years then stated, there could be no further claim in respect of any such plots. He said that it was a commercial transaction and that therefore time should be considered of the essence. I cannot agree to that argument. It seems to me that this was a contract for the purchase of land, in which the parties, through their own common solicitor, put forward the period of two years as their target for completion; but that was, as is usual in cases of the sale of land, only a target: it was not something which was of the essence of the matter. Our legal procedure is well adapted to meet such a situation. If either side wanted to bring the other up to the mark, all he had to do was to give him reasonable notice requiring him to complete. Neither side did so, and, therefore, time is not by itself a bar to the action.

The second point is on delay or laches. Mr. Meurig Evans said that there had been much too much delay to enable the purchaser to obtain specific performance. On this point it is

[1] [1936] 1 All E.R. 421.
[2] (1867) 3 Ch.App. 61.
[3] [1935] 2 K.B. 198.
[4] (1877) 6 Ch.D. 196.
[5] (1868) 3 Ch.App. 496.
[6] (1844) 1 Jo. & Lat. 723.
[7] (1856) 22 Beav. 606.
[8] (1875) L.R. 20 Eq. 659.
[9] [1915] A.C. 386.
[10] (1806) 2 Sch. & Lef. 583.

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necessary to remember that when the deposit was paid there was a binding contract—binding on the vendor—whereby he let the purchaser into the land to erect the buildings. It was binding even though the vendor kept the cheque in his pocket. It was a contractual licence which the vendor could not repudiate at will. It created an equity. The purported repudiation by the vendor in April, 1947, was entirely inoperative. He could not renounce a binding contract in that way. The purchaser did not accept the repudiation as a rescission of the contract. He stopped building, but he did not take down his fence. He still remained in possession of the land, and, being in possession under a contractual licence, he had an equity to remain there.

But then it is said: when the vendor repudiated this contract, surely the purchaser ought to have taken him to court; he ought to have brought an action for specific performance then and there to compel him to perform his contract. I confess that that argument did appeal to me at one time in the course of the case. A very long time elapsed without his taking the vendor to court. But I think the answer to it is this: once the purchaser went into possession of the land, having the contractual right to be there, he not only had an equity to be there, but also the benefit of a contract to sell him these two plots. That was not only an equity: it was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he does not lose his rights simply by not proceeding at once for specific performance.

There is an interesting passage which Mr. Pennant read us from a case in 1806, *Crofton* v. *Ormsby*,[1] in which Lord Redesdale, Lord Chancellor in Ireland, said[2]: "The whole laches here "consists in the not clothing an equitable estate with a legal "title, and that by a party in possession. Now I do not conceive "that this is that species of laches, which will prevail against the "equitable title; if I should hold it so, it would tend to overset a "great deal of property in this country, where parties often "continue to hold under an equitable contract for 40 or 50 years, "without clothing it with the legal title. I conceive, therefore, "that possession having gone with the contract, there is no room "for the objection." And then he added[3]: "But, in the "present case, there is nothing but a resting on the equitable "estate by a person in possession, without clothing it with a "legal title, which I think never was held to be that sort of "laches that would prevent relief." Likewise we have here possession which is taken under a contract of purchase with an equitable right to be there. All that needs to be done is for the legal title to be perfected. In such a case, laches or delay is not a bar.

Mr. Meurig Evans argued that possession is only an excuse for delay in cases where the whole agreement is substantially

[1] (1806) 2 Sch. & Lef. 583.
[2] Ibid. 603.
[3] Ibid. 604.

completed: as, for instance, when, under an agreement for a lease, the tenant goes into possession and pays rent and all that is necessary is that a formal lease should be granted. He said no case had ever gone so far as the one before us. That may be so. Nevertheless I think the principle which Lord Redesdale has stated applies. The fact of possession is enough.

Next, Mr. Meurig Evans said that there must be acquiescence by the owner, and he referred to *Mills* v. *Haywood*.[4] I think there was sufficient acquiescence here. Although in one sense the vendor objected—he turned the purchaser off the land and made it clear that he did not want him there—nevertheless in another sense he acquiesced: he did nothing to see that the fence was removed or to take down the garage. If he wished to exclude the purchaser, he ought to have taken possession himself. He never did so. I am quite clearly of opinion that, as long as the purchaser remained in possession under a contract which entitled him to be there, he had an equity which the courts will protect. There was no need for him to claim specific performance in order to give him a right to be there. Laches or delay is not a bar to this action.

Mr. Meurig Evans said that the work done on the plots in 1946 and 1947 was illegal because there was no written licence. In my opinion that was nothing to do with the vendor and he cannot take advantage of it.

The only remaining question is one of abandonment. It is said that by stopping work and not continuing with his building, the purchaser abandoned the contract. The judge has negatived it, and I agree with him. The purchaser was put in a very difficult position by the conduct of the vendor, first of all, in regard to plots 1 and 2; and then by his conduct in coming and turning him off the land. He was put in such a difficult position that it is quite understandable that he did not feel it wise to take legal proceedings at an earlier stage. He only brought them when they were forced upon him by the resale by the vendor. After all, he had a contract under which he had an equity and under which he was in possession. That is binding on the vendor and on anyone who agreed to take from the vendor with knowledge of the contract or with knowledge of such facts that he ought to have realized that there was such a contract. D. B. Williams certainly comes into that category. Neither the vendor nor D. B. Williams has a right as against the better equity of the purchaser. D. B. Williams never got the legal estate; so it does not matter that the contract with the purchaser was not registered. I find myself in agreement with the county court judge and would dismiss the appeal.

HODSON L.J. I entirely agree. I think the judgment of the county court judge was perfectly correct. This case has taken a

[4] (1877) 6 Ch.D. 196, 202.

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very considerable time to hear, both in the county court and in this court; but the facts are really in essence simple.

The first question depends on the agreement of May 28, 1946, whereby the defendant agreed to sell to the plaintiff a plot of land, and on that the first question is whether the time mentioned is an essential term, because in clause 3 the intention is stated that the purchase of all the 34 plots, that is, all those the subject-matter of the agreement, shall be completed within two years of the date thereof. Two years have long since passed, and if two years was an essential term of the contract, the plaintiff could not succeed in getting the contract performed.

First of all, I would say that this agreement is severable in that it provides for the completion of a number of separate contracts, one individual contract in respect of each of these 34 plots of land. Plots 1 and 2 have been dealt with already; I do not propose to refer to their unhappy history; their sale has been completed; and with regard to the last surviving 30 plots the contract has been abandoned by both parties; the plaintiff has given up the idea of ever getting the other 30 plots. The contest has been about what are called plots 3 and 4; a separate contract is contemplated in respect of each of those two plots, as appears from the words used in clause 3, that "The vendor will allow "the purchaser to enter on the said plot for the purpose of "erecting any buildings thereon and on payment of the balance "of the purchase money will execute a proper conveyance to the "purchaser of the said plot"; then follows the provision that the intention is that the purchase of all the plots shall be completed within two years.

In my opinion that contract is an ordinary contract for the sale of land and is not subject to the considerations which apply to commercial contracts dealing with special subject-matter and where particular considerations apply, having regard to market variations and diminution in the value of property through effluxion of time, and so forth.

Nor are we concerned with a case where a special provision has been made to make time of the essence of the contract. The ordinary rule of equity, therefore, applies as stated by Lord Parker of Waddington in *Stickney* v. *Keeble*,[5] when dealing with a contract for the sale and purchase of real estate. He pointed out that at law the time fixed by the parties for completion had always been regarded as essential. He continued[6]: "In such "cases, however, equity having a concurrent jurisdiction did not "look upon the stipulation as to time in precisely the same "light. Where it could do so without injustice to the contracting "parties it decreed specific performance notwithstanding failure "to observe the time fixed by the contract for completion, and as "an incident of specific performance relieved the party in default "by restraining proceedings at law based on such failure. This

[5] [1915] A.C. 386. [6] Ibid. 415.

"is really all that is meant by and involved in the maxim that in "equity the time fixed for completion is not of the essence of the "contract, but this maxim never had any application to cases in "which the stipulation as to time could not be disregarded "without injustice to the parties, when, for example, the parties, "for reasons best known to themselves, had stipulated that the "time fixed should be essential, or where there was something in "the nature of the property or the surrounding circumstances "which would render it inequitable to treat it as a non-essential "term of the contract."

If time was not originally of the essence of the contract, no notice was ever given by the defendant to complete the contract, so as to make it essential for the plaintiff to agree to buy within a reasonable time. Indeed, as Mr. Meurig Evans pointed out, he could hardly do it, because his attitude has been for a very long time that he wanted nothing more to do with the plaintiff and would not touch him in business in any circumstances whatever. The position is that, as the county court judge held, on the basis of this contract the plaintiff paid his deposit. The deposit cheque had rather a curious history, because the defendant kept the cheque representing the deposit in his pocket. The plaintiff never got his money back and he did not know that the defendant had refused to apply the proceeds of the cheque that the plaintiff had drawn in favour of the solicitor in the first instance.

Relying on the contract, the plaintiff went into possession of the property and did such acts as were necessary and relevant to show that he was in possession. I attach great importance to the putting round these plots 3 and 4 of a fence. What more can a man do ordinarily if he buys or agrees to buy a piece of freehold land than to put a fence round it in order to show that it is his land and mark it off from the neighbouring land in that way? This is not the case of a man who had taken a lease and had to pay rent. He has nothing further to do. Land is not capable in the ordinary way of being reduced into possession except in such manner by the inclusion of it in a boundary fence. That is the first thing one is likely to do in any event and perhaps in many cases it may be the only thing one does. In this case the plaintiff did a bit more: he started some building; he put up some sheds and did some road works. But the fence, to my mind, was sufficient intimation that he was claiming possession of that land.

It has been said that he cannot rely on his acts of possession because he has to come to court with clean hands, and so far as the building work was concerned he was working without a licence, and therefore he cannot rely on that. It is unnecessary to express any opinion on that. Nobody raised any defence of illegality against him, and I doubt very much whether such a defence would have succeeded. But so far as putting up a fence to mark his boundary is concerned, at any rate it has not been shown to us that that would have been in any event an illegal

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act, whatever regulations were in force at that time. As I say, the regulations have not been shown to us in detail and perhaps the point was not pressed very hard.

What is the position if the plaintiff was in possession? In Fry L.J.'s book on Specific Performance (6th ed. 1921)—which was not, of course, edited by him—at p. 517 it is stated: "1110. "Where the contract is substantially executed, and the plaintiff "is in possession of the property, and has got the equitable "estate, so that the object of his action is only to clothe himself "with the legal estate, time either will not run at all as laches "to debar the plaintiff from his right, or it will be looked at less "narrowly by the court"; and the authority for that proposition is stated to be that of Lord Redesdale in *Crofton* v. *Ormsby*,[7] to which reference has been made. The paragraph continues: "for "the plaintiff has not been sleeping on his rights, but relying on "his equitable title, without thinking it necessary to have his "legal title perfected. 1111. Therefore, where a tenant holds "under a contract for a lease, pays his rent, and has possession "of the property and the enjoyment of all the benefits given him "by the contract, the effluxion of time will not be a ground for "resisting its enforcement." There are referred to in the footnote as authorities for the last sentence the cases of *Clarke* v. *Moore*[8]; *Sharp* v. *Milligan*[9] (affirmed by the L.JJ.); *Shepheard* v. *Walker*,[10] which are cases which deal with tenancies.

Mr. Meurig Evans sought to distinguish those cases because he said the situation is very different when one has a tenant in possession under the lease paying a rent, and the landlord takes the rent over a period of years; it would be absurd not to allow the tenant to complete his title when all he requires is a formal document, namely, the lease. He says this case is entirely different. But to my mind the principle is exactly the same, and each case must depend on how much it is necessary for the man who is seeking specific performance to do to establish the possession, and the nature of the possession which he can establish must depend on the subject-matter.

Cotton L.J. in *Mills* v. *Haywood*,[11] where he was commenting on *Clarke* v. *Moore*,[12] one of the lease cases to which we were referred, said: "In such a case as, e.g., where the purchaser in "possession has no right or title to such possession except as "purchaser, his possession is an assertion on his part of his "right under the contract of purchase, and acquiescence in his "possession is a recognition by the vendor of this right."

That brings me really to the last point in this case, because Mr. Meurig Evans says that, possession or no, nobody could accuse the defendant of ever having acquiesced in anything, because his attitude throughout had been one of defiance and protest and, indeed, abuse of the plaintiff whenever he saw him.

[7] 2 Sch. & Lef. 583, 604.
[8] (1844) 1 Jo. & Lat. 723.
[9] (1856) 22 Beav. 606.
[10] (1875) L.R. 20 Eq. 659.
[11] 6 Ch.D. 196, 202–203.
[12] 1 Jo. & Lat. 723.

I do not agree. I do not attach any particular significance to what took place in April, 1947, when the defendant tried to frighten the plaintiff off the place by abusing him and telling him to get off the land. The plaintiff never did get off the land. He stopped building, but there were various reasons for doing that. One was that he could not get a licence at that time. But he never got off the land. He kept on using the land; he kept his fence there; he kept his sheds there, and used the land so far as it was capable of being used in the circumstances throughout; and, so far as the attitude of the defendant is concerned, I think the position is that he substantially acquiesced. However much he breathed fire and slaughter, he did not do anything about it. The evidence is not very clear about this, but he was living on the farm or spent part of his time on the farm of which this land was part, and he certainly, from his evidence, must have known what was going on during, at any rate, part of this long period during which the plaintiff delayed in bringing his action and taking steps to get the land conveyed to him. The defendant has done nothing to bring the thing to a head. So that I think the position is that he has acquiesced in the plaintiff remaining in possession throughout, and therefore there are no laches on the part of the plaintiff which could defeat him in this action for specific performance.

MORRIS L.J. I have reached the same conclusion. The important part of the agreement for present purposes is contained in clause 3. It seems to me that the agreement was a severable one in the sense that when the purchaser intimated a desire to acquire and to accept a particular plot, that plot became the subject of a separate contract. My Lord has read clause 3 and I do not read it again beyond referring to these words: "and on "payment of the balance of the purchase money will execute" —that is to say, the vendor will execute—"a proper conveyance "to the purchaser of the said plot." I think the words "the "said plot" shows that it was contemplated that there would be or certainly might be individual conveyances, and indeed those conveyances might be from the vendor direct to an ultimate purchaser of a plot, that is to say, a purchaser from Mr. Harold Jack Williams.

The plaintiff in the action undoubtedly gave a notice in reference to plots 3 and 4, the plots in issue in this litigation. The judge in his judgment said: "I find as facts that the plaintiff "gave notice; he paid his deposit; he went into possession; he "remained in possession; and the only thing which prevented "him from completing the purchase was the conduct of the "defendant when he ordered him off the land." The judge then proceeded to consider the legal position, starting by a reference to the general principles as stated in Halsbury's Laws of England (2nd ed., vol. 31). I think it is abundantly clear that the plaintiff did give notice; it is quite clear that he paid his deposit. He had

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a receipt for the deposit, and it was not until 1956 that it was learned that the cheque that was paid by his solicitor to the vendor had not in fact been presented by the vendor but had been kept by him and, as far as I know, is still kept by him. It is true that at some intermediate stage somebody looking at the accounts in the solicitor's office, for the purpose presumably of audit or of preparing accounts, realized the position in regard to the cheque; but neither the plaintiff nor his solicitor knew that the cheque had not been presented.

It is further, I think, quite clear that the plaintiff went into possession; and he went into possession as a result of the agreement that he made. His possession was only referable to the agreement, and it was possession to which he was entitled under the agreement after he had given notice to the vendor and had paid a deposit of 10 per cent. As from that time it seems to me that he was the equitable owner of plots 3 and 4. Under the words of the contract he was, I think, under obligation to pay the balance of the purchase price and entitled to a conveyance within a period of two years from May 28, 1946.

Mr. Meurig Evans submits that the stipulation as to time which is found in clause 3 was a stipulation that was of the essence of the contract: his submission is that as the balance of the price was not tendered before May, 1948, it was thereafter too late for the plaintiff to become entitled to a conveyance, in other words, to clothe his equitable ownership with legal ownership. I do not find myself able to accept the submission that time was of the essence of this contract. The principle relating to this matter is stated in paragraph 1075 of Fry on Specific Performance (6th ed., p. 502) as follows: "Time is originally of "the essence of the contract, in the view of a court of equity, "whenever it appears to have been part of the real intention of "the parties that it should be so, and not to have been inserted "as a merely formal part of the contract." And later, in paragraph 1077 (p. 503), it is stated: "In order to render time thus "essential, it must be clearly and expressly stipulated, and must "also have been really contemplated and intended by the parties "that it shall be so; it is not enough that a time is merely "mentioned during which or before which something shall be "done."

We were referred to *Tilley* v. *Thomas*,[13] in which Lord Cairns L.J. said[14]: "A court of equity will indeed relieve against, and "enforce, specific performance, notwithstanding a failure to keep "the dates assigned by the contract, either for completion, or "for the steps towards completion, if it can do justice between "the parties, and if (as Turner L.J. said in *Roberts* v. *Berry*[15]), "there is nothing in the 'express stipulations between the parties, "'the nature of the property, or the surrounding circumstances,' "which would make it inequitable to interfere with and modify

[13] (1867) 3 Ch.App. 61.
[14] Ibid. 67.
[15] (1853) 3 D.M. & G. 284.

"the legal right. This is what is meant, and all that is meant, "when it is said that in equity time is not of the essence of the "contract."

That passage was in substance repeated and reinforced by Lord Parker in *Stickney* v. *Keeble*.[16] There is clearly nothing in this contract that in terms makes time of the essence of the contract; there is not a clear stipulation to that effect. Of course, there may be contracts in cases where land is going to be used for the purpose of trade or commerce or where there is the element of fluctuation in value or where minerals may become worked out: in such contracts, as the authorities show, there may be indications that time is of the essence of the contract, even though it is not in so many words stated to be of the essence of the contract. I entirely agree with my Lords that there is nothing here to show that time was of the essence of the contract, with the result that once the date of May, 1948, was passed it was too late for the plaintiff to ask for specific performance. It is quite clear that time was not later made of the essence of the contract by the defendant: he never did anything in the way of giving a notice so as to make time of the essence. He did not do that because of his whole attitude in the case.

It remains, therefore, to consider whether the delay in this case was evidence of abandonment on the part of the plaintiff or whether the delay was such as to make it inequitable for a court of equity to decree specific performance of the contract. I do not wish to repeat what my Lords have said, but I fully agree with the conclusions they have reached, on an analysis of the evidence, that it cannot be said that there was an abandonment here by the plaintiff of this contract.

In regard to possession, the plaintiff clearly went into possession with the full assent of the defendant and undoubtedly he was in possession in the spring of 1947 when the incident took place to which much prominence has been given. The defendant went on to the land, made rather a scene, told the plaintiff that he was not a builder, that he had no intention of building, and ordered him off the land. But he could not order the plaintiff off the land; the land belonged to the plaintiff; the plaintiff was the equitable owner of it; and it does not seem to me that what the defendant then said, when analysed, really amounted to more than abuse of the plaintiff, who appears to have acted with considerable restraint. It was very disconcerting for the plaintiff to be told that he had never paid a deposit on plots 3 and 4. The plaintiff went to his solicitor and reported the conversation, but was, not unnaturally, reassured by his solicitor, who said: "Well, "I have paid and we have got the receipt." The solicitor had paid. There was no knowledge that the cheque had not then been presented. The receipt was in existence.

After that date the plaintiff did renew his applications for

[16] [1915] A.C. 386, 415–416.

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building licences. That appears clearly from the letter of July 31 written from the borough engineer to the plaintiff's concern: The letter says: "In reply to your letter of July 26, I have to say "that your applications have been submitted to the Welsh Board "of Health on three separate occasions, namely, July 8, 1946, "April 25, 1947, and May 14, 1947, and on each occasion the "Welsh Board of Health has intimated that they are not prepared "to advise that the ban on the issue of licences for the erection "of dwellings of this area by private persons should be raised in "the particular case." The date May 14 was presumably after the time when there was a scene on the land, and certainly the date July 26 was after such time. Later history has been recited. It was necessary to bring the county court proceedings relating to the deeds of plots 1 and 2, and after those county court proceedings were terminated the plaintiff built a garage on part of plots 3 and 4. Up to then he had spent some £500 in regard to the preparations of plots 3 and 4 and he had when dealing earlier with plots 1 and 2 spent an amount of money on a sewer which was far more than he would have spent if he had not contemplated building on plots additional to plots 1 and 2. In 1955, after compliance by the defendant with an order made by Roxburgh J., the plaintiff extended the service road, spending over £100 in so doing; and at a later date he put up a garage. All this time the fence with concrete posts remained on the land. I cannot see any evidence that the plaintiff abandoned plots 3 and 4, and, though the delay seems considerable, there are many reasons that in part led up to it which are entirely attributable to the attitude of the defendant.

If the delay was not such as to amount to abandonment, it does not seem to me that there are any reasons which make it inequitable for the court in this case to decree specific performance, notwithstanding the lapse of time. I therefore do not see any reason to disturb the findings of the judge.

Appeal dismissed.
Interest at 4 per cent. on balance of purchase price.

Solicitors: *Rhys Roberts & Co. for S. Garelick & Co., Cardiff; Myer Cohen & Co., Cardiff.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

* WEST WAKE PRICE & CO. *v.* CHING.

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Oct. 29, 30, 31; *Nov.* 1, 14.

Devlin J.

[1956 W. No. 1792.]

Insurance—Liability insurance—Professional negligence—Accountants indemnified against loss for any claim made against them in respect of their neglect, default or error or that of their servants—Queen's Counsel clause—Mixed claim involving negligence and dishonesty—Whether within scope of policy.

Accountant.

The plaintiffs, a firm of accountants, took out a policy of insurance to cover themselves against loss for any claim which might be made against them in respect of any act of neglect, default or error arising out of the conduct of their business as accountants. The policy, in addition to the main indemnity, contained a "Queen's Counsel clause" whereby the underwriters agreed to pay any such claim without requiring the plaintiffs to dispute it, unless a leading counsel (to be mutually agreed upon between the parties) advised that the claim could be successfully contested and the plaintiffs consented to it being contested, their consent not to be unreasonably withheld.

A clerk employed by the plaintiff firm received from two of the clients certain sums of money which ultimately could not be accounted for; and, subsequently, the clients issued writs against the plaintiffs. In their statements of claim three causes of action were alleged: first, damages for negligence or breach of duty as accountants; secondly, money had and received; and, thirdly, moneys converted by the plaintiffs to their own use. A request for indemnity was refused by the underwriters and the plaintiffs sought a declaration that the claims formulated in the writs issued against them were claims based in negligence, and in consequence brought into operation the Queen's Counsel clause under which the underwriters were bound to indemnify them:—

Held, that despite the form of the statements of claim, there was in each action only one claim, which was primarily in respect of fraud; that to fall within the scope of the policy the character of the claim must not be a mixed one of fraud and negligence but negligence alone and, accordingly, the claim was outside the scope of the policy.

Goddard and Smith v. *Frew* [1939] 4 All E.R. 358 and *Reischer* v. *Borwick* [1894] 2 Q.B. 548; 10 T.L.R. 568 considered.

ACTION.

By a Lloyd's accountants inndemnity policy dated February 6, 1950, granted to the plaintiffs, West Wake Price and Co., a firm of accountants, by the defendant and other Lloyd's underwriters, the underwriters agreed to indemnify the plaintiffs up to a sum not exceeding £25,000 against "Loss for any claim or claims "which may be made against them . . . in respect of any act of "neglect, default or error on the part of the assured . . . or their "partners or their servants, in the conduct of their business as

[Reported by Miss J. EPHRON, Barrister-at-Law.]

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"accountants. . . ." In addition, the policy contained a further clause whereby it was agreed to pay "any such claim or claims "which may arise without requiring the assured to dispute any "claim, unless a King's Counsel (to be mutually agreed upon by "the underwriters and assured) advise that the same could be "successfully contested by the assured, and the assured consents "to such claim being contested, but such consent not to be "unreasonably withheld."

The plaintiffs had one Bell in their employ as an accountant clerk; and between the years 1949 and 1952 he received and paid out moneys for two of the firm's clients, Hammer (Southern) Ltd. and Mr. William Hinds, who were promoters and financiers of theatrical enterprises. At the end of that period it was discovered that sums of money amounting to £20,000 had been received by Bell which could not be accounted for.

On April 26, 1946, writs were issued by the clients (hereinafter called "the claimants") claiming (1) damages for negligence and/or breach of duty as accountants in failing to keep proper books and ledgers, conduct annual audits and supervise their servant Bell; (2) money had and received; and alternatively (3) moneys converted by the plaintiffs, through Bell, to their own use.

The plaintiffs, considering the claims to be of the class covered by their policy, made a request to the defendant, as underwriter, for indemnity, but this was refused on the ground that the claims did not, in fact, fall within the scope of the policy. Thereupon, the plaintiffs sought a declaration that the defendant was bound to pay the claims made against them in accordance with the provisions of the Queen's Counsel clause.

Gilbert Paull Q.C. and *R. J. Parker* for the plaintiffs.
Neil Lawson Q.C. and *W. G. Wingate* for the defendant.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Leyland Shipping Co. Ltd.* v. *Norwich Union Fire Insurance Society*[1]; *Davies* v. *Hosken*[2]; *In re Windsor Steam Coal Co. (1901) Ltd.*[3]; *Yorkshire Dale S.S. Co. Ltd.* v. *Minister of War Transport*[4]; *Ocean Steamship Co. Ltd.* v. *Liverpool & London War Risks Association.*[5]

Cur. adv. vult.

Nov. 14. DEVLIN J. stated the facts and continued: The plaintiffs assert that the claimants have made claims which are covered by the Q.C. clause; and the plaintiffs have brought this action in order to have that point determined. They contend

[1] [1918] A.C. 350; 34 T.L.R. 221.
[2] (1937) 53 T.L.R. 798; [1937] 3 All E.R. 192.
[3] [1929] 1 Ch. 151.
[4] [1942] A.C. 691; 58 T.L.R. 263; [1942] 2 All E.R. 6.
[5] [1946] 1 K.B. 561.

that for this purpose the nature of the claims is sufficiently and conclusively set out in the statements of claim. The underwriters contend that the nature of the claims cannot be ascertained without an investigation into the facts on which they are based; and they also dispute that the claims formulated in the statements of claim are within the Q.C. clause. That clause refers to "any such claims," which takes one back to the body of the policy, where they are described as "claims in respect of "any act of neglect, default or error." These words are apparently wide, but it is plain on the authorities—and Mr. Paull does not contend otherwise—that they do not extend to acts of dishonesty by the claimants or their servants, or to claims against the plaintiffs for money had and received, at any rate unless it is shown that those claims are in respect of an act of neglect, default or error. The problem in this case is how to deal with a "mixed" claim in which questions both of dishonesty and negligence are raised.

In speaking of negligence or dishonesty, I am using broad terms and I must now analyse more closely the nature of the claims as formulated in the writs and statements of claim. Three causes of action are alleged: first, damages for negligence or breach of duty as accountants; secondly, money had and received; and, thirdly, "monies converted by the defendants to "their own use." The statements of claim, which were delivered at the same time as the writs, show that the third head is restricted to the acts of Bell, which are alleged as wrongful conversion. Any direct allegation of fraud or dishonesty is avoided. A person can, of course, convert money innocently; he can even convert it to his own use innocently if he believes he has a good title to it; but it has, I think, been taken for granted in this case that Bell, if these allegations are proved, was dishonest. The point may not matter for Mr. Paull's purpose, since he is ready to concede that a claim for money had and received would not be a claim within the policy. I have no doubt that it would be outside the policy if the failure to account was due to dishonesty. I wish, however, to guard against a decision that all claims for money had and received are necessarily outside an indemnity policy in the terms of the present one or that the authorities by which I am bound would compel me so to decide. It might be—I do not have to decide it—that a failure to account which was due to a payment made to a third party, who was in good faith believed to be entitled to it, would be an "error" within the meaning of the policy. For the purposes of this case it has not been found necessary in the argument to draw precisely the boundaries between an indemnity policy and a fidelity policy, and the broad distinction that has been used is the distinction between negligence and fraud. I shall in this judgment use the word "negligence" to describe the ambit of the policy and to save the constant repetition of "any act of neglect, default or error"; and I shall

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by way of contrast with it use the term "fraud," though I am well aware that there may be acts of conversion which fall short of fraud and yet are outside the policy.

There are thus three causes of action set out in each action and there is one loss claimed, for the whole loss is attributed to one or other of the three causes. The question I shall have to determine in the end is whether there is more than one claim.

If there is only one claim, I may also have to determine what its real nature is, whether it ought to be described as a claim in respect of fraud or a claim in respect of negligence. In each document—writ and statement of claim—negligence is put as the main claim and the other heads of claim are alleged as alternative. Mr. Paull submits that the court is not entitled, in ascertaining the true nature of the claim, to look outside these documents; but he does not carry this submission so far as to say that the court is bound by the order in which the pleader chooses to arrange them and bound to accept as the main claim that which the pleader or those instructing him have selected. I find the selection in this case rather a curious one. The truth is, to put it bluntly, that Bell is alleged to have stolen the claimants' money. It seems an inversion from the natural in these circumstances to begin by saying that the plaintiffs were careless in not discovering that their servant was stealing money; and then to add by way of alternative that in fact he was stealing money. The statement of claim was delivered six months ago and the defence has not yet been filed. The claimants have very reasonably granted time while the plaintiffs' differences with their insurers are being resolved. I may take it, I suppose, that the claimants are now aware of the policy of insurance in this case and I suppose I ought not to speculate about when they first became aware of it or whether they thought that a claim put into a form apparently covered by a Lloyd's policy might be more valuable to them than one which was not. But I am satisfied that if I have to ascertain the real nature of the claim, I am entitled to look at the matter as well as the form of the statement of claim and to reach my own conclusions about it, and I am satisfied that this claim is a claim based primarily on the fraud of Bell.

Of course, if there was a real doubt about whether Bell was the servant of the assured, it would be more understandable that the claimants should keep the allegation of his fraud as a second string. But Mr. Paull has admitted that Bell was employed by the assured as an accountant clerk and was their general servant. He made that admission subject to the qualification that in these particular matters Bell might have been acting outside his employment, and also subject to the reservation that the facts about Bell's position, as distinct from the allegations about it, were irrelevant and inadmissible. I am not prepared, for reasons which I shall give later, to take as strict a view on the latter point as Mr. Paull would wish me to. I think that if I have

to ascertain the true nature of the claim, it is permissible for me to satisfy myself, as I do, that the allegation that Bell is a servant is substantial and not flimsy.

I turn now to the construction of the policy. It seems that the effect upon a policy in these terms of a mixed claim in fraud and negligence has not yet been judicially considered—in the relevant cases hitherto fraud has been admitted; and it will, I think, prove helpful to consider the effect of a mixed claim upon the main indemnity clause in the policy before tackling the complications created by the Q.C. clause.

The essence of the main indemnity clause—as indeed of any indemnity clause—is that the assured must prove a loss. The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss. If judgment were given against them for the sum claimed, they would undoubtedly have sustained a loss and the question would then arise what was the cause of the loss. If the proximate cause (this seems to be the test; *Goddard and Smith* v. *Frew* [1]) of the loss was the dishonesty of their servant, they could not recover under the policy; if on the other hand it was their own neglect, they could recover. If the action between the claimants and the assured did not settle the question of causation, it would in all probability settle the facts in the light of which the question could be answered. But all this would involve publicity which, where charges of professional negligence are made, might do considerable harm to an assured over and above the amount of any judgment obtained against him. For this reason professional men may prefer paying a bad claim to fighting it. Obviously one of the main objects of the Q.C. clause is to give the assured additional cover, not only against the costs of litigation but also as a protection against unwelcome publicity.

I said that the question would be what was the proximate cause of the loss—dishonesty or negligence. Mr. Paull submits that that would not in fact be the right question. He submits, quoting as authority the dictum of Lindley L.J. in *Reischer* v. *Borwick*,[2] and a passage in Halsbury's Laws of England, 2nd ed., vol. 18, p. 306, that is largely founded upon it, that it would be enough for him to show that negligence was one of the proximate causes of the loss. I think that as the argument developed it became apparent that this point would not play as large a part in the determination of this dispute as was at first thought. I do not for the purposes of my judgment find it necessary to decide it. But since in the course of the discussion I have had occasion to look at what I said about *Reischer* v. *Borwick* [2] six years ago in *Heskell* v. *Continental Express*,[3] I must comment that I do not find the relevant passage altogether satisfactory. I doubt that

[1] [1939] 4 All E.R. 358.
[2] [1894] 2 Q.B. 548, 551; 10 T.L.R. 568.
[3] [1950] 1 All E.R. 1033, 1048.

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it is correct to describe the dictum of Lindley L.J. as "the rule "laid down in *Reischer* v. *Borwick*."[4] I should still like to find a way of avoiding the making of minute distinctions between two causes "of approximately equal efficacy"; but if the price that has to be paid for the solution is the interposition of a category labelled "cause of equal efficacy" between "the cause" and "a cause," the price may be too high.

I turn now to an analysis of the Q.C. clause. It comprises three promises by the underwriters, and while this combination of promises produces a clause which is sui generis in contracts of insurance, each of the promises looked at individually is, I think, based on a conception which is not a novelty in insurance law. The three promises, each contingent upon the happening of certain events, are: (1) that the underwriters will pay the costs of legal proceedings; (2) that they will pay a claim against the assured without proof of actual loss, if it is more likely than not that there will be a loss, the question of likelihood being determined by Queen's Counsel; (3) that they will pay a claim without proof of loss, and even if it is unlikely that it would cause a loss, if the assured reasonably objects to fighting it.

There is no great dispute about the meaning and effect of the first promise. It is an engagement "supplementary to the con-"tract of insurance"—I adopt the phrase by which a suing and labouring clause (to which this part of the Q.C. clause bears some similarity) is described in the Marine Insurance Act, 1906, section 78. A suing and labouring clause is not part of the contract of indemnity: see *Johnston* v. *Salvage Association*.[5] The performance of this promise does not involve the underwriters in any liability to indemnify the assured against the loss. If the action against the assured succeeds, a loss will be proved; but it would still be open to underwriters to assert that the loss is not within the policy. For example, a claim which appeared on presentation to be in respect of negligence might turn out in reality, when all the facts were known, to be in respect of fraud. It would then be open to the underwriters, irrespective of whether they could properly be made liable for the costs of the action, to refuse to pay the claim.

The second promise comes into operation if a claim is made and Queen's Counsel advises that it cannot successfully be contested. The underwriters' liability in this event to pay the claim bears some similarity to the conception in marine insurance of constructive total loss. There is behind it the same notion, namely, that there are circumstances in which a business man does not want to have to wait until he can prove that a loss has actually occurred. In the conception of constructive total loss he recovers if he can show that a peril insured against has operated in such a way as to be more likely than not to cause

[4] [1894] 2 Q.B. 548, 551.

[5] (1887) 19 Q.B.D. 458; 3 T.L.R. 744.

an actual total loss of the thing insured, the question of likelihood being determined as a question of fact by the court. The similar question which arises under the Queen's Counsel clause, namely, whether the action can be successfully contested, is to be determined by Queen's Counsel.

The third promise involves underwriters in the obligation of paying the claim, whether or not it can be successfully contested, if the assured has reasonable grounds for refusing to contest it. This is not, I think, an indemnity insurance at all. The underwriters undertake to pay on the happening of an event, namely, the making of a claim within the categories defined in the policy, even though it may be beyond question a bad claim and therefore one which cannot legally involve the assured in any loss; the assured need prove neither that the loss has occurred nor that there is any likelihood of a loss occurring. It is, in short, what is called contingency insurance.

The making of a claim is the event or "peril" which brings the Q.C. clause into operation and so puts it upon the underwriters to fulfil one or other of the three obligations in the clause. It may be indeed that it is more truly expressed as one obligation, which is a conditional obligation to pay the claim unless underwriters establish grounds for substituting one or other of two alternative promises. It does not, for the purposes of this case, matter how that point of construction should be decided. This case turns on whether the event which brings the clause into operation has occurred, that is, whether a claim for negligence within the policy has arisen. Quite clearly a claim has been made and Mr. Paull submits that in considering whether or not it is within the policy, that is, whether it is in respect of negligence, all that can be looked at is the claim as formulated by the claimants—the writ and Statement of Claim. As this is at least inter alia a claim in respect of negligence, the plaintiffs contend that the clause has come into operation, and a declaration to that effect is in substance the relief which they are asking for in this action. Or, put another way, since the question whether or not the clause has come into operation depends entirely on whether a claim has been made within the meaning of the policy, the court is in effect being asked to declare that the claim in the statement of claim is one that falls within the policy.

Mr. Lawson disputes that this is the right approach to the Q.C. clause. He is bound, I think, to concede that if a claim within the meaning of the clause arises, the underwriters' obligations also arise. But he submits that a claim within the meaning of the clause does not arise unless it is a claim which is in some way connected with loss. He submits that the clause is part of the contract of indemnity and that there can be no indemnity without proof of loss. He therefore submits that it is not enough for the assured to produce a claim which appears to be in form within the policy; they must also prove, before the clause comes

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into operation at all, that it is a claim which is connected with loss. The word "connected" is not one that Mr. Lawson used. It is the best one that I can think of to describe what I understood him to mean. For he does not say that the assured must prove that the claim has actually caused him a loss: clearly, if the assured had to prove that, the Q.C. clause would give him no rights over and above the main indemnity clause. Nor does he make the unqualified contention that the assured must prove that the claim is one that is likely to cause a loss: for one easy way of disputing such a proposition would be to show that the claim was a bad one and would be likely to fail; and Mr. Lawson is bound to concede that under the Q.C. clause that issue is reserved for Queen's Counsel. So he phrases the connexion in this way—that the assured must show that the claim, if pursued to a successful conclusion, would cause him to sustain a loss within the policy. How does the assured set about proving this? The sort of inquiry that Mr. Lawson envisages would take a curious form. The assured would call evidence to show that he was negligent and that as a result of his negligence he would have to pay the claim. The underwriters would be, by reason of the Q.C. clause, as it were, estopped from contending that the assured was not careless—in something of the same way, I suppose, as a tenant may be estopped from denying his landlord's title—but might contend that the admitted negligence was not, or would not be, the true cause of the loss. On the particular facts of this case—if such an inquiry took place—Mr. Lawson would hope to establish that it was Bell's dishonesty and not the firm's negligence, if any, that was the true cause of the loss.

If the assured emerged successfully from this ordeal and showed that his negligence, if proved, would be the true cause of the loss, the matter would then be remitted to Queen's Counsel to decide whether the issue of negligence ought to be fought at all. If he decided that it ought to be fought, and if the assured was unable to find reasonable grounds for withholding his consent, the trial between the claimant and the assured would then take place—the claimant being, it must be hoped, a man of sufficient patience to consent to holding up his claim while the assured was fighting his preliminary bouts with his insurers—and the assured would then contend that he was not negligent. If judgment went against the assured, it is quite possible, and indeed probable in a case such as the present, that the judge, if he found that Bell was fraudulent and that the firm was negligent, would not determine which was the cause of the loss, since the assured was plainly responsible for both. The contest would then enter upon its third phase. Hitherto it would have been dealing with probabilities. The assured would have succeeded in showing that his negligence, if successfully proved, would probably (no one could say more than that) be the cause of the loss which would be actually incurred only if the action against him was successful. By this means he would

have satisfied the requirements of the Q.C. clause and obtained the rights which that clause grants to him. In the third phase, where he seeks an indemnity under the main indemnity clause, he must show that his negligence was in fact the cause of judgment being given against him. Many facts might have come out at the trial when the claimant's case was heard which would have been unknown to the judge who had to try the question whether the Q.C. clause had come into operation. It would be open to the underwriters, therefore, to contend once again that dishonesty was the real cause. When the assured emerged triumphant from this third phase, he would obtain full relief under the policy.

With all respect to underwriters, these sort of contentions really make nonsense of the Q.C. clause. It does not have to be read twice to see that its main object is to protect the assured from having to face litigation which, whether successful or not, might be damaging to his reputation. If before the clause comes into operation underwriters can require the assured to expose the whole nature of the claim in a court of law, the object is completely defeated. Worse than that, a clause which is manifestly designed so that it may be concealed from the public that the assured has been charged with negligence would have as a preliminary to its operation a set of proceedings conducted by the assured on the assumption that he was in fact negligent. Such proceedings would form a most unhappy preliminary to the action between the claimant and the assured in which the assured might wish properly to dispute his negligence. But, of course, they are unlikely to be a preliminary to anything. In nine cases out of ten the claimant would decline to hold his hand while proceedings under the policy were taking place, the assured would be driven to fight and the Q.C. clause would be quite worthless.

I do not go as far as do Mr. Paull's contentions in this matter. I do not consider that the underwriters are bound by the way in which the claimant has chosen to formulate his claim. I think that underwriters can properly invite the court at this stage to ascertain the true nature of the claim and to make such inquiry as may be necessary for that purpose. An example may be given in relation to a claim for money had and received of the sort which I have already considered. I think it would be open to the underwriters to show, for example, that, while that might be the form of claim which commended itself to a pleader, the writ had been preceded by a letter charging embezzlement. Similarly, I think it might be open to the assured to show that the issue raised by such a claim was whether or not a person to whom he had in good faith paid away the claimant's money was authorized to receive it. But there is all the difference between a limited inquiry of this sort confined to ascertaining the true nature of the claim and the inquiry into the whole circumstances which would

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be necessary in order to determine whether fraud or negligence was the probable cause of the loss.

I should therefore reject Mr. Lawson's interpretation of the Q.C. clause for the sufficient reason that it robs the clause of all sense and meaning. But I reject it also on the ground that there is no justification for reading into it the limitations which Mr. Lawson wants to introduce. The clause says in effect that in the event of "any such claim or claims" arising the underwriters are to do one of three things. "Any such claim" clearly means any claim "in respect of any act of neglect default or error." There is no justification for introducing the additional qualification that it also means any claim which, if successfully prosecuted, would be likely to result in a loss. Mr. Lawson's reason for introducing this additional qualification is that one must import into the clause the conception of indemnity. I do not see why one should. The conception of indemnity may arise to some extent from the clause itself; for example, if one of the promises may be regarded as in effect a promise to pay a constructive total loss, it would be a contract of indemnity. But the clause at least in part, and perhaps in whole, is not a contract of indemnity; but is, as I have described it, a supplementary contract outside the main contract of indemnity. Mr. Lawson has submitted as a matter of construction that as the limitation of loss to £25,000 is contained in the contract of indemnity, the Q.C. clause must be read as part of the contract of indemnity, since otherwise there would be an obligation under the Q.C. clause to pay claims up to any amount. I think that a limitation to £25,000 can however be implied into the Q.C. clause as a matter of common sense without troubling whether it is a part of the contract of indemnity or not. In a commercial document it is reasonable to think that commercial men will regard some things as being too obvious to require statement.

The rejection of Mr. Lawson's main submission clears the ground for his alternative argument which seems to me to raise the real point in the case. In the action which has been brought against the assured, is there one "claim" or more than one "claim" in the sense in which the word "claim" is used in the policy? If the claim is to be related to the amount claimed, there is only one sum claimed either as a liquidated amount or by way of damages (it is not argued that for this purpose a distinction is to be drawn between them), although the claim is supported by three alternative causes of action. If, on the other hand, "claim" means "cause of action," then there are three, of which one is undoubtedly within the policy. Mr. Paull submits that "claim" means "cause of action," that there has therefore arisen against the assured a claim for negligence, that that brings the Q.C. clause into operation and that it is immaterial that the document which contains the claim should also contain other claims based on different causes of action which are not within the policy. Mr. Lawson submits that only one claim has arisen.

If he is right about that, it does not determine the matter, for it would then be necessary to consider whether that claim was a claim for negligence or not. If, however, Mr. Paull is right that there are two or more claims, then he must succeed, for one is undoubtedly within the policy.

I think that the primary meaning of the word "claim"—whether used in a popular sense or in a strict legal sense—is such as to attach it to the object that is claimed; and is not the same thing as the cause of action by which the claim may be supported or as the grounds on which it may be based. In the Oxford Dictionary "claim" is defined as: first, "A demand for some-"thing as due; an assertion of a right to something"; secondly, "Right of claiming; right or title (to something or to have, be, "or do something; also on, upon the person, etc., that the thing "is claimed from)." All the examples given under these two heads are examples of claims made to an object or upon a person. Under the verb "to claim" it is observed that it is "often loosely "used, especially in the United States for: contend, maintain, "assert." I do not doubt that the word is frequently used in this looser meaning of "contention," or that it is often used by lawyers as if it meant the same thing as a cause of action. It is quite natural to speak of a claim in fraud or a claim in negligence, and Mr. Paull has advanced many powerful arguments to show that it is as "cause of action" that the word is used in this policy. His strongest point is, I think, that the words that I have to construe are "claim . . . in respect of any act of neglect, "default or error." This would seem to show that the policy is itself characterising claims according to their causes of action. Mr. Paull can also argue that his interpretation makes the policy more workable, at any rate from a lawyer's point of view. Thus, a claim in negligence comes into existence when an allegation of negligence is made and continues until the allegation fails or succeeds; a claim in the sense of a cause of action must always be either inside or outside the policy for the whole of its life. A claim for a sum of money, however, may start outside the policy if it is based solely on fraud; perhaps be brought within the policy if a charge of negligence is added; and then disappear from the scope of the policy if the charge of negligence is disproved at the trial. I do not see any insuperable difficulty about this. A claim need not always have the same character. Under the policy there are only two points of time when its character is relevant; the first is when it is made and the second when (if it does) it succeeds; and it is not essential to the working of the policy that it should bear the same character on both occasions. But Mr. Paull is justified in submitting that this point is at least a helpful indication.

He illustrates the same sort of point by reference to the clause in the policy which requires immediate notice in writing to be given of any claim. When the assured received a claim in the form in which it is set out in this case, that is, for fraud

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and negligence, ought he to give notice of it? Ought his duty to give notice to depend upon the view he forms of the real nature of the claim—whether it is in fraud or negligence? If he failed to give notice and the action proceeded and the claim in fraud failed, would the claim then for the first time come within the policy? And would not underwriters have cause for complaint that they had not been notified of the claim when it was first made? I find this last consideration rather artificial. The clause in the policy requires "immediate notice in writing of any "claim made upon them." I think that the object of the clause is that underwriters want to be told at once of any claim that is likely to be of interest to them under the policy and I have no doubt that a sensible assured would act in that spirit without sitting down first to construe the words "act of neglect, default "or error." Still, the phrase "any claim" must on a strict construction refer only to any claim that falls within the policy; and if an assured liked to stand on his strict rights and declined, for example, to report a claim for money had and received until the point when it became manifest that it involved neglect or error, underwriters might have a grievance but no remedy. The value of the point can be exaggerated but again it is helpful as showing the sort of sense in which the parties might understand the word.

The machinery of the policy does not work so smoothly under Mr. Paull's interpretation when one comes to apply the Q.C. clause; but, nevertheless, it may be said, except at one point, to work. If the Queen's Counsel is presented with the statement of claim in this case, he will, on Mr. Paull's interpretation, be asked to advise merely in relation to one paragraph, ignoring another. He will have to advise whether the claim in negligence can be successfully contested. If it is quite obvious that there is no answer to the claim in fraud, the exercise will, except for the purpose of the policy, be academic, but it must be performed. One of the ways in which the claim might be successfully contested would be to say that while negligence might have to be admitted, it was not the cause of the loss; and that would, I suppose, have to be considered as if someone other than the assured was responsible for Bell's acts. If counsel advised that the action should be contested, and it was contested, the underwriters would be liable to pay all the costs in connexion with the negligence, but not any costs relating to fraud if that was also contested. This division of finance might be inconvenient but it is not impracticable. The clause is not a subrogation clause; the assured remains in full control of the action. He is not, it may reasonably be contended, entitled to call for funds in advance but merely to be reimbursed costs, charges and expenses that have been incurred. If at the end of the case the division cannot be agreed, any dispute that is brought to the courts about it would doubtless be referred to a taxing master and settled by him.

Moreover, on any view of the clause, a division may be inevitable; for separate claims in respect of separate sums of money, one claim based on fraud and the other on negligence, may be combined in the same action against the assured and there could then be no doubt that under the Q.C. clause the claims would have to be dealt with separately.

The real difficulty in the application of the Q.C. clause arises if underwriters are required to pay the claim. This difficulty is to my mind a most formidable one. The underwriters cannot pay the claim in negligence without also discharging the claim in fraud; and they can therefore, if the plaintiffs' contention is right, be compelled under the Q.C. clause to pay a claim that is not within the policy.

This difficulty, in spite of all the attractiveness of Mr. Paull's argument, seems to me to be, if not decisive, at least enough to drive me back to a favourable reconsideration of the ordinary and primary meaning of the word "claim." If the word is to be used with any precision, it must be defined in relation to the object claimed. The grounds for the claim or the causes of action which support it can give it colour and character, but cannot give it its entity. If you say of a claim against a defendant that it is for £100, you have said all that is necessary to identify it as a claim; but if you say of it that it is for fraud or negligence, you have not distinguished it from a charge or allegation. In particular, if you identify a claim as something that has to be paid (and that is how it is referred to in the Q.C. clause), it must be something that is capable of separate payment: you cannot pay a cause of action. It follows, I think, that if there is only one object claimed by one person, then there is only one claim, however many may be the grounds or the causes of action which can be raised in support of it: likewise, where several claims are each dependent on the same cause of action (as, for example, where one cause of action leads to alternative claims for an injunction, damages or an account or other different forms of relief), there remains only one cause of action, however many claims it may give rise to. In my judgment there is in each of these actions against the assured only one claim and I have therefore to consider whether this "mixed" claim is a claim in respect of negligence within the meaning of the policy.

Several tests have been considered in the course of the argument which may be applied to the claim in order to answer this question. One is that the court must look at the real nature of the claim, irrespective of the form in which it is pleaded, and determine whether it is wholly or mainly a claim in respect of fraud or in respect of negligence. If this is the right test, for reasons that I have already indicated I should determine it as a claim in fraud.

Another test is to follow, as closely as the altered circumstances permit, the method adopted in *Goddard and Smith* v.

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Frew.[6] The Court of Appeal there determined that the true proximate cause of the loss being embezzlement, it was not within the policy. There is nothing in this case to show that the Court of Appeal had to distinguish between two suggested causes; but presumably if it had had to do so, it would have done it by ascertaining which of the two was the proximate cause (subject to Mr. Paull's contention based on *Reischer* v. *Borwick*[7]). For that purpose it would have had access, if necessary, to proved or admitted facts. Here, in my judgment, Mr. Paull is right in submitting that if causation enters into the matter at this stage at all, which he disputes, it must be determined on the facts alleged. On the assumption that all the facts in the statement of claim are to be taken as true—as they would be, for example, in demurrer proceedings—I am satisfied that the true cause of the loss is the dishonesty of Bell. Indeed, it seems to me to be plain that the charge of negligence cannot be regarded as anything other than an alternative. In order to sustain the charge that the plaintiffs were careless in not discovering that Bell was failing to account for money, the first matter to prove is that Bell was in fact failing to account for money; as soon as it is established that a servant of the plaintiffs failed to account for money the cause of action against them is complete and any investigation into the question, whether it ought to have been detected or not, is superfluous.

If, therefore, either of these were the tests, I should decide the point in favour of there being one claim. But I have reached the conclusion that there is in fact a simpler and more effective test which is the correct one. It depends simply on the true construction of the policy. Business men often want to write into a document words which they think will amplify its meaning, but which lawyers reject as superfluous; nevertheless, the writing in of superfluities sometimes helps to clarify questions of construction. If a layman wanted a phrase such as "claims in respect of "negligence" to be altered to read "claims in respect of negli-"gence only" or "claims in respect of negligence but not in "respect of fraud," a lawyer would tell him that these additions were superfluous, since negligence meant negligence and nothing else and did not include fraud. That is plainly enough the effect of the decision in *Goddard and Smith* v. *Frew*.[8] But if words such as these were there, they would serve to show that a claim in respect of negligence and in respect of fraud is excluded from the description in the policy. To come within the policy the character of the claim must be unmixed. It must be negligence alone. Applying this test, which I think is the right one, the claim in this case is outside the policy.

It is true that a decision to this effect can deprive the assured of the benefit of the Q.C. clause in a case in which, if the true facts were known, he would be entitled to it; but that is the

[6] [1939] 4 All E.R. 358.
[7] [1894] 2 Q.B. 548.
[8] [1939] 4 All E.R. 358.

inevitable result of a clause whose very nature compels it to be applied to cases where the true facts are still unknown. Under the main indemnity clause the assured has all his rights intact under the policy, if he wishes to wait until the true facts are known. The Q.C. clause is an additional right which he can claim before the true facts are known. But he must take with it all the virtues and vices inherent in the character of a clause which is dealing not with certainties but with possibilities. In general, the clause will work to his advantage; claims will get paid which on the true facts have no validity. It does not seem to me that the clause is stultified because it may occasionally work the other way. There is no practical danger that claims for negligence will frequently be overlaid by unsustainable charges of fraud and so taken outside the policy; businessmen do not as a rule make charges of fraud without justification.

But it is not in any event simply a question of giving a literal meaning to the word "claim" in a case in which a more liberal meaning might be urged as being more consistent with the presumed intention of the parties. While a loose or liberal meaning would ensure that the assured derived all possible benefit from the Q.C. clause, it would also mean that the underwriters were compelled to discharge a claim which admittedly, good or bad, was outside the limits of the policy. If I were entitled to determine the case by setting these two considerations in opposite scales, I think that I should find that the latter weighed more heavily with me. But in truth where considerations of this sort are at all finely balanced, it cannot be disputed that the right method—perhaps it is the right method in all cases—is to take the words in their primary meaning, certainly whenever that corresponds with the ordinary usage of business men.

In my judgment therefore the plaintiffs have failed on the material they have produced to establish that a claim, which is within the meaning of the policy, has arisen against them; and accordingly have failed to prove the event which brings the Q.C. clause into operation. Their claim must therefore be dismissed.

Judgment for the defendant.

Solicitors: *Ward, Bowie & Co.; William Charles Crocker.*

[CHANCERY DIVISION.]

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Oct. 23, 24, 25; *Nov.* 8.
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Revenue — Income tax — Employment — Voluntary payment — Transfer of shares—Transfer in compliance with wishes of deceased shareholder—Transfer expressed to be in consideration of transferee remaining in service of the company—Nature of transfer changed by deed—Shares taxable—Schedule E—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 156, *Sched.* 9, *r.* 1.

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The business of public company was built up by the work of two of the directors, the secretary and the managing director, but the majority of the shares were held by F. H., who died in 1936. The two directors had understood that F. H. would leave each of them a reasonable number of shares by his will; F. H. did not do this but left all his shares in the company in trust for his wife for life and thereafter to his two sons. The sons felt under a duty to transfer a number of shares to the directors. Nothing was said about the transfers being a reward or remuneration for past services, but deeds of transfer of 8,000 shares to each director were executed in 1945, stating in each case that the transfer was "In "consideration of the covenantee [the director] continuing his "present engagement" with the company "until the expiry of four years from the date hereof." The transfers were intended to take effect after the death of the widow of F. H., but the shares were in fact transferred to the directors in 1953. The Inspector of Taxes claimed that the shares were taxable under Schedule E for the year 1953–1954 as profits of their office or employment:—

Held, that the transfer of the shares would, apart from the terms of the deeds, have been an act of bounty; but the deeds by introducing the element of consideration had altered the nature of the transaction, and the acquisition of the shares was therefore linked with the services of the directors as officers of the company and taxable for the year 1953–1954 as a profit of their office.

APPEALS from the Commissioners for the Special Purposes of the Income Tax Acts.

The Inspector of Taxes appealed from two decisions of the commissioners in favour respectively of Ernest Bearsley and Walter Manning Hewitt, relating to assessments to income tax under Schedule E for the year 1953–1954 in respect of transfers of shares.

The case stated in respect of Bearsley so far as material provides:

1. At meetings of the commissioners on December 15, 16 and 17, 1954, Ernest Bearsley appealed against an assessment to income tax, Schedule E, made upon him for the year 1953–1954 in the sum of £50,465.

2. The questions in issue were (a) whether £36,000, the value at July 27, 1953, of 8,000 shares in Meccano Ltd. transferred on that day to Bearsley by the brothers Roland and Douglas Hornby, was income, assessable under Schedule E, from Bearsley's office or employment as managing director of Meccano Ltd.; (b) if the value of the said shares did not represent such income, whether the value of covenants to transfer them made by the Hornby brothers on December 30, 1945, represented such income; (c) if any income was assessable, whether such income was properly assessable for the year 1953–1954.

3. At the same time as the present appeal we heard the appeal of Hewitt against an assessment to income tax, Schedule E. made upon him for the year 1953–1954. The facts in the present appeal do not materially differ from those in Hewitt's appeal.

4. In June, 1908, Meccano Ltd. (hereinafter called "the

"company") took over a business of constructional and mechanical toy manufacture, which had been begun in the early part of the present century by Frank Hornby. Practically all the shares in the company were allotted to Frank Hornby.

5. Frank Hornby had been greatly helped in building up the company's business and in running it, when it had become successfully established, by Bearsley, Hewitt and George Jones . . .

6. (c) The relations of all three persons with Frank Hornby were good, and though he was . . . chary of transferring shares to them during his lifetime, they all had the impression that he would leave each of them a reasonable number of shares by his will.

7. Frank Hornby died on September 21, 1936, and by his will he left all his shares in the company in trust for his wife for life and thereafter to his two sons, Roland and Douglas, in equal shares absolutely. Roland and Douglas were already directors of the company, and Roland was appointed chairman soon after his father's death.

Frank Hornby's wife was 76 when he died, and she did not die till October, 1953. . . .

8. Bearsley, Hewitt and Jones were very surprised and disappointed that Frank Hornby had not left them any shares in the company by his will, and they decided to approach the Hornby brothers about the matter; . . .

9. (a) Some time in the last quarter of 1945 Bearsley and Hewitt had a meeting with Roland Hornby, . . .

(b) Roland Hornby agreed at once that Bearsley, Hewitt and Jones should have 20,000 shares between them. Roland Hornby's view was that his father had been remiss in not leaving shares by his will to these three persons. Nothing was said suggesting that the shares were to be a reward or remuneration for past services, but Roland Hornby thought the shares should have been left in recognition of the work of these three persons with the company. No condition was suggested that Bearsley and Hewitt should continue in the service of the company (their service agreements were due to expire on September 30, 1946), or that the shares were remuneration.

(c) As Roland Hornby held only 12,000 shares and Douglas Hornby only 10,000, it was never contemplated that the Hornby brothers should transfer any of their own shares; it was understood that the shares should come on the death of Frank Hornby's widow from the trust fund in which she had a life interest. . . .

11. On December 30, 1945, deeds of covenant were entered into as follows:—(a) (1) Between Roland Hornby and Bearsley and (2) Roland Hornby and Hewitt, whereby Roland Hornby covenanted to transfer 4,000 shares each to Bearsley and Hewitt within three months of the death of Mrs. Frank Hornby. The consideration moving from the convenantees was expressed to be their continuing in their present engagements with the company for four years. (b) Between Roland Hornby and Jones in similar

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terms, except that Roland Hornby covenanted to transfer 2,000 shares in the company, and the consideration moving from Jones was his continuing his present engagement with the company for six months. (c) Three deeds of covenant by Douglas Hornby in terms the same as those referred to in (a) and (b) of this paragraph. (d) All the above deeds were executed by Roland and Douglas Hornby respectively, and counterparts were signed by Bearsley, Hewitt and Jones respectively.

12. (a) Hewitt became ill in October, 1952. The company had only a small pension scheme and Hewitt was maintaining his three sisters. He became apprehensive as to his financial position and pressed for the transfer of the shares without waiting for the death of Mrs. Frank Hornby. (b) On July 27, 1953, although Mrs. Frank Hornby was still alive, all the shares which Roland and Douglas Hornby had by the deeds of covenant of December 30, 1945, covenanted to transfer after her death, were transferred to Bearsley, and (c) Jones having died in April, 1949, his shares were transferred to his executors. . . .

The commissioners decided that neither the value of the shares nor the value of the covenants to transfer them represented income assessable on Bearsley under Schedule E.

His Lordship found that the following provisions were material in the deed of December 30, 1945, between Roland Hornby and Ernest Bearsley (thereafter called the "covenantor" and "covenantee" respectively). It recited the interest of the covenantor in shares of the company under his father's will and recited that "the covenantor desired to mark his appreciation of the past services of the covenantee in the employment of the said company and also desires that the covenantee shall remain in the employment of the said company for a certain period."

Clause 1 of the deed was as follows: "1. In consideration of the covenantee continuing his present engagement with Meccano Ltd. until the expiry of four years from the date hereof the covenantor for himself and his legal personal representatives hereby covenants with the covenantee that he the covenantor will after the date of the death of the said Clara Hornby and within three months after such date transfer and assign to the covenantee absolutely and free from any lien charge or other incumbrance and without any payment therefor by the covenatee 4,000 Ordinary Shares in Meccano Ltd. or the equivalent thereof if the capital be increased and will execute in due form a written transfer in respect of such shares sufficient to vest the full equitable title to such shares in the covenantee and will use his best endeavours to procure that the covenantee shall be registered as the holder of such shares in the register of members of the said company."

By clause 2 the covenant bound the covenantor's legal personal representatives and required them to assume liability for the death duties (if any) in respect of the shares. Clause 3 gave

the benefit of the covenant to the covenantee's legal personal representatives. Clause 4 provided in effect for liquidated damages payable by the covenantor in the event of performance of the covenant being prevented by the sale of shares by the covenantor or the trustees of Frank Hornby's will.

The case stated in respect of Hewitt contained the additional statement that when the payment was made to him in 1953, he had ceased to be secretary of the company, and the payment was therefore not assessable under Schedule E for the year 1953–1954. The findings and decision of the commissioners were otherwise identical with those in the case of Bearsley.

The Crown appealed in both cases.

F. N. Bucher Q.C. and *Sir Reginald Hills* for the Crown.

N. E. Mustoe Q.C. and *H. H. Monroe* for the respondent taxpayers, Hewitt and Bearsley.

Cases cited in argument not referred to in the judgment: *Heasman* v. *Jordan* [1]; *Stainer's Executors* v. *Purchase* [2]; *Edwards* v. *Bairstow* [3]; *Levermore* v. *Joby* [4]; *Turner* v. *Forwood* [5]; *Tilley* v. *Wales* [6]; *Edwards* v. *Roberts* [7]; *In re British & Foreign Cork Co.* [8]; *Townend* v. *Toker* [9]; *Reade* v. *Brearley* [10]; *Beak* v. *Robson* [11]; *Rogers* v. *Hadley* [12]; *Chibbett* v. *Robinson.* [13]

Cur. adv. vult.

Nov. 8. DANCKWERTS J. having stated the facts read the following judgement: It was in respect of the receipt of the shares by Bearsley and Hewitt that claims have been made by the Inspector of Taxes for the year 1953–1954. The claims are made under Schedule E (section 156) of the Income Tax Act, 1952, which provides that tax "shall be charged in respect of every "public office or employment of profit." Meccano Ltd. is in fact a public company. The relevant rules are found in the Ninth Schedule to the Act. [His Lordship read rule 1 of the Ninth Schedule to the Income Tax Act, 1952.[1]] Rule 4 provides for

[1] [1954] Ch. 744; [1954] 3 W.L.R. 432; [1954] 3 All E.R. 101; 35 T.C. 518.

[2] [1952] A.C. 280; sub nom. *Gospel* v. *Purchase* [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071; sub nom. *Purchase* v. *Stainer's Executors*, 32 T.C. 367.

[3] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48; 36 T.C. 207.

[4] [1956] 1 W.L.R. 697; [1956] 2 All E.R. 362.

[5] [1951] W.N. 189; [1951] 1 All E.R. 746.

[6] [1943] A.C. 386; 59 T.L.R. 178; [1943] 1 All E.R. 280; sub nom. *Wales* v. *Tilley*, 25 T.C. 136.

[7] (1934–5) 19 T.C. 618, 634.

[8] (1865) L.R. 1 Eq. 231.

[9] (1866) 1 Ch.App. 446.

[10] (1933) 17 T.C. 687.

[11] [1943] A.C. 352; 59 T.L.R. 90; [1943] 1 All E.R. 56; 25 T.C. 33.

[12] (1863) 2 H. & C. 227.

[13] (1924) 9 T.C. 48.

[1] Income Tax Act, 1952, Sched. 9, r. 1: "Tax under Schedule E shall "be annually charged on every person "having or exercising an office or "employment of profit mentioned in "Schedule E . . . in respect of all "salaries, fees, wages, perquisites or "profits whatsoever therefrom for the "year of assessment."

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assessment on any additional salary, fees or emoluments in a similar manner.

The charge is upon salaries and other profits of the office, and it is rather startling to find a large and, at first sight, capital sum received in one year giving rise to such a devastating claim upon the taxpayer. As Lord Dunedin said in *Seymour* v. *Reed*[2] in reference to the "benefit" received by the cricketer, James Seymour,[3] "When I think of this little nest egg—which, of "course, paid income tax as an investment and which, now that "it has taken the form of a farm, will pay income tax under "Schedule A—being treated, the whole sum, as income, honestly, "had it not been for the fact that honourable judges, whose "opinions I respect, have come to another conclusion, I would "have thought the contention was quite preposterous."

However, it must be accepted that, as the result of a number of decisions, some of which were given when income tax was not the crushing burden that it is at the present time, it is no longer possible to assume that a large sum received in one year is not to be treated, for income tax purposes, as the income of that year. Nor again can it be assumed that the fact that the money or property is acquired from other persons than the recipient's employers prevents the acquisition being treated as a profit of the recipient's office: James Seymour's benefit was held by the House of Lords to escape the terms of Schedule E, but another cricketer was less fortunate in *Moorhouse* v. *Dooland*,[4] in which collections made by the public at cricket matches were held to be part of the perquisites or profits of a professional cricketer playing under the rules of the Lancashire Cricket League. Therefore, the fact that the payments were not made in the present case by the Hornby brothers as directors of Meccano Limited or by that company (which was the employer of Bearsley and Hewitt) does not necessarily enable Bearsley and Hewitt to escape tax on the transfers of shares. On the other hand, the contention made on behalf of the Revenue that the Hornby brothers had such a financial interest in the company that they were substantially their employers seems to me not to be sustainable.

The special commissioners reached the conclusion that the value of the shares was not assessable as income of Bearsley and Hewitt for the year 1953–1954, and they considered that the transfer of the shares was not intended to be an act by way of remuneration for the services performed by them in their capacities as officers of the company. The main contention of the Crown before me was that the special commissioners had fallen into error by attributing too much importance to the motives which induced the Hornby brothers to make the payments and too little importance to the positions of the recipients, which, it was claimed, was the decisive aspect.

[2] [1927] A.C. 554; 43 T.L.R. 584; 11 T.C. 625.

[3] [1927] A.C. 560.

[4] [1955] Ch. 284; [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93; 36 T.C. 1.

A number of cases were cited to me, which it will be useful to examine. *Blakiston* v. *Cooper*[5] (the Easter offerings case) is, of course, a case on which the Inland Revenue relied. The Easter offerings, which were given by the congregation to the incumbent for the purposes of augmenting his stipend, were given to the incumbent as such and so were held by the Court of Appeal and the House of Lords to be profits of his office. These were, of course, as is pointed out by Lord Phillimore in *Seymour* v. *Reed*,[6] periodical payments, and Lord Loreburn said in *Blakiston* v. *Cooper*,[7] "Had it been a gift of an exceptional kind, such as a "testimonial, or a contribution for a specific purpose, as to pro-"vide a holiday, or a subscription peculiarly due to the personal "qualities of the particular clergyman, it might not have been "a voluntary payment for services, but a mere present." Mr. Bucher, by way of meeting this suggestion, pointed out that during Mr. Frank Hornby's lifetime, Bearsley and Hewitt obtained transfers of shares from time to time. But I can well imagine that if the large blocks of shares, which are the subject of the present case, had been received by them from Mr. Frank Hornby shortly before his death, the Revenue would be contending, for estate duty purposes, that they were not part of the normal expenditure of the deceased or of the same nature as the earlier transfers of shares.

Herbert v. *McQuade*,[8] where the clergyman received annual grants of money from a fund, was a case of a similar nature.

In *Cowan* v. *Seymour*[9] (a surveyor of taxes) the ordinary shareholders of a company, after liquidation had been completed, by a unanimous resolution voted a sum in equal shares to the chairman and the secretary of the company. It was held that the sum thus received by the secretary did not accrue to him in respect of an office or employment of profit and that he was not chargeable to income tax under Schedule E in respect of the sum. In this case, it is plain that when the appellant received the sum he had ceased to hold any office, and while he was secretary and liquidator he never received any remuneration. These facts distinguish it from the present case.

In *Salmon* v. *Weight*,[10] a managing director of a company received a fixed salary and each year by resolution the directors gave him the privilege of applying for certain unissued shares in the company at their par value, which was considerably less than their current market value. He was assessed to income tax under Schedule E on the basis of the difference between the market value of the shares taken up and the par price actually paid for them. It was held by the House of Lords that the privilege

[5] [1907] 2 K.B. 688; 23 T.L.R. 663; affirmed [1909] A.C. 104; 25 T.L.R. 164.

[6] [1927] A.C. 554, 570.

[7] [1909] A.C. 107.

[8] [1902] 2 K.B. 631; 18 T.L.R. 728; 4 T.C. 489.

[9] [1920] 1 K.B. 500; 36 T.L.R. 155; 7 T.C. 372.

[10] (1935) 51 T.L.R. 333; sub nom. *Weight* v. *Salmon*, 19 T.C. 174.

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represented money's worth and was assessable as a profit of his office as managing director.

In *Cameron* v. *Prendergast* [11] a director of a limited company intimated to his co-directors his intention of resigning his office. In a letter they asked him in the interests of the company not to serve notice of resignation, and said that the company, in consideration of his acceding to this request, would within a certain time pay him a sum of £45,000 and would embody its undertaking in a formal deed. The deed was entered into, and the company did pay £45,000, in two sums of £35,000 and £10,000. The House of Lords held that the amount received by the director arose from his office and was properly assessable to income tax under Schedule E.

I was also referred to *Patrick* v. *Burrows* [12] (in which an employee was successfully assessed upon the value of shares transferred to him under a trust scheme for the benefit of employees), and *Calvert* v. *Wainwright* [13] (in which a taxicab driver was held to have been correctly assessed on the tips received by him from passengers).

I have already mentioned *Moorhouse* v. *Dooland* [14] in which the professional cricketer was held by the Court of Appeal to be assessable on the sums received by him by means of collections from the public. It is to be observed that under the rules of the Lancashire Cricket League (a member club of which was his employer) the professional cricketer was authorized to make such collections on the occasion of meritorious performances by him, and these collections, in the case of a successful cricketer, would be periodic. On the other hand, in *Seymour* v. *Reed* [15] the proceeds were of a benefit received by the cricketer which was held not to be assessable to income tax. The features of this case were that, save in very exceptional cases, a benefit would not be received more than once in a cricketer's career, and the cricketer was approaching retirement, and the amount was in fact used to provide for his retirement.

These cases seem to me to establish—(1) That a sum may be assessable as a profit even though it appears to be an unusually large one in comparison with the recipient's normal income. (2) It may be assessable though it is received in the form not of cash, but of money's worth, such as shares. (3) That it may be assessable though it is received from persons who are not the employers of the recipient or even persons having any actual financial interest in the services of the recipient. But (4) it depends on the circumstances, and not every sum received from another person during the period of the recipient's service is assessable as income and a profit of his office, even though it

[11] [1940] A.C. 549; 56 T.L.R. 499; [1940] 2 All E.R. 35; sub nom. *Prendergast* v. *Cameron*, 23 T.C. 122.

[12] (1954) 35 T.C. 138.

[13] [1947] K.B. 526; 63 T.L.R. 199; [1947] 1 All E.R. 282; 27 T.C. 475.

[14] [1955] Ch. 284.

[15] [1927] A.C. 554.

comes from the recipient's employer, and this must be more obviously so if the amount is received from a person who is not the employer.

In the end, therefore, none of the cases cited is conclusive. It must depend upon the circumstances of the particular case. The test is put in this way by Lord Cave in *Seymour* v. *Reed* [16]: "... and it must now (I think) be taken as settled that they" [that is, the words "salaries, fees, wages, perquisites or profits" from the office or employment of profit] "include all payments "made to the holder of an office or employment as such, that is "to say, by way of remuneration for his services, even though "such payments may be voluntary, but they do not include a "mere gift or present (such as a testimonial) which is made to "him on personal grounds and not by way of payment for his "services. The question to be answered is, as Rowlatt J. put "it: 'Is it in the end a personal gift or is it remuneration?' If "the latter, it is subject to the tax; if the former, it is not."

The word "remuneration" does not appear in the material provisions of the Act. It is a paraphrase used by Lord Cave and Rowlatt J.

I must now face the difficult task of applying the test to the circumstances of the present case. The material findings of fact by the commissioners seem to me to be these. When Roland Hornby was approached, his view was that his father had been remiss in not leaving shares by will to the three persons who had helped him to build up the company. Nothing was said suggesting that the shares were to be a reward or remuneration for past services, but Roland Hornby thought the shares should have been left in recognition of the work of these three gentlemen with the company. No condition was suggested that Bearsley and Hewitt should continue in the service of the company, or that the shares were remuneration. If the matter had rested there, I think that the taxpayers would have been entitled to succeed. It seems to me that the expectation of receiving bequests of shares in Frank Hornby's will was an expectation of receiving *gifts* of shares, and when Roland Hornby accepted that the taxpayers had a moral claim to have received shares, it was not on the footing that taxpayers had any claim to receive them as remuneration for services, but simply that Frank Hornby had failed in his generosity as a testator. In my view, the taxpayers did not think that they were going to receive shares from the Hornby brothers by reason of services performed or to be performed to the company, and the Hornby brothers did not think they were going to give shares to the taxpayers in any way in consideration of services by them to the company. The position was that there was a promise by the Hornby brothers to give the taxpayers some of the shares which were coming to the Hornby brothers under Frank Hornby's will. This was a purely voluntary promise, the performance of which could

[16] [1927] A.C. 554, 559.

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not have been enforced by the taxpayers by process of law. If the matter had remained in this position, and the promise had been duly fulfilled by the transfers of the shares, I think that the shares would have been received as a present and not as a profit of the taxpayers' offices, and would not have been assessable to income tax in the hands of the taxpayers.

But the transaction was changed. It was conceived that it was desirable to introduce the element of consideration in order to make the promises legally enforceable, and the consideration which was selected was a promise by Bearsley and Hewitt to continue serving in their offices with the company for four years from the date of the deeds of covenant. In this way, the acquisition of the shares under the terms of the deeds irretrievably was linked up with the services of the taxpayers as officers of the company. It seems to me to be impossible to deny that under the obligations created by the deed the shares were received by the taxpayers by reason of their offices, and, therefore, as profits of these offices. I have already said that I do not think that evidence is admissible to contradict the plain terms of the deeds by attempting to show that the intentions of the parties were to give a meaning to the provisions of the deeds contrary to the words which the deeds plainly contain. But, even if evidence was to be admitted as to the intentions of the draftsman of the deeds, I am not satisfied that a different result would be reached. The draftsman chose to introduce consideration into the transaction between the parties, in order to create a binding relationship, and it seems to me to be impossible to contend that the consideration was not a real consideration, having no effect in law at all. The parties introduced consideration for what were supposed to be adequate reasons, and the effect cannot now be cast aside, because the results have been found to be inconvenient.

Two alternative contentions were put forward on behalf of the taxpayers. The first of these was that if the transaction fell within the terms of Schedule E, the income of the taxpayers was the value of the rights acquired in December, 1945, by the taxpayers under the deeds of covenant; this would mean that those values would have to be estimated in December, 1945, and the assessment on them now, or at the material date of the assessments under appeal, would be out of time. Evidence was tendered that it was possible for a valuer to make an estimate of some sort as to the values in question. The commissioners treated the estimates as being such an uncertain matter that they could not amount to money's worth and, therefore, they were not a possible part of the taxpayer's income. I do not think that this is the correct answer, but I do not think that the contention can succeed. Mr. Mustoe, in support of this contention, relied on *Tait* v. *Smith*[17] as well as *Salmon* v. *Weight*[18] (which I have already mentioned). But I do not think

[17] (1954) 35 T.C. 79. [18] 51 T.L.R. 333.

that those cases have any application on the facts of the present case. If the conclusion is correct that the transfers of the shares were profits of the taxpayers' offices and remuneration for the services to be performed by them, they were paid for those services when the shares were transferred to them (though the shares were not immediately realized), and assessable accordingly. The assessments were, therefore, correctly made in respect of the year when the assessable income was received by the taxpayers.

A further contention was made by Mr. Mustoe that the amount of the values of the shares received by the taxpayers should be spread over the four years during which they promised to serve the company, and the assessments made accordingly. Whatever morality or reasonableness might be thought to be satisfied by such a result, in my view it is not maintainable, because there was no promise to make payments over a series of years—merely a promise to make transfers of the shares as a whole on the happening of a certain event.

In the result, therefore, the appeals succeed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Lightbounds, Jones & Crean for Owen, Dawson & Wynn-Evans, Liverpool.*

I. G. R. M.

[CHANCERY DIVISION.]

* JACKSON (INSPECTOR OF TAXES) *v.* LASKERS HOME FURNISHERS LTD.

1956
Nov. 13.
Danckwerts J.

Revenue—Income tax—Capital or income expenditure—Repairs—Lease of business premises for 14 *years—Property out of repair—Covenant compelling tenants to put property in repair—Reduction in rent for first seven years—Not a deductible expenditure—Schedule D—Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 122, 137.

A lease of business premises for 14 years contained a covenant under which the tenants were obliged to put the premises in repair, and thereafter to keep them in repair. The premises had been unoccupied for a number of years and were unfit for occupation. The tenants in compliance with the covenant spent £2,295 in putting the premises into repair. The rent payable was a peppercorn rent for the first year, £700 a year for the next six years, and £1,000 a year for the last seven years. The tenant claimed that the sum of £2,295 was a deductible expenditure under Schedule D:—

Held, (1) that this was an expenditure of a capital nature, being an expenditure in respect of the accumulation of repairs which the tenant had had to carry out to make the premises suitable for their business, and it had nothing in common with the usual

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liability for current repairs under a lease; and accordingly it was not a deductible expenditure under Schedule D.

(2) That if a transaction had, in fact, been carried out in such a way that the expenditure was not deductible, it was irrelevant that it might have been deductible if the transaction had been carried out in some other way.

Observations of Lord Greene M.R. in *Henriksen* v. *Grafton Hotel Ltd.* [1942] 2 K.B. 184 at p. 193; 58 T.L.R. 271; [1942] 1 All E.R. 678 applied.

APPEAL from the Commissioners for the General Purposes of the Income Tax.

The case stated, so far as material, provided:

At a meeting of the Commissioners for the General Purposes of the Income Tax for the Division of Manchester, held on March 16, 1955, Laskers Home Furnishers Ltd. (hereinafter called "the company") appealed against an assessment to income tax made upon it under Schedule D for the year 1953–1954 in the estimated sum of £4,400 in respect of the profits of its business of retail furnishers.

The only question before the commissioners was whether or not expenditure incurred by the company in the relevant year amounting to £2,295 was an allowable deduction in computing the profits of the business.

Mr. Lasker, a director of the company, gave the following evidence, which the commissioners accepted: The company, as the result of the termination of the lease of the premises which it had previously occupied, had obtained a lease of nearby premises, 68 and 70, Oldham Street, in the City of Manchester. Under the terms of the lease the premises were demised to the company for the term of 14 years (determinable as therein mentioned) from March 25, 1952, at a rent of a peppercorn during the first year of the term, at a yearly rent of £700 during the next six years and at a yearly rent of £1,000 during the remainder of the term and subject to the covenants on the part of the company and the conditions therein contained.

The demised premises had been unoccupied for a number of years before the lease was granted to the company. This had resulted in the deterioration of the premises, which at the time the lease was entered into were unfit for occupation, and accordingly in order to render the premises fit for occupation under clause 2 (4) of the lease the company covenanted forthwith to reinstate the demised premises including the repair of the main roof and plaster, and to instal electric light and heating and a new shop front to the reasonable approval of the lessors' architect and thereafter at all times during the term to keep the whole of the demised premises and all additions thereto, including all doors, keys, locks, bolts, bars, fastenings, windows, window cords and the glass in the windows and doors, and the drains and sanitary and water apparatus thereof, and all fixtures and fittings thereon, in good and substantial repair and condition.

The company, pursuant to that covenant, incurred expenditure in the relevant year amounting to £2,295, of which £1,767 was in respect of the reinstatement of the demised premises and general repairs, £40 in respect of repairs to the roof, £338 in respect of electrical repairs and £150 in respect of the electric supply installation.

It was contended on behalf of the company: (1) That the expenditure of £2,295 which had been incurred was necessary solely for the rehabilitation of the demised premises. (2) That the sum of £2,295 was therefore admissible as a deduction in computing the profits of the company for assessment to income tax.

It was contended by the Inspector of Taxes that since the expenditure of £2,295 was incurred in order to render the premises fit for occupation, the expenditure was capital expenditure and was therefore inadmissible as a deduction in computing the profits of the company for assessment to income tax.

The commissioners were of opinion that the expenditure incurred by the company could fairly be said to be in respect of the reinstatement of and repairs to the demised premises, and decided that the sum of £2,295 should be allowed as a deduction in computing the profits of the company for income tax purposes.

The figures having been agreed on the basis of their decision, they discharged the assessment.

On appeal by the Crown by way of case stated to the High Court on February 24, 1956, it was ordered by Roxburgh J. that the case be remitted to the commissioners to hear additional evidence and find all the relevant facts. At a further hearing on August 1, 1956, evidence was given by Mr. Lasker and by Mr. Matheson, a director of A. & M. Matheson Ltd., the contractors mainly concerned with the work which the company had done at the premises.

The facts found by them on that evidence were as follows: The premises, consisting of the ground floor and first and second floors, had not been occupied since 1934, and were in a very bad state of repair. As a result thereof the landlords had agreed to reduce what would have otherwise been a rent of £1,000 for each of the 14 years of the lease, as stated above, on the understanding that the company would do the initial work to put the premises in a good state of repair.

Mr. Matheson had made a survey of the premises towards the end of 1951 and had found that about one-fifth of the roof was in holes. This had resulted in about one-fifth of the roof timbers being rotten and also about one-sixth of each of the three floors, mainly around the stairs. The gutters had been largely stripped of lead and the brickwork was saturated to a depth level of eight feet from the eaves and was so rotten that a penknife could easily be pushed into the bricks. The work done by A. & M. Matheson Ltd. to put the above matters right had

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involved the using of 2½ standards of timber, nearly 2,000 slates and about 20,000 bricks.

The shop front had been in the form of a small arcade or foyer and was of metal construction; it was badly rusted and parts were boarded up. It was taken out and replaced by a new straight shop front of wooden construction and on less elaborate lines than the original one had been. No major structural alterations were involved. The expenditure on the new shop front was about £600, and it would have been less expensive to have repaired and renovated the old one. Parts of the plaster inside the premises had perished and these parts were made good. It was necessary to fit a new rising main for the toilets and renew the plumbing system. No additional toilet accommodation was provided, but an Ascot heater was fitted. The outside stonework and woodwork were painted and the interior decorated. Apertures were cut in the party wall between 68 and 70, Oldham Street on the first and second floors to facilitate the use of these floors as showrooms in connexion with the company's business as retail furnishers. Previously these floors had been used as offices. The cost of this work was approximately £60. Plaster board partitioning was put up on the first and second floors and also on the ground floor, together with a cash desk. This work cost approximately £65. The electric wiring system was renewed, the old one being beyond repair.

On the additional evidence adduced before them the commissioners arrived at the conclusion that the whole of the sum of £2,295 was not allowable as a deduction in computing the profits of the company, and that this sum should be reduced by £275, the allowable deduction thus being £2,020.

F. N. Bucher Q.C. and *Sir Reginald Hills* for the Crown.
N. E. Mustoe Q.C. and *Peter Whitworth* for the company.

Cases cited in argument are referred to in the judgment.

DANCKWERTS J., having stated the facts, continued: The commissioners give no indication of how the reduction in the allowance of £275 is allocated, but a guess suggests that it is made up of adding £60 for the apertures and £65 for the plaster board partitioning and the cash desk, and, treating it as a capital expenditure, the cost of the electric wiring being renewed, which happens to be a sum of £150, as shown in the previous case; and those three sums added up together come to £275. Even then the commissioners did not find the whole of the facts necessary to appreciate the case. The parties have agreed certain facts which, therefore, may be treated as part of the case.

The company apparently went into occupation on May 17, 1952, and the lease was signed a month later, on June 10, 1952. By the time that the company went into occupation it appears that the electric wiring work had just been finished, but that the

builders did not actually finish their work until about a month later, June 26, 1952.

The contention on behalf of the Inspector of Taxes is, of course, that this was wholly in the nature of capital expenditure and therefore not allowable as a deduction for the purposes of the annual profits and gains of the company's trade. Reliance was placed by Mr. Mustoe, on behalf of the taxpayer, on section 137 of the Income Tax Act, 1952, which contains a number of prohibitions of things which may not be deducted for the purpose of arriving at the profits of the year. I do not think that that section really has much to do with this case, because it does not settle in any way whatever the question which I have to decide, and which the commissioners had to decide, namely, was it capital or was it revenue expenditure? Consequently, it is necessary to consider the matter, not so much on the wording of that section, but on the general principles which have been applied to situations of this kind by the courts in considering the Income Tax Acts generally.

I was referred by Mr. Bucher, on behalf of the Crown, to *The Highland Railway Company* v. *Balderston.*[1] That was a decision which did not really help very much, because it was a case of a purchase of certain tracks from another company, and certain work had to be done in order to make that railway suitable for use by the purchasing company. It is plain that that was, of course, expenditure of a capital nature. *Law Shipping Company Ltd.* v. *Inland Revenue Commissioners*[2] seems to me to have more to do with the matter. I am not clear at all whether the company concerned was an existing company or one that had been newly formed, but it may well have been from the indications of the case a company which had been in the shipping business before. At any rate, that company purchased a ship for the sum of £97,000 when the ship was due for a survey, and in fact overdue for a survey. Consequently, when the ship, after it was purchased, was put onto survey there was a large sum for repairs necessary to comply with the rules and requirements of the case, which included a large amount of accumulated repairs during the period in which it belonged to the vendors and was used by them in their trading operations. Out of the sum of £51,000 odd, £12,000 was allowed as expenditure on repairs during the purchasing company's ownership, and the rest, amounting to a sum of £39,000, was disallowed as a deduction in ascertaining the profits of the purchasing company.

The principle of that case—and I think there is a principle discernible in it as argued by Mr. Bucher—is this: that the accumulated repairs could not properly be attributed to the period of trading of the purchasing company who acquired the capital asset subject to necessary repairs, and the accumulated repairs

[1] (1889) 26 S.L.R. 657; 16 R. 950; 2 T.C. 485.

[2] 1924 S.C. 74; 12 T.C. 621.

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were properly attributable to the period of trading of the vendor, which was quite a different matter.

I was also referred to certain cases which involved the payment of premiums on the acquisition of leases, and those cases decided, as one would expect, that one could not disguise a transaction by merely making the premium payable over a series of years by annual instalments: *MacTaggart* v. *Strump*[3]; *Green* v. *Favourite Cinemas Ltd.*,[4] which was a case before Rowlatt J., who adopted some of the language which had been used in the earlier cases; and *Inland Revenue Commissioners* v. *Adam*,[5] which was a case where a building contractor had to pay a sum to acquire the use over a period of eight years of a site for dumping the surplus materials which he had to dispose of in some way or other. In those cases the attempt is to set out the more or less disguised premiums against the annual profits after the first payment. But I find in another case, relating, not this time to premiums, but to payment of monopoly value in respect of licensed premises, certain statements by Lord Greene M.R. which assist me very much in coming to my conclusion in this case. That case was *Henriksen* v. *Grafton Hotel Ltd.*,[6] in which a series of licences were granted by the licensing authority on successive occasions for periods of three years, and a lump sum for the monopoly value was fixed in respect of each period of three years. On the other hand, the payments of the lump sums were allowed by the licensing authority to be spread over the three years in each case, and it was claimed that those sums were deductible as expenses for trading attributable to the trading operations of the licensee and deductible from his profits.

The case, on its facts, obviously has not much to do with the present case, but Lord Greene makes some remarks which seem to me to be eminently applicable to the present case[7]: "One "other argument must be mentioned. It was said that what-"ever the position might be in the case where, e.g., a freeholder "obtains a licence and makes the necessary payments there is "a difference where the payments are made by a lessee under a "covenant in that behalf contained in his lease. I do not follow "this. If a payment is of such a nature as to preclude its "deduction when made spontaneously, I cannot see that its "nature is affected by reason of the fact that it is made under "a covenant with a third party. Capital improvements are often "made under a covenant in a lease. I have never heard it "suggested that the cost of making them can be deducted by "the lessee in computing his profits for income tax purposes. "An attempt was made to rescue this argument from shipwreck "by saying that if the lessor had undertaken to bear these pay-"ments and had consequently exacted a higher rent, the full "rent could have been deducted as an expense. This argument

[3] 1925 S.C. 599; 10 T.C. 17.
[4] (1930) 15 T.C. 390.
[5] 1928 S.C. 738; 14 T.C. 34.
[6] [1942] 2 K.B. 184; 58 T.L.R. 271; [1942] 1 All E.R. 678.
[7] [1942] 2 K.B. 184, 193.

"has a familiar ring. The answer to it is that this was not the "contract which the parties chose to make. It frequently "happens in income tax cases that the same result in a business "sense can be secured by two different legal transactions, one of "which may attract tax and the other not. This is no justifica-"tion for saying that a taxpayer who has adopted the method "which attracts tax is to be treated as though he had chosen "the method which does not or vice versa."

In some of the cases to which I have referred the tenants were induced to adopt a form of transaction which involved them in having to stand the burden of what they might have got as deductions if they had been payable as rent. The fact that they might have done it another way and got an equivalent sum payable by them in the form of rent did not get them out of their difficulties. Indeed, the same applies in the present case. The landlords might, of course, have agreed to a lease of 14 years, as in the present case, and an annual rent of £1,000 a year, and in that case no doubt the tenant would have been entitled to deduct £1,000 rent, I suppose, in each year. But the different plan was adopted which, as it turns out, may perhaps have unfortunate results for the tenants.

The rent had been reduced for the first seven years to a payment of nothing substantial in the first year, and by about £300 a year of the full rent in each of the following six years. The consequence of this course is that there is no rent of the same amount in those years from which the tenant could deduct any income tax that he had paid. It seems to me that in consideration of those deductions of rent the tenants agreed to do work which otherwise the landlord might have been required to do, and they did work which represented a capital expenditure required on the acquisition of the premises by them for the purposes of their trade. It was work and expenditure of a capital nature, being in respect of the accumulation of repairs or alterations (of a small nature, perhaps, but none the less alterations) of the premises to suit their business. It had, therefore, nothing in common with the current expenditure on repairs of the property which call to be made normally under a lease. Consequently, the only possible and reasonable conclusion on the facts in this case is that this work and expenditure was of a capital nature, and the commissioners must have misdirected themselves in law, as it is not a conclusion which seems to me a reasonable one in the circumstances of the case. Therefore, the appeal must be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Clutton, Moore & Lavington for Ralph C. Yablon, Temple-Milnes & Carr, Bradford.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

1956
Nov. 7, 8, 9.

Donovan J.

*REILLY *v.* BRITISH TRANSPORT COMMISSION. WOODS *v.* SAME.

[1955 R. No. 3045. 1955 W. No. 4135.]

Railway—Statutory duty—Permanent way men—Men killed on line—"Repairing the permanent way"—Men engaged in tightening crossing and nose bolts—Whether work of "repairing"—Whether "danger . . . likely to arise"—Prevention of Accidents Rules (S.R. & O., 1902, *No.* 616), *r.* 9.

R. and W. were lengthmen employed by the defendants. On May 13, 1954, they were, in the course of their employment, tightening crossing bolts on a main railway line as they had been instructed to do, and while so doing, they discovered a loose nose bolt which required tightening. It was the accepted practice that if, in the course of tightening crossing bolts, a nose bolt was found to be loose, the men were expected to tighten that also. The tightening of a nose bolt required the use of a "T" spanner which needed two men to operate it, and while both men were so operating it, they were struck and killed by an express train. No look-out man had been provided by the defendants.

In actions under the Fatal Accidents Acts, 1846 to 1908, the plaintiffs, the widows of the two deceased men alleged, inter alia, breach of rule 9 of the Prevention of Accidents Rules, 1902 [1]:—

Held, (1) that the tightening of crossing bolts and nose bolts was a work of "repairing the permanent way" within rule 9 of the Prevention of Accidents Rules, 1902.

(2) That the circumstances in which the deceased men were working constituted a case where "danger is likely to arise" within the meaning of rule 9, and the defendants, therefore, in failing to provide a look-out man were in breach of their duty under that rule.

ACTIONS.

The plaintiff in the first action, *Reilly* v. *British Transport Commission*, Alice Reilly, was the widow of Peter Reilly, a lengthman employed by the defendants. The plaintiff in the second action, *Woods* v. *British Transport Commission*, Emily May Woods, was the widow of John Woods, a lengthman also employed by the defendants.

On May 13, 1954, Reilly and Woods were, in the course of their employment, tightening crossing bolt nuts of the main up fast line at Cambridge Junction, near Hitchin Station, and while

[1] Prevention of Accidents Rules, 1902, r. 9: "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall . . . in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out."

so doing, discovered that a nose bolt was loose and required tightening. The tightening of the nose bolt required the use of a "T" spanner which needed two men to operate it. While the deceased men were operating the "T" spanner they were struck and killed by an express train which was travelling at speed along the line at the same time as another train was proceeding in the same direction along the up-branch line from Cambridge.

In actions under the Fatal Accidents Acts, 1846 to 1905, in which they claimed damages in respect of the death of Reilly and Woods, the plaintiffs alleged that the defendants had been negligent at common law and guilty of a breach of the Prevention of Accidents Rules, 1902, rule 9, in that they had failed to provide any persons or apparatus for the purpose of maintaining a good look-out and for giving warning against the approach of the train while the deceased men were working.

The defendants, denying negligence and breach of statutory duty, contended that the Prevention of Accidents Rules, 1902, did not apply to the work of tightening crossing bolt nuts or nose bolts, and alleged contributory negligence on the part of the deceased men.

N. R. Fox-Andrews Q.C. and *W. G. Wingate* for the plaintiffs.

R. Marven Everett Q.C. and *F. H. Lawton* for the defendants.

The following cases were cited in argument: *London and North Eastern Railway Co.* v. *Berriman*[2]; *Hutchinson* v. *London and North Eastern Railway Co.*[3]; *Griffin* v. *London Transport Executive.*[4]

DONOVAN J. The work which the deceased men were instructed to do on the day they met their deaths was to tighten up all crossing bolts that needed tightening on this part of the line. If in so doing they came across any nose bolts that also needed tightening they would, according to the general practice and expectation, tighten those up also. For this they would need a different spanner from the ones they carried for tightening crossing bolts. This different spanner is known as a "T" spanner, and one was, apparently, kept in a hut near the signal box close to where the accident happened. When they were struck by the express and killed, the two men were engaged in tightening up a nose bolt with such a "T" spanner. How far that bolt had worked loose will never be known, but the probability is, not a great deal.

The defendants say that the work on which the men were sent out was not work of "repairing the permanent way" within

[2] [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255.

[3] [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330.

[4] [1950] W.N. 152; [1950] 1 All E.R. 716.

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the meaning of rule 9 of the Prevention of Accidents Rules, 1902, and that, therefore, on this ground alone there was no breach of statutory duty in not providing a look-out man. The defendants say further that the work of tightening bolts is more properly described as maintenance or adjustment.

Unfortunately, the terms "repair," "maintenance" and "adjustment" are not mutually exclusive. One cannot, therefore, by describing some operation as "maintenance" or "adjustment," exclude the possibility that it is also a "repair." Furthermore, in considering whether any particular work may properly be called a repair, one must, I think, remember that our language necessarily abounds in instances of particular operations or activities which acquire distinctive names or descriptions, but still remain species of one genus of operations or activities bearing a comprehensive name. The particular name, however, becomes so much used that the comprehensive term fades into the background, until the precise question "Is it applicable?" has to be answered. For example, there are a host of operations which can be properly described as "cutting," but each of which has its own distinctive name: chopping, sawing, scything, mowing—even shaving. The Divisional Court in *Fallaize* v. *Troughton & Young Ltd.*[1] heard much argument as to whether drilling was cutting, and decided that it was. So it is, I think, with the word "repair." It covers a host of things, many of which are given distinctive names which become so popular that it becomes easy to think of them as something different from repairs. If the wheel nuts of my car work loose and I take the car to a garage, I probably never use the word "repair" at all when I ask for the nuts to be tightened. In these circumstances one must ask in such a case as the present, first, whether the word "repairing" is to be construed in some special sense or according to its everyday meaning, and, second, whether the work in question comes within the interpretation adopted, whatever particular name the work may have acquired. The defendants say, in effect, that a special meaning should be given to the word, that is, the meaning which a railwayman would put upon it, for the rule is dealing with railways. But that mere fact does not justify a departure from the canon of construction, namely, that words are to be given their ordinary meaning unless the contrary plainly appears. The context of rule 9 gives no support to the plea for some special or restricted interpretation of the word "repairing," nor do the decided cases where the rule has been considered, nor does the object of the rule. I think, therefore, that I am bound to give the word its ordinary meaning.

In *London and North Eastern Railway Co.* v. *Berriman*,[2] where the House of Lords decided by a majority of three to two that the routine oiling of signalling mechanism and points on the

[1] [1956] 1 W.L.R. 1079; [1956] 3 All E.R. 127n.

[2] [1946] A.C. 279; 62 T.L.R. 170; [1946] 1 All E.R. 255.

railway was not "repairing," Lord Porter said[3]: "The exact "meaning of repair is perhaps not easy to define, but it contains, "I think, some suggestion of putting right that which has gone "wrong." Curiously enough, Lord Jowitt L.C., who dissented in that case, gave the very illustration of tightening a nut as being a work which would be conceded, he thought, as being a work of repair. He said[4]: "It would, I suppose, be conceded "that if a nut had worked loose and required to be tightened the "work involved would be a work of 'repair,' even although the "actual work occupied only a few seconds of time." It is, however, not so conceded in the present case, and I must, therefore, form my own independent opinion upon it.

It would be wrong in the present case to isolate the nose bolt and consider whether tightening that alone was a repair, for the men's work on the morning in question comprised more than that. It was, as I say, to tighten all crossing bolts that needed tightening on this section of the line; and if, in the course of doing that, a nose bolt were found loose, the men were expected to tighten that too. I say that on the evidence of Mr. Nye and Mr. Mowl. The question is whether this work in its entirety was a work of repair. The function of crossing bolts and nose bolts is to hold tightly together the component parts of the points at that spot. If by working loose they do not do this, then the bolts cease to perform their full duty even though they have worked loose only a little. For their function is not to work loose at all. Accordingly, when the bolts are tightened up again the result is that something which has not been doing its full duty before is now restored to full duty. I see no difficulty in describing an operation which has that effect as a repair. Looked at in another way, a crossing bolt or nose bolt which is loose is a defective unit, even though it is only a little loose, for it should be tight, and if the defect is not made good, it may become more pronounced, and serious results, for example, a derailment of a train, might ensue. To put right such a defect is, I think, reasonably and properly called a repair. I, therefore, come to the conclusion that these two men were on this morning working for the purpose of repairing the permanent way within the meaning of rule 9 of the rules.

The next question is whether the circumstances were such as to constitute a case where danger was "likely to arise," also within the meaning of rule 9. The defendants are naturally apprehensive about a possible construction of the rule which would put upon them the obligation of providing a look-out man every time anybody worked, singly or otherwise, on a stretch of line in use for traffic, because, it can be said, in a loose way, that danger must then be ever present. I do not think this apprehension need be too great. Danger is not constituted by the mere presence of moving trains, nor by such trains plus the presence

[3] [1946] A.C. 279, 307. [4] Ibid. 291.

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of workmen in the vicinity. It is constituted, or "arises," only when trains and workmen are brought into close proximity one to the other, and the surrounding circumstances are such as to constitute a real risk of accident. I use the expression "real "risk" in contradistinction to a remote risk, for the words in rule 9 are "danger is *likely* to arise"; and the word "likely" is important in this context. So that, if a linesman is sent off alone to inspect a length of line and tighten up, for example, fish plates, this is work which he can do with a long spanner provided for the purpose, and at the same time keep his eyes and ears open. If no special danger like fog is present, there is no reason to expect that he will be struck by some passing train, the approach of which he could both see and hear, and to avoid which he has ample time and space. Such I think would be a case where danger was not likely to arise. A fortiori where two men are sent out together to do such work, for then a double look out can be kept. The present case is different, and I have used the foregoing example simply to point out the contrast. Here the two men were sent out on work which included the tightening of any nose bolt found loose. That involved the use of a "T" spanner. Each man would operate one end of the crossbar, standing opposite one another and pulling in opposite directions. If the men moved their position as they pulled—and they might well do so—then either of them might obscure the view of the other up or down the line at some moment. The men would be bent a little over the spanner and might well be observing the nut they were in the process of tightening. The place where they would be doing this work was a place of busy railway traffic, including shunting lines on either flank, and a branch line leading off from the main line. No one, in my view, assessing the situation at the outset could come to any other reasonable opinion than this: that if these men used a "T" spanner on a nose bolt, then circumstances might well combine to cause a real risk of accident. The posture that the men would naturally and probably adopt; the possibility of mutual obstruction of their view, albeit for fleeting moments; the difficulty sometimes encountered in getting the spanner to fit the bolt unless the spanner was first cleared of grease inside its box; the possibility that the men would become engrossed on the job—all these things combine to make the case, in my opinion, one where danger was likely to arise. It was this work which the men were doing when they were killed. It is perhaps interesting to observe that the defendants' own witnesses were of the like opinion, although what I have just said expresses my own independent view. That being so, there was a breach of rule 9, no look-out man having been provided. The result would be the same at common law, for the defendants have, in my view, by rule 234 (d) of their domestic rules indicated a standard of reasonable care. That rule imposes on the ganger an obligation to appoint someone to act as a look-out man "When work is about to be undertaken

"on or near lines in use for traffic and danger is likely to arise." The present was such a case, but no look-out man was appointed.

On the issue of contributory negligence, I bear in mind all that was said by Lord Greene M.R. and by Goddard L.J. in *Hutchinson* v. *London and North Eastern Railway*[5] against too ready a finding of contributory negligence where the employers have themselves been guilty of a breach of statutory duty. In particular, I recall the observation of Lord Greene M.R.[6] that it must be shown, inter alia, that the man had the opportunity of avoiding what happened. In the present case, had someone said to these two men: "Do not go onto the fast main up line "yet, for a train is about to come on it," and despite that warning they had done so, no one could contest their negligence. In fact, to these two experienced men, the signal, plainly visible to them, gave just that message. It was in the "off" position for some three minutes before the train arrived, and they simply could not have looked at it as they should. In addition, the driver of the train was whistling to them as he approached the last 200 to 300 yards towards them. The evidence of the eye-witnesses concurs in this, that the men took no notice whatever. This, by itself, I would not describe as negligence. Obviously they were so engrossed on their job as to be oblivious to all else. But the warning message of the signal was there for them to see; they could not have looked for the sign that a train was due, and their failure to do so must be regarded as contributory negligence. I regard what must have been a temporary and probably unaccustomed lapse on their part as carrying a lesser share of responsibility than the initial failure to assess the situation and send a look-out man, and I rate it at one-third.

Judgment for the plaintiffs.

Solicitors: *Pattinson & Brewer; M. H. B. Gilmour.*

P. P.

[5] [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330.

[6] [1942] 1 K.B. 481, 486.

[CHANCERY DIVISION.]

* *In re* THE TRUSTS OF THE ARTHUR McDOUGALL FUND. THOMPSON *v.* FITZGERALD.

1956
Oct. 30, 31;
Nov. 1.

Upjohn J.

[1956 M. 652.]

Charity—Education—Political—Trust for public instruction in forms of government—Trustees to be members of political society—Whether charitable.

A testator bequeathed a sum of money to a political society to be held at the disposal of the governing body thereof. The executive

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committee decided that a permanent endowment fund should be created to be devoted solely to charitable purposes and a resolution was duly passed, with the result that on October 6, 1948, a trust deed was executed, which, by clauses (2) and (3) provided as follows: "(2) The trustees shall hold the fund together with all income "arising therefrom upon trust to pay and apply such income from "time to time for such charitable purposes including grants to "persons or institutions to be employed for such charitable purposes "as in the absolute discretion and opinion of the trustees (i) shall "best advance and encourage education or other charitable purposes "beneficial to the community in connexion with the art or science "of government or other branches of political or economic science "(ii) shall most tend to encourage the study of methods of govern-"ment or civil commercial or social organizations (3) Not so as "to limit the generality of the provisions of clause (2) hereof the "trustees may apply the whole or any part of the income of the "fund for any or all the purposes hereinafter declared so far as "the same may lawfully be applied for charitable purposes namely:— "(a) the advancement of learning in matters affecting forms of "government and representative assemblies whether or not such "forms of government and representative assemblies shall be actual "or theoretical and whether or not the same shall exist or have "existed (b) the encouragement of interest in and knowledge of "the science of government and civics." The trust deed later provided that none but members of the society should be trustees:—

Held, that the trusts in clauses (2) and (3), which were stated in express terms to be for charitable purposes, could be reasonably described as educational trusts; that the deed was one which was to be read on its true and fair construction; and that valid charitable trusts were thereby declared.

Bonar Law Memorial Trust v. *Commissioners of Inland Revenue* (1933) 49 T.L.R. 220; 17 T.C. 508 and *In re Hopkinson* [1949] W.N. 29; 65 T.L.R. 108; [1949] 1 All E.R. 346 distinguished.

Held, also, that the fact that the deed provided that the trustees must be members of the society did not in any way control the trusts in clauses (2) and (3), it being clearly established that, where there is a trust which in its operative part is as declared in the present deed, the fact that the trustees are of a certain persuasion cannot affect the matter.

Dunne v. *Byrne* [1912] A.C. 407; 28 T.L.R. 257 applied.

ADJOURNED SUMMONS.

By a third codicil to his will, dated May 5, 1938, Sir Robert McDougall bequeathed, subject to the life interest of his wife, one equal seventh portion of a sum of £50,000 "to the Propor-"tional Representation Society for the creation of a separate "fund in connexion with such society to be held at the disposal "of the governing body thereof for a specific purpose at the "choice and in the discretion of such governing body such fund "to bear the name of 'the Arthur McDougall Fund.'" The testator died on December 15, 1938, and his widow died on April 4, 1945.

In or about September, 1945, the Public Trustee, who was the executor of the testator's will and codicils, transferred into the names of trustees for the society the money designated to them under the terms of the third codicil.

The objects of the society were to secure the adoption of the

principle of proportional representation by the method of the single transferable vote in elections.

The executive committee, having considered the terms of the third codicil, believed that the wishes of the testator would be best carried out by the creation of a permanent endowment fund bearing the name of "The Arthur McDougall Fund" to be devoted solely to charitable purposes, and a resolution was duly passed, with the result that on October 6, 1948, a trust deed was executed, of which the material clauses were as follows:—

"(1) The fund shall be called 'The Arthur McDougall Fund.' "(2) The trustees shall hold the fund together with all income "arising therefrom upon trust to pay and apply such income "from time to time for such charitable purposes including grants "to persons or institutions to be employed for such charitable "purposes as in the absolute discretion and opinion of the "trustees (i) shall best advance and encourage education or other "charitable purposes beneficial to the community in connexion "with the art or science of government or other branches of "political or economic science (ii) shall most tend to encourage "the study of methods of government or civil commercial or "social organizations (3) Not so as to limit the generality of "the provisions of clause (2) hereof the trustees may apply the "whole or any part of the income of the fund for any or all the "purposes hereinafter declared so far as the same may lawfully "be applied for charitable purposes namely:—(a) the advance-"ment of learning in matters affecting forms of government and "representative assemblies whether or not such forms of govern-"ment and representative assemblies shall be actual or theoreti-"cal and whether or not the same shall exist or have existed "(b) the encouragement of interest in and knowledge of the "science of government and civics . . . (10) No trustee shall "be or remain a trustee and no administrative trustee shall be or "remain an administrative trustee unless such trustee shall be "and remain a member of the society and cessation of member-"ship of the society shall be a ground of unfitness to act in the "trusts for the purposes of section 36 of the Trustee Act, 1925, "but no purchaser shall be concerned to see that any person "removed from the trusts hereof in accordance with this clause "shall have ceased to be a member of the society . . . (11) (i) "The majority of the chairman deputy chairman treasurer and "secretary for the time being of the said executive committee "shall have power to nominate a new or additional trustee or "new additional trustees and effect shall be given to such "nomination by a deed executed by the secretary for the time "being of the said executive committee and for the purposes "aforesaid such secretary shall have power to appoint a new or "additional trustee or new or additional trustees hereof and to "vest the property in the new and continuing trustees and the "provisions of the Trustee Act, 1925, shall apply accordingly . . . "(v) Any trustee may be removed . . ."

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Doubts having arisen as to the validity of the trusts declared by the trust deed, a summons was taken out by the trustees to determine whether they held the fund on valid charitable trusts declared by the deed; and that, if the answer should be in the affirmative, and if and so far as might be necessary but not otherwise, a scheme for the administration of the trusts might be directed.

J. N. Gray Q.C. and *E. W. H. Christie* for the plaintiffs, the trustees of the trust deed of October 6, 1948.

G. H. Newsom Q.C. and *G. B. H. Dillon* for the first defendant, the director and secretary of the society.

Denys Buckley for the Attorney-General.

Cases cited in argument not referred to in the judgment: *In re Macduff* [1]; *In re Strakosch, decd.* [2]

UPJOHN J. This summons raises a question of the validity of certain trusts conferred by a trust deed dated October 6, 1948: the sole question being whether the trusts thereby declared are valid charitable trusts or not.

In view of the argument which has taken place before me, the history of this matter assumes an unusual importance. The trusts were declared as a result of the bounty of the late Sir Robert McDougall, who died in 1938. Sir Robert had been a member since 1906 of a well-known society called the Proportional Representation Society. He remained a member all his life. He was a member of the executive committee from 1926 onwards and a vice-president from 1934. He made a contribution each year to the society, sometimes of substantial amounts. On three occasions they exceeded £1,000.

By a third codicil to his will, which was dated May 5, 1938, Sir Robert bequeathed to the Proportional Representation Society a one-seventh share of a sum of £50,000, subject to the life interest therein of his widow "for the creation of a separate "fund in connexion with such society to be held at the disposal "of the governing body thereof for a specific purpose at the "choice and in the discretion of such governing body such fund "to bear the name of 'the Arthur McDougall Fund.'" Pausing there, Arthur McDougall was the son of Sir Robert McDougall and he had unhappily been killed in the 1914–1918 War. He had no connexion with the Proportional Representation Society. Sir Robert died on December 15, 1938, and his widow died on April 4, 1945.

Shortly after that the Public Trustee, who was the executor of his will and codicils, transferred into the names of two gentlemen who were parties to the trust deed, Sir Leslie Boyce and Mr. Aneurin Williams, the money to which they were entitled

[1] [1896] 2 Ch. 451; 12 T.L.R. 452.

[2] [1949] Ch. 529; 65 T.L.R. 383; [1949] 2 All E.R. 6.

under the terms of the third codicil which they held in trust for the society.

Before I come to the terms of the trust deed, it may be convenient to say a few words about the society. The objects of the society are to secure the adoption of the principle of proportional representation by the method of the single transferable vote in national, local and other elections. That may be a very laudable object, but it is clear that it is not a charitable object, for the simple reason that, as the society is seeking to alter the method of voting at present in force, legislation would be required, and, therefore, their principal object is to alter the law of this country. On the authorities it is clear that that cannot be a charitable object.

I will now turn to the trust deed. The parties of the first part were called the officers. The parties of the second part were the trustees to whom the Public Trustee had transferred the legacy. Then there follow, as parties of the third part, a number of persons all of whom were constituted trustees for the purposes of the deed. I had better refer to some of the recitals. After reciting the will and codicil and the deaths of the testator and his widow, this is stated in recital (v): "At the "annual general meeting of the society held on June 7, 1945, "it was unanimously resolved that the governing body of the "society was the executive committee thereof (vi) The Public "Trustee transferred into the names of the present trustees the "stocks and shares specified in the schedule hereto (hereinafter "called 'the fund' which expression shall be deemed to include "the investments for the time being representing the same and "of all or any augmentations thereof) (vii) The said executive "committee having considered the terms of the recited codicil "and the facts relating to the testator's association with the "society believe that the wishes of the testator would be best "carried out by the creation of a permanent endowment or fund "capable of augmentation by donation or subscription and otherwise and bearing the name of 'the Arthur McDougall Fund' "and consequently that the fund and the income thereof should "be devoted solely to charitable purposes (viii) In pursuance of the "facts lastly hereinbefore recited the said executive committee "resolved at a meeting held on December 4, 1947, that the trusts "herein declared should be agreed and confirmed that the officers "were thereby authorized and directed to execute this deed for "and on behalf of the said executive committee and that the "trustees should be appointed trustees for the purposes of this "deed and the trustees have agreed to act in the trusts in witness "whereof they have executed these presents (ix) In further "pursuance of the premises the trustees have agreed with "the said executive committee to hold the fund upon the "trusts hereinafter declared concerning the same and it is "intended that the fund shall forthwith be transferred into the "names of the trustees." Now follows the operative part.

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[After reading clauses (1), (2) and (3), his Lordship continued:]

Then follow three provisions, being sub-clauses (*c*), (*d*) and (*e*) of clause (3), enabling the trustees to make provision for the payment of lecturers and for the provision of scholarships and prizes, for the provision and maintenance of a lecture room or lecture rooms and a reading room or reading rooms and a library or libraries and for the preparation and publication and grants towards the preparation and publication of books, pamphlets and periodicals for the promotion of the foregoing objects.

Then follow a large number of administrative clauses, which I do not think that I need read, except to point out that by those provisions the trustees were entitled to delegate certain powers of management to a body of persons called the administrative trustees.

Now follow two very important clauses. [His Lordship read clauses (10) and (11) and continued:] Then it is provided that additional trustees might be appointed notwithstanding that there was no vacancy in the office of trustee, and there is provision that a trustee or administrative trustee might at any time resign. Sub-clause (v) is in these terms: "Any trustee may be "removed by a resolution passed at a meeting of the said "executive committee by a majority of the said committee "present and voting at the meeting (vi) Nothing herein shall "affect the power of the trustees to appoint or remove the "administrative trustees if any as provided by clause (7) hereof."

Apparently some years after that deed was executed doubts were raised as to its validity, it being clear that if the trusts were not valid charitable trusts, the deed was altogether void, and the executive committee were advised to execute a second trust deed. I am not directly concerned with that, but according to the evidence that was a deed in a very different form because it provided that, unless otherwise directed, the trustees were "to provide out of the income and capital" of the fund "the "salary of the secretary of the society," and there was to be applied the income or capital in accordance with the secretary's direction in writing.

The main attack which is made on the validity of this deed is that it is said that, when the whole of the deed is examined and the history and the surrounding circumstances are taken into account, it is clear that the real dominant purpose of this deed was not to create a charitable trust at all, but to further the political objects of the society. It was not put so much as a matter of the minute construction of the deed, but as a view which ought to be taken bearing in mind all its provisions.

However, Mr. Newsom quite properly on behalf of the first defendant, who represents the society, pointed out a good deal of vagueness and uncertainty in the provisions of the deed. He used that argument coupled with those important clauses (10) and (11) to show that the whole object of the deed was really political: for he recognized that after the passing of the Charitable

Trusts (Validation) Act, 1954, it would not avail him merely to say that some of the trusts went beyond the conception of a valid charitable trust.

The first uncertainty to which he drew my attention was in clause (2), sub-clause (ii). He said that notwithstanding that that sub-clause was plainly governed as a matter of grammar by the earlier words "charitable purposes," the gift encouraging "the study of methods of government," and so on, was really not a charitable purpose at all: for a gift merely to promote the study of methods of government of the State, if it gave no advantage to the public, would not be a charitable purpose.

Then he referred me to the opening words of clause (3), and certainly it is difficult to read those words as entirely grammatical. Again, he commented on "the advancement of learning," submitting that the mere advancement of learning by itself is not necessarily charitable. He drew attention to the very vague form of sub-clause (a) and he said that "the advancement "of learning" in matters affecting forms of government which had existed in the past also covered entirely theoretical forms of government whether or not they had ever existed. He also commented on the vagueness of sub-clause (b), pointing out that it was merely to encourage "interest in and knowledge of the "science of government and civics." "Civics," he said, so far as the Oxford Dictionary was concerned, only appeared in publications in the United States of America and Canada. Those vague and uncertain terms, coupled with the complete power of the society, through its executive committee, over the personnel of the trustees, showed that the powers of the executive of the society were very great. Whether the cessation by a trustee of membership of the society would be a valid ground of unfitness for the purposes of section 36 of the Trustee Act, 1925, I do not think I need consider. Certainly it is quite plain in clause (10) that the intention was that anyone who ceased to be a member of the society from lack of interest or something else could instantly be removed. Perhaps what is even stronger is that under clause (11) (v) any trustee who is proving perhaps a deviationist from the majority of the executive committee could be removed by them, and they could appoint under clause (11) (i) persons in his place or additional to him. Therefore, there is no doubt that the society had complete control of the personnel of the trustees.

Mr. Newsom further submitted to me that the mere fact that the settlor or trustee under the trust deed used expressions such as "charitable purposes" or "educational purposes" is by no means conclusive that the trusts are in fact charitable, and he referred to three cases to illustrate that point. The first one was *Bonar Law Memorial Trust* v. *Commissioners of Inland Revenue.*[1] In that case the fund had been formed by Mr.

[1] (1933) 49 T.L.R. 220; 17 T.C. 508.

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Broughton, and with it Ashridge Park was purchased and called the Bonar Law Memorial College, on certain trusts that were created. Finlay J. came to the conclusion that, although one of the principal objects of the trust was to be used for the purposes of an educational centre, on the true construction of the whole document its primary purpose was to promote the views of the Conservative Party. Dealing with the clause providing for the setting up of this educational centre he said [2]: "The fact that "the education was entrusted to the Conservative Party would "not, I think, affect the validity of the trust if in truth it was a "trust for education; but, on the other hand, if the true view is "that the trust was a trust for the promotion of Conservative "principles—by that I mean, I need hardly say, the principles "of the political party commonly called the Conservative Party— "and that the education, the lectures, and so forth, were "subsidiary to that which was the main and dominating "purpose, then the fact that the lectures, and so forth, would be "educative would not be sufficient to make the trust a trust for "charitable purposes only." He came to the conclusion, having considered the terms of the trust, that, taking it as a whole, it was a trust to promote political principles and, therefore, was bad. I think that I need not consider that further, because Finlay J. was considering an entirely different deed. The point is also well illustrated by a more recent case, *In re Hopkinson.*[3] That was on the other side of the line, in the sense that it was dealing with the Labour Party. There the testator gave his residuary estate to four prominent members of the Labour Party "as trustees of the educational fund hereinafter "mentioned upon trust that they shall stand possessed of the "same as an educational fund and shall apply the same both "capital and income at their absolute discretion for the advance- "ment of adult education with particular reference to the "following purpose (but in no way limiting their general dis- "cretion in applying the fund for adult education), that is to say, "the education of men and women of all classes (on the lines "of the Labour Party's memorandum headed 'A Note on "'Education in the Labour Party,' a copy whereof is annexed to "this my will and signed by me) to a higher conception of social, "political and economic ideas and values and of the personal "obligations of duty and service which are necessary for the "realization of an improved and enlightened social civilization." It is to be observed that the Labour Party memorandum was made part of the will. Vaisey J., having set out the relevant terms of the will, said this [4]: "In my judgment, there are two "ways of reading the words which I have quoted. They may be "read, first, as equivalent to a general trust for the advancement "of adult education which, standing alone, would admittedly be

[2] 17 T.C. 508, 517.

[3] [1949] W.N. 29; 65 T.L.R. 108; [1949] 1 All E.R. 346.

[4] [1949] 1 All E.R. 346, 348.

"charitable, the super-added purpose being treated merely as a "rough guide to be followed or as a hint to be taken as to the "kind of adult education which the testator had in mind, the "strictly educational main purpose always being adhered to, or, "secondly, they may be read as indicating that the first part is "to be taken as a general direction and the second part beginning "with the words 'with particular reference to' as the particular "direction dominating the whole of the trust. The second of "these alternative views seems to me to be the right one." So that although the testator's will began by declaring a trust of an educational fund, the judge came to the conclusion upon the construction of the whole will that in fact the dominating intention was to promote the views of the Labour Party and as such it was bad. There again the precise words are entirely different from the words I have to consider, so I need not consider that case further.

Then *In re Cox*,[5] a decision of the Judicial Committee of the Privy Council, is another example of the point that the use of the word "charitable" is not conclusive. I think that it will be sufficient if I say that in that case their Lordships came to the conclusion that when the testator gave the income of certain property for "charitable" purposes for the benefit of the employees of a certain company, in using that expression he did not mean merely the relief of poverty, but included all four heads in Lord Macnaghten's celebrated definition. As the gift was confined to the employees of a company, it followed that there could in fact be no valid charitable bequest because it lacked the necessary public element.

In the end it comes down in each case to a question as to the proper construction. I must approach the deed trying to give a fair construction to its operative parts. The recital makes it quite plain that a charitable trust was intended to be set up, but that cannot control the operative part. It seems to me clear that so far as clause (2) (i) is concerned, taken by itself, that is plainly a charitable trust, and the contrary was not really suggested. In my judgment so is the second sub-clause, for grammatically it reads: "The trustees shall hold the "fund together with all income arising therefrom upon trust to "pay and apply such income from time to time for such charit-"able purposes," and then omitting a few words, "as in the "absolute discretion and opinion of the trustees . . . (ii) shall "most tend to encourage the study of methods of government or "civil commercial or social organizations." That seems to me, standing by itself, to be a charitable trust. It is not a trust to promote the study among closed orders in some monastery; it is a charitable trust to encourage the study of methods of government for the general benefit of the public.

With regard to clause (3) there is a grammatical difficulty on

[5] [1955] A.C. 627; [1955] 2 All E.R. 550.

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which Mr. Newsom relied, but I do not think that there can be any real doubt as to what is meant and I think what is meant is this: not so to limit the generality of the provisions of clause (2), the trustees might apply the fund for the following purposes set out in (a) and (b), so far as those purposes were charitable. There again, looking at clause (3), it seems to me that sub-clauses (a) and (b) set out trusts which, having regard to the opening words of the clause, are plainly charitable. The fact that theoretical forms of government may be studied does not, I think, detract from that in the least. It seems to me that, as a matter of construction, the trust deed was trying to provide for public instruction in the matters set out and not to create some merely private study and knowledge. I think that is clear from the terms of sub-paragraphs (c), (d) and (e). Therefore, upon the true construction of those two clauses, standing alone, I should come to the conclusion that this constituted a valid charitable trust.

But Mr. Newsom has rightly argued that I must not look at those clauses alone. I must look at the whole of the deed and all the surrounding circumstances. I have summarized clauses (10) and (11) and I need not repeat their substance. Mr. Newsom says that the existence of those clauses, coupled with the testator's well-known interest in the society, entitles me to give a different construction to clauses (2) and (3) to that which I have already stated. It must be noticed that, unlike the *Bonar Law* case [6] and unlike the *Hopkinson* case,[7] there is no context in clauses (2) and (3) dealing with the substance of the trusts, which shows that, in fact, the trusts were intended to further political objects and promote the purposes of the society. It seems to me an entirely different case from those which I have mentioned. I cannot see anything in clauses (10) and (11) which controls the trusts in clauses (2) and (3). Where a charitable trust is declared, the fact that the trustees must be persons of a certain persuasion cannot really affect the matter. They are always subject to the control of the Attorney-General.

The principle is quite clearly stated in *Dunne* v. *Byrne* [8]: "It is difficult to see on what principle a trust expressed in plain "language, whether the words used be sufficient or insufficient "to satisfy the requirements of the law, can be modified or "limited in its scope by reference to the position or character of "the trustee." It seems to me that these trusts in clauses (2) and (3) are reasonably described as educational trusts. I think that has been made sufficiently clear by making it plain that they are in express terms to be for "charitable purposes." There are a very large number of charitable purposes which can be carried out in compliance with the provisions of clauses (2) and (3), and I cannot see that the fact that the trustees have to be persons

[6] 49 T.L.R. 220; 17 T.C. 508.

[7] [1949] W.N. 29; 65 T.L.R. 108; [1949] 1 All E.R. 346.

[8] [1912] A.C. 407, 410; 28 T.L.R. 257.

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who are members of the society can alter that. I venture to think the argument really comes to this: that the trustees might commit a breach of trust and might, therefore, apply the moneys wrongly in furthering the objects of the society. I should add this. No one, in fact, suggests that they have committed any breach of trust. No one suggests that this is a sham deed to hide the real purpose, which is to further the objects of the society. It is a deed which is to be read on its true and fair construction, and I come to the conclusion that valid charitable trusts are thereby declared and I must declare accordingly.

Declaration accordingly.

Solicitors: *T. S. Stallabrass; Pollard, Stallabrass, Beuselinck & Martin; Treasury Solicitor.*

J. L. D.

[COURT OF CHANCERY OF THE COUNTY PALATINE OF LANCASTER.]

* MANNING *v.* TURNER AND ANOTHER.

[1955 M. No. 6337.]

1956 *June* 4; *July* 9.

Sir Leonard Stone V.-C.

Vendor and Purchaser — Defective title — Right to rescind contract— Vendors' title dependent on deed of gift within five years by living donor—Contingent liability to estate duty—Vendors' duty to secure at their expense a policy of insurance providing indemnity — Vendors' failure to fulfil duty within reasonable time—Purchaser's right to rescind.

The plaintiff, having at an auction sale held on October 14, 1954, been declared the purchaser of a house for the sum of £500, paid a deposit of £50 and signed a printed form of contract which incorporated the Law Society's General Conditions of Sale, 1934 (1949 Revision), so far as they were not specially varied. The defendants sold the house as beneficial owners and the abstract of title disclosed that their title depended upon a deed of gift to themselves dated October 16, 1953, by a donor who was still living. On October 26, 1954, the plaintiff's solicitors, by requisition, required the defendants to provide at their own expense an insurance policy in favour of the plaintiff which would indemnify her against the charge for estate duty on the property which would arise in the event of the death of the donor within five years of the date of the deed of gift. On November 8, 1954, the plaintiff's solicitors informed the defendants' solicitors that the plaintiff was not prepared to accept a covenant for indemnity and, unless an insurance indemnity were provided, she required the return of the deposit she had paid. On December 9, 1954, the defendants' solicitors wrote to the plaintiff's solicitors stating that they had instructions without prejudice to make inquiries of an insurance company in the matter. Having received no further communication from the defendants' solicitors, the plaintiff's solicitors by

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[Reported by E. Somerset Jones, Esq., Barrister-at-Law.]

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letter dated December 21, 1954, rescinded the contract on behalf of the plaintiff. Subsequently the defendants offered an indemnity policy and served notice to complete, but the plaintiff contended that she was entitled to rescind the contract and that, having done so, she was entitled to the return of the deposit which she had paid:—

Held, (1) that since in an action for specific performance at the instance of the vendors the court would not have forced a title containing the defect on a reluctant purchaser unless the defect was first removed by an indemnity policy issued by a reputable insurance company insuring against the risk involved, the plaintiff was entitled to rescind the contract.

(2) That the plaintiff had, as soon as she discovered the defect, unequivocally adopted the attitude, "I repudiate unless you "provide an indemnity policy," and, although it would have been wiser if the plaintiff's solicitors had served a notice setting a time limit, the period from October 26, 1954, to December 21, 1954, gave the defendants what in the circumstances was a reasonable period of time in which to provide or to undertake to provide an indemnity policy; accordingly, the rescission contained in the letter dated December 21, 1954, was valid and operative.

Halkett v. *Earl of Dudley* [1907] 1 Ch. 590 and *Elliott and H. Elliott (Builders) Ltd.* v. *Pierson* [1948] Ch. 452; [1948] 1 All E.R. 939 considered.

WITNESS ACTION.

At an auction sale on October 14, 1954, the plaintiff, Nora Manning, was declared the purchaser of a house, 21, Litherland Park, Liverpool, for the sum of £500. She thereupon paid a deposit of £50 and signed a printed form of contract incorporating the Law Society's General Conditions of Sale, 1934 (1949 Revision), save in so far as they were specially varied or inapplicable to a sale by auction. In the space provided on the form for the date of completion there was inserted simply the figures "1954." The defendants, Frances Kendall Turner and Amy Knowles, sold the property as beneficial owners holding the title as owners by a conveyance of September 7, 1931, and the abstract of title which was sent to the plaintiff's solicitors on October 22, 1954, disclosed that the defendants' title to the property depended upon a deed of gift to themselves dated October 16, 1953, and made by Florence Ellen Amos. On October 26, 1954, the plaintiff's solicitors delivered requisitions on title, the material one of which read: "A claim for estate duty on the property may arise "in the event of the death of the said Florence Ellen Amos "within five years of the date of the said deed of gift and the "vendors must obtain an insurance indemnity in favour of the "purchaser to secure the same and at the vendors' expense." Thereafter, correspondence ensued between the solicitors for the parties, the defendants' solicitors writing on November 4, 1954, that negotiations in respect of the matter, which would normally have preceded the exchange of contracts, had been precluded by reason of the sale being by auction, but that they were prepared to advise their clients to enter into a covenant for indemnity in

respect of any estate duty; adding that it was unlikely that the estate of the donor would bear a high rate of duty since she was in only very moderate circumstances. The plaintiff's solicitors replied to that letter on November 8, 1954, stating that the plaintiff was not prepared to proceed and required the return of the deposit paid unless an indemnity policy in her favour were obtained, and pointing out that the circumstances of the donor might be better at her death and that the rate of duty would therefore be higher. By letter dated November 17, 1954, the defendants' solicitors stated that the defendants, whilst willing to enter into a covenant of indemnity, were not prepared to obtain an indemnity policy, to which the plaintiff's solicitor replied that since the gift had not been disclosed in the contract, their client was entitled to rescind unless an indemnity policy were obtained. The plaintiff's solicitors reiterated their view in a telephone conversation with the defendants' solicitors, who on the following day, December 9, 1954, wrote: "... we have "seen our client this morning on the matter and we are "instructed, without prejudice, to ascertain on what terms an "insurance company would require indemnity and we will "communicate with you further in early course." Nothing at all happened between December 9, 1954, and December 21, 1954, when the plaintiff's solicitors wrote: "Our client now instructs "us to say that in view of your client's delay in providing for "the insurance indemnity policy asked for in our requisition "No. 27 and on further consideration of the claim for estate duty "which may arise on the death of Florence Ellen Amos as dealt "with in that requisition, she (our client) hereby rescinds the "contract and requires the return of the deposit paid by her."

Subsequently the defendants offered an indemnity policy and served notice to complete, but the plaintiff maintained that the offer came too late and that she had exercised her right to rescind, and brought this action claiming the return of the deposit paid and damages. The defendants counterclaimed for specific performance on the basis that they would provide an indemnity policy giving cover for up to £500.

The plaintiff appeared in person.

E. W. Griffith for the defendants.

The following case, in addition to those referred to in the judgment, was cited in argument: *In re Forsey and Hollebone's Contract.*[1]

Cur. adv. vult.

July 9. SIR LEONARD STONE V.-C. read the following judgment. This action concerns two questions of conveyancing practice on the first of which there appears to be no authority, and on the second of which there is authority, although the

[1] [1927] 2 Ch. 379.

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manner in which the principles enunciated ought to be applied in this case is not free from difficulty. [His Lordship, after stating that in view of the fact that the plaintiff was not represented by counsel, and although counsel for the defendants had been scrupulously fair, he had reserved judgment in order to look into the matter further, stated the facts which are substantially summarized above, and continued:]

The first question is whether, as purchaser, the plaintiff was entitled to adopt the attitude which her solicitors, on her behalf, took as soon as they had examined the abstract of title and discovered the then recent deed of gift, to the effect that the vendors must obtain a policy of insurance in favour of the purchaser to cover the possibility of a claim for estate duty against the property. It is not disputed that if Mrs. Amos died before October 16, 1958, the property, the subject-matter of this contract, would be charged with estate duty, the exact amount of which cannot be known before the death of Mrs. Amos. I think the answer to that question, about which there appears to be no authority, must be in the affirmative. The contract contains no mention of, or special condition concerning, this deed of gift, or of the contingent claim for estate duty which may flow from it. The risk cannot be said to be so remote or so shadowy as to be one to which no serious attention need be paid, and the offer of a covenant of indemnity by the vendors personally carries the matter little further for, on every authority, it is upon the donees that the primary obligation of discharging the duty, if it should arise, would fall. In my opinion the test must always be: would the court, in an action for specific performance at the instance of the vendors, force a title containing the alleged defect upon a reluctant purchaser? In my opinion, in the case before me, the title would not be forced upon the purchaser unless the defect were first removed by an indemnity policy issued by a reputable insurance company insuring against the risk involved. It is, I think, not without significance that the defendants, by their counterclaim, only claim specific performance on the footing that they will, at their own expense, provide an indemnity policy to be issued by the National Guarantee and Surety Association Ltd. affording indemnity against any claim for estate duty up to £500, the total amount of the purchase price.

The second question is whether the repudiation or rescission contained in the letter of December 21 is valid and operative. In this respect Mr. Griffith has referred me to *Murrell* v. *Goodyear*.[1] The defect in that case could only be cured by the concurrence of the heir. The purchaser, after some correspondence in which he required the concurrence of the heir, abruptly gave notice to determine the contract and immediately afterwards brought up the title of the heir. The circumstances were, accordingly, unusual; but Mr. Griffith refers me to the case for the following

[1] (1860) 1 De G.F. & J. 432.

passage of Turner L.J.[2]: "But then it is said, that upon "October 27, 1858, notice was given to determine this contract, "and that it must be treated as null and void. Now it is to be "observed that, with a full knowledge of this objection to the title, "the defendant did not, in the requisitions which he made, take "the objection, if he was entitled to take it, that the contract was "void, upon the ground that the assignees had sold that to which "they had no title. All he said was, 'Procure me the concur-"'rence of the heir at law.' He treated the contract, therefore, "as a subsisting contract. I do not enter into the question of "whether he was or was not entitled to say that he would put an "end to the contract. I am not by any means satisfied that "he was. But supposing him to have been so, he treated the "contract as a subsisting contract at the time when he made the "requisitions upon the title; and not only so, but after discussions "between the solicitors with respect to the title down to as late "as October 19, 1858, this contract was treated by the defendant "as a subsisting contract, and the concurrence of the heir at law "required, . . ." Turner L.J. then discusses some of the letters and continues: "So that down to October 19, 1858, this contract "is distinctly treated by the defendant as a subsisting contract. "Then comes this question: having treated the contract as a "subsisting contract down to October 19, can the defendant, on "October 23, four days afterwards, turn round and say, 'I "'determine this contract, and require payment back of the "'deposit which I have paid?' I think that every principle, and "I may add, every authority, is against the existence of any "such right on the part of the purchaser. The defendant was "bound to afford to the vendors a reasonable time to enable "them to clear the title of this difficulty which existed upon it."

The next case to which I was referred is *Halkett* v. *Earl of Dudley*.[3] In that case the headnote, so far as is material, is as follows: "A purchaser's right to repudiate the contract is an "equitable right arising from want of mutuality, and may be a "defence to an action for specific performance; but in order to "avail himself of that defence he must repudiate the contract "as soon as he finds that the vendor cannot make a good title."

Parker J. says this[4]: "it is in my opinion equally clear that "this right of repudiation, whatever be its true nature, must "be exercised, if it is to be exercised at all, as soon as the defect "is ascertained. If, after ascertaining the defect, the purchaser "still treats the contract as subsisting he does not retain the "right to repudiate at any subsequent moment he may choose." Later he said[5]: "It is not necessary for me to go so far as to "hold that, by not repudiating promptly, the purchaser loses his "right of repudiation altogether; but it seems to me that by "treating the contract as subsisting after the discovery of the

[2] Ibid. 449.
[3] [1907] 1 Ch. 590.
[4] Ibid. 597.
[5] Ibid. 600.

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"defect he did preclude himself from exercising a right of repudia-
"tion at a subsequent time before giving the vendor a reasonable
"time to cure the defect, and that thereafter his only safe course
"was to limit the time within which the defect must be removed
"and a title made out, if the contract was to go through."

There is no trace of any such course having been taken in the present case. By the letter of November 8, 1954, the plaintiff made her position clear, and the defect was not in fact cured before the attempted repudiation of December 21 of the same year.

Lastly, there is a more recent case, *Elliott and H. Elliott (Builders) Ltd.* v. *Pierson*,[6] where the reversion of interest in the property was outstanding in a company, but the vendor absolutely controlled that company and therefore could get it in. In the course of his judgment Harman J. said[7]: "At law A may con-
"tract to sell to B any defined subject-matter and can enforce
"the contract if by the time when he is obliged to do so he has
"obtained a sufficient interest or can compel other interested
"parties to concur in the sale. It matters not at all that at the
"date of the contract A had no interest if he obtain it in time to
"fulfil the bargain. To this doctrine equity made a qualification
"in cases of specific performance of contracts for the sale of land.
"The exception arises, I think, out of the peculiar difficulty of
"making a title to land in England which is also recognised in
"the rule as to damages on failure to make a good title (known as
"the rule in *Bain* v. *Fothergill*).[8] The rule is that if after con-
"tract the purchaser discovers that the vendor has no sufficient
"title he need not wait to see if he could obtain one before
"completion date but may repudiate. This matter is best dis-
"cussed by Parker J. in *Halkett* v. *Earl of Dudley*.[9] This case
"came in for sharp criticism by Mr. Cyprian Williams in his
"book on Vendor and Purchaser. Sargant J., however, in
"*Proctor* v. *Pugh*[10] returned Mr. Williams' fire and followed
"Parker J. Mr. Williams, in his latest edition counter-attacked,
"but in my judgment the field remains in possession of the
"judiciary.

"Even if I should be wrong in this and the true doctrine be
"that the court will not aid a man who had no interest in the
"property when he contracted to sell it (cf. *Chamberlain* v.
"*Lee*[11]), that does not apply here for Mr. Elliott clearly had a
"substantial term of years and only the reversion remained to
"be got in. Moreover all the cases show that if a purchaser is to
"be allowed to repudiate on this ground it is essential that he
"do so at once (see for instance *Halkett* v. *Earl of Dudley*[12]).
"If he begins to seek out explanations or to demand the getting
"in of outstanding interests he will be deemed to have waived

[6] [1948] Ch. 452; [1948] 1 All E.R. 939.
[7] [1948] Ch. 455.
[8] (1874) L.R. 7 H.L. 158.
[9] [1907] 1 Ch. 590.
[10] [1921] 2 Ch. 256.
[11] (1840) 10 Sim. 444.
[12] [1907] 1 Ch. 590.

"the point. If however he act promptly he may say 'I will "'have nothing to do with it'—see *per* Lord Romilly M.R. in "*Forrer* v. *Nash*.[13]"

Those cases lay down two principles: first, that the purchaser, if he wishes to repudiate a contract on the ground that there is some defect in the title, must do so as soon as he discovers the defect; and secondly, that if he enters into a further negotiation with regard to the removal or adjustment of the defect, he must allow the vendor a reasonable time in which to do so. Of course, that involves the problem of what is "a reasonable time," and that must, in my view, depend on all the circumstances of the particular case. In the case before me the defect was of an unusual character. Unlike the obtaining of the concurrence of the heir-at-law or the removal of a restrictive covenant or the getting in of an outstanding reversion, it was a defect that could not be righted because nothing could, before October 16, 1958, obviate the contingent charge of estate duty except the death of Mrs. Amos and the payment of the duty.

On the other hand, the death of a particular person before a particular date is a calculable risk in respect of which the insurance companies of this country issue cover policies every day. It is something which can be done in the normal course of business and the only matter which has to be worked out is the amount of the premium, having regard to the age and state of health of the life involved. The moment the plaintiff's solicitors discovered the deed of gift with the consequent contingent charge for estate duty, indeed by the requisitions on title themselves dated October 26, 1954, they required that the vendors at their own expense should obtain an insurance indemnity in favour of the purchaser. Further, as soon as the defendants' solicitors had written that they could not advise their clients to obtain such an insurance policy, the purchaser's solicitors, by their letter of November 8, made their client's position perfectly clear: "Our "client is not prepared to proceed with the matter and requires "the return of the deposit paid unless an indemnity policy in "her favour is obtained." That is quite unequivocal. It is not the same thing as entering into negotiations to adjust the defect in such a way as to amount to a waiver of the right to repudiate. In effect the plaintiff was saying, "I repudiate unless you provide "an indemnity policy."

Of course, a reasonable time must be allowed for the provision of such policy, but the subsequent course of the correspondence shows that the vendors did not accept the necessity to provide such a policy. On the other hand, the purchaser has never modified her attitude. That appears from the letter of November 18 and from the telephone conversation referred to in the letter from the vendors' solicitors of December 9. Having waited until December 21 without the provision of the indemnity policy or any

[13] (1865) 35 Beav. 167, 171.

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undertaking or promise to provide it, the purchaser, by her solicitors' letter of that date, rescinded the contract. In my view it would have been wiser if her solicitors had served a notice setting a time limit, but, in my opinion, the period from October 26 to December 21, a period of nearly two months, gave the vendors a reasonable period of time in which to provide or to undertake to provide an indemnity policy which, as I have already held, ought in the circumstances to have been provided. It is not wholly irrelevant to observe that, although time was never expressly made the essence of this contract, the contract to the knowledge of both the vendors and the purchaser was in respect of a house let off in separate rooms, some of which were tenanted and some not, and furniture was included in the sale.

In the result the plaintiff, in my judgment, is entitled to a declaration that the contract is rescinded and that she is entitled to the return of her deposit. The plaintiff is entitled to the costs of the action, and to the £13 1s. 6d. damages she has claimed. The counterclaim for specific performance must be dismissed with costs.

Judgment for the plaintiff.
Counterclaim dismissed.

Solicitors: *Lamb, Goldsmith & Howard, Liverpool.*

[COURTS-MARTIAL APPEAL COURT.]

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Lord Goddard C.J., Hallett and Pearson JJ.

* REGINA *v.* MAHONEY.

Military Law—Evidence—Desertion—Inadmissibility of statement in certificate of arrest that soldier wearing civilian clothes at time of arrest—Army Act, 1881 (*as re-enacted*), *s.* 163 (1) (*g*) (*h*) (*jj*)—*Courts-Martial* (*Appeals*) *Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 46), *s.* 5 (1), *proviso.*

Per curiam. The passage in the Manual of Military Law (1951), 8th ed., p. 383, note 17, that "A statement in the certificate of "surrender to the effect that the man was wearing civilian clothes "is admissible as part of the fact of the surrender or apprehension" is inaccurate. Such a statement is inadmissible in the certificate although it could be given in oral evidence.

APPEAL AGAINST CONVICTION.

The appellant, Private Bertie Mahoney, of the Middlesex Regiment, was convicted of desertion at a district court-martial held at Chelsea Barracks on June 7, 1956, and sentenced to nine months' detention. The only evidence given for the prosecution was that of a non-commissioned officer who produced a certified copy of the record of a declaration of a court of inquiry, pursuant to section 163 (1) (*b*) of the Army Act, which stated that the appellant illegally absented himself without leave at

Colchester on October 9, 1955, and was still absent on October 31, 1955, the day when the court of inquiry was held; and (2) a certificate of arrest by military authority, pursuant to section 163 (1) (*jj*) of the Act, signed by an officer of the Royal Military Police certifying that the appellant was arrested at Midhurst on April 13, 1956. That certificate also stated that at the time of his arrest the appellant was wearing civilian clothes. At the conclusion of the case for the prosecution counsel for the appellant submitted that there was no case to answer as the appellant was entitled to be released on October 2, 1955, and that the prosecution had not proved that he was still liable for service; and that even if he was still liable there was no evidence that he was guilty of anything more than absence without leave. That submission was overruled. The appellant did not himself give evidence and no witnesses were called on his behalf.

He appealed against conviction by leave of the court on the grounds (1) that there was no sufficient evidence of desertion; (2) that the evidence showed that the appellant was no longer a serving soldier at the time of his arrest; (3) that there was no evidence that he was absent without leave at the time of his arrest. Before the Court of Criminal Appeal counsel for the appellant took the point that the certificate of arrest was inadmissible in view of the inclusion therein of the words "at the "time of his arrest he was wearing civilian clothes."

W. R. Rees-Davies for the appellant.
E. Garth Moore for the Crown.

No cases were cited in argument.

LORD GODDARD C.J. The appellant was found guilty by a court-martial of desertion. He obtained leave to appeal to this court because our attention at the time—and I am not blaming anybody—was not called to the provisions of section 163 of the Army Act which makes certain documents evidence. The only evidence, which, of course, would not be evidence in a civil court, which was called before the court-martial was that of a corporal who was detailed to produce and did produce documents which show that a court of inquiry had been held in respect of this man's absence from his unit, and that the court of inquiry had found that he was absent from October 9, 1955, to October 31, 1955, the day when the court of inquiry was held. Another document was then put in which showed that the appellant was arrested at Midhurst, his unit being at Mill Hill. A further document was put in certifying "that the accused of the Middle-"sex Regiment was arrested at Midhurst, Sussex, at 19.45 hours "on April 13, 1956, and at the time of his arrest was wearing "civilian clothes."

Section 163 (1) of the Army Act provides: "(*g*) Where a "record is made in one of the service books in pursuance of any

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"Act or of the King's Regulations, or otherwise in pursuance of "military duty, and purports to be signed by the commanding "officer or by the officer or record officer whose duty it is to "make such record, such record shall be evidence of the facts "thereby stated: (*h*) A copy of any record in one of the said "service books purporting to be certified to be a true copy by "the officer or record officer having the custody of such book "shall be evidence of such record."

By clause (*jj*): "Where the proceedings are proceedings "against an officer or soldier on a charge of being a deserter or "absentee without leave, and the officer or soldier has been "apprehended and has on arrest been taken into the custody of "a provost marshal, assistant provost marshal or other officer, "a certificate purporting to have been signed by such provost "marshal, assistant provost marshal or other officer, and stating "the fact, date and place of arrest, shall be evidence of the "matter so stated." Therefore, this finding of the court of inquiry was quite properly admitted, and I do not think that Mr. Rees-Davies, who has endeavoured to take every point that could be taken, has disputed that it could be admitted as evidence of what the court of inquiry found.

The court-martial therefore had before them evidence that the appellant was absent from his unit from October 9 to October 31, 1955. They also had evidence that he was arrested on April 13, 1956. Mr. Rees-Davies with some courage has asked the court to say that on those facts the court-martial were not justified in drawing the inference that the appellant was absent from his unit from the day when the absence began, October 9, until his arrest. I cannot agree to that. It seems to me that where a man is found to be absent without leave from October 9 to October 31 and has then to be arrested, and is not arrested until April 13, 1956, the inference is that he has been absent from his unit the whole of that time. If a man is absent from October 9 to October 31, I should say that that is ample time for a court-martial to hold that he did not intend to return. Why he did not intend to return is a matter which has to be explained by him. No explanation being given, there was ample evidence here on which the court-martial could hold that this man was absent from his unit from October 9, 1955, till his arrest on April 13, 1956, and therefore there was ample evidence that he had been absent for such a long time that in the absence of any explanation by the accused man he intended to desert Her Majesty's Forces.

The whole argument addressed to the court was that this man was entitled to assume that he had not to go back to his unit. He gave no evidence why he did not return. Therefore, there was abundant evidence to find that he intended to desert, except for one other point which has been brought up in this court for the first time; it was not mentioned in the notice of appeal nor taken below. The certificate of arrest, which was put in as

evidence, does add these words: "At the time of his arrest was "wearing civilian clothes." It might be some evidence of a man's intention to desert that he dressed himself as a civilian and not in his uniform. At any rate, the court cannot say, and Mr. Garth Moore does not contend, that the words "at the time "of his arrest was wearing civilian clothes" could properly be inserted in the certificate. They ought not to have been there, and the passage in the Manual of Military Law (1951) 8th ed., p. 383, n. 17, which reads: "A statement in the certificate "of surrender to the effect that the man was wearing civilian "clothes is admissible as part of the fact of the surrender, or "apprehension," is wrong. It is inadmissible in the certificate although it could be given in verbal evidence. The attention of the court-martial was not called to the point, I think for the good reason that Mr. Rees-Davies was strenuously arguing that no inference could be drawn from the fact that the appellant was in civilian clothes and, for all I know, the court was in agreement with that because, as he says, nowadays soldiers are allowed to wear civilian clothes a great deal more than they used to be. But no objection was taken to the admissibility of the document in which the statement appeared, and the court considers that they are justified in applying the proviso to section 5 (1) of the Courts-Martial (Appeals) Act, 1951.[1] Of course, the appellant did not intend to return, his contention being that he was not bound to do so. The question as to whether he was bound to return has not been argued before us. If he had gone into the witness-box and given some explanation about that, it might have had considerable effect in mitigation, but he did not do so. There was, therefore, abundant evidence in this case that the appellant was absent from his unit in such circumstances that the court was perfectly entitled to find that he had no intention of returning and that constitutes the offence of desertion, and this appeal is dismissed.

Appeal dismissed.

Solicitors: *Wilders & Sorrell; Director of Army Legal Services.*

E. M. W.

[1] Courts-Martial (Appeals) Act, 1951, s. 5 (1): "Subject to the pro-"visions of the next following section, "on an appeal under this Part of this "Act the court shall allow the appeal "if they think that the finding of "the court-martial is unreasonable or "cannot be supported having regard "to the evidence or involves a wrong "decision of a question of law or that, "on any ground, there was a mis-"carriage of justice, and in any other "case shall dismiss the appeal: Pro-"vided that the court may, notwith-"standing that they are of the opinion "that the point raised in the appeal "might be decided in favour of the "appellant, dismiss the appeal if they "consider that no substantial mis-"carriage of justice has actually "occurred."

[CHANCERY DIVISION.]

1956
Dec. 4.

Upjohn J.

* *In re* CAPELOVITCH, DECD. SANDELSON *v.* CAPELOVITCH AND ANOTHER.

[1950 C. No. 4558.]

Practice and Procedure — Transfer of proceedings — Administration pending — Locus standi — Order for administration made in the Chancery Division — Action against executors in Queen's Bench Division — Transfer of action to Chancery Division — Motion to discharge order of transfer — Plaintiff in action not party to administration proceedings — Locus standi of plaintiff — R.S.C., Ord. 49, *r.* 5.

An order for the administration of the estate of a testator was made in the Chancery Division in July, 1952. An action against the testator's executors as executors and personally was started in the Queen's Bench Division in June, 1953. On November 19, 1956, just before the action was due to come on for trial, one of the executors obtained an order transferring the action to the Chancery Division. The plaintiff in that action who was not a party to the administration proceedings, and who had not been served with the administration order, moved in the administration proceedings to discharge the order for transfer.

The motion was opposed, inter alia, on the ground that the plaintiff had no locus standi to bring the motion:—

Held, that the plaintiff had a locus standi to move the court to discharge the order of transfer.

MOTION.

The applicant on this motion, Mark Ginsberg, moved to discharge an order made by Master Holloway on November 19, 1956, transferring to the Chancery Division under R.S.C. Order 49, rule 5, an action proceeding in the Queen's Bench Division, in which he (Mark Ginsberg) was the plaintiff. The action was brought against Dennis Leon Sandelson and Eric Charles Glen-Smith, the executors of one Harris Capelovitch, deceased, as executors and personally. The action was begun in June, 1953, and was for breach of an undertaking by the executors in connexion with a lease of a cinema in Leeds.

On October 17, 1950, Sandelson took out an originating summons, in which Glen-Smith and Nathan Capelovitch were the defendants, for the administration of the estate of Harris Capelovitch; and an order for the administration thereof was made on July 21, 1952. Ginsberg's action was due to come on for trial at the Leeds Assizes about December 3 or 4, 1956. At the last moment Sandelson obtained the order for transfer as stated above.

Ginsberg brought the present motion in the administration proceedings against all the parties therein asking that the order transferring the proceedings be discharged.

B. J. H. Clauson for Mark Ginsberg, plaintiff in the Queen's Bench action.

A. C. Sparrow for Sandelson, plaintiff in the administration proceedings.

W. A. Bagnall for Glen-Smith, the second defendant in the administration proceedings.

Nathan Capelovitch, the first defendant in the administration proceedings, did not appear and was not represented by counsel.

Case referred to in argument not cited in the judgment: *Samuel* v. *Samuel.**

UPJOHN J. having stated the facts: The sole question that I can determine today is whether Mr. Ginsberg, who has not been served with the notice of the order of administration, has any locus standi to move this court to discharge the order transferring the action. I am not concerned with the merits of the application at this stage, for this reason, that the executors, quite properly, have not allowed Ginsberg to see the evidence which they say explains the extraordinary delay that has taken place.

Orders transferring actions where an administration order has been made are commonly made ex parte, and for the very good reason that normally they go as of course; but, of course, there may be circumstances in which it is not convenient to transfer the action.

Mr. Clauson has drawn my attention to the authorities: *In re United Kingdom Electric Telegraph Co.*[1]; *Field* v. *Field*[2]; and *In re Pimm.*[3] Those authorities make it plain that the court does entertain applications such as this, and I therefore propose to hold that the applicant has a locus standi to make this application.

I must, therefore, stand the matter over in order that evidence may be put in which the applicant is now entitled to see, and then the matter can be considered upon its merits.

Order accordingly.

Solicitors: *Lieberman, Leigh & Co. for Saffman & Co., Leeds; Waterhouse & Co.; Ward, Bowie & Co.*

I. G. R. M.

* (1879) 12 Ch.D. 152.
[1] (1881) 29 W.R. 332.
[2] [1877] W.N. 98.
[3] [1916] W.N. 202.

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* PRACTICE DIRECTION (GUARDIANSHIP OF INFANTS ACTS, 1886 AND 1925).

Infant—Guardianship—Practice—Appeals to the assigned judge of the Chancery Division—R.S.C., Ord. 55A, *r.* 6.

In cases in which applications under the above Acts have been made with regard to two or more infant children of the same parents, and such applications have been heard together or have been heard on the same day and by the same tribunal, one originating notice of motion only under rule 6 of Order 55A of the Rules of the Supreme Court is to be issued by way of appeal, whether or not separate orders in respect of each infant have been drawn up by the court below. The originating notice of motion should, if necessary, refer in separate paragraphs to the order made with regard to each infant.

By direction of Roxburgh J.

W. S. JONES,
Chief Registrar, Chancery Division.

December 7, 1956.

[COURT OF APPEAL.]

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Nov. 15, 16, 20, *Dec.* 6.

Singleton, Jenkins and Parker L.JJ.

* MURFIN *v.* UNITED STEEL COMPANIES LTD. (POWER GAS CORPORATION LTD., THIRD PARTY).

Electricity—Regulations—Insulating screens—Control house—Failure to screen live switchboard panels—Electrician fatally injured—Breach of statutory duty—Electricity (Factories Acts) Regulations, 1908 (*S.R. & O.*, 1908, *No.* 1312), *regs.* 15 *and* 24.

Negligence—Meaning—Contract—Indemnity clause—Whether breach of statutory duty is negligence.

During the course of building works being carried out by contractors and subcontractors at the defendants' factory the plaintiff's husband, an experienced foreman electrician employed by subcontractors, was electrocuted while replacing a burned-out overload trip unit in a switchboard control panel in the contactor room. Panel no. 3, on which the electrician was working, was the central one of three panels in the contactor room, into which no unauthorized person was permitted to enter, being set apart to comply with regulation 15 of the Electricity (Factories Acts) Regulations, 1908. No. 3 panel was isolated, but panels nos. 2 and 4, each of which had live conductors, were exposed and not screened. In some way unknown the electrician's forehead came in contact with the busbars on no. 4 panel, and (it was suggested) his hand or some other part of his body came in contact with an upright metal bar between the panels, or with a trunking, so completing the circuit and resulting in a fatal shock.

The plaintiff, as administratrix of her husband's estate, claimed damages from the defendants, as occupiers of the factory, alleging common law negligence and breach of statutory duty. The defendants denied liability and pleaded that if they were guilty of a breach of statutory duty they were entitled to be indemnified

under contract by their contractors, whom they joined in the action as third parties. The contract provided for an indemnity against claims "under any statute or at common law . . . from any cause "other than the negligence of the company or its employee."

The trial judge found that the defendants, as occupiers of the factory, were in breach of regulation 24 of the Electricity (Factories Acts) Regulations, 1908,[1] in failing to screen the live panels, but he also held that they were entitled to be indemnified by their contractors. He did not find the defendants guilty of common law negligence.

Both the defendants and the third party appealed, the latter contending that the defendants, being in breach of their statutory duty, were guilty of negligence and could not recover under the indemnity clause:—

Held, (1) that regulation 24 was to be regarded as a general or sweeping up provision to avoid danger and prevent an accident such as had occurred in the present case; that it laid upon occupiers of a factory a duty to provide portable insulating screens, etc., and to see that they were used "when necessary "adequately to prevent danger," and the defendants were in breach of that statutory duty.

(2) That although breach of statutory duty might in some cases fall within the term "negligence," in the indemnity clause in question a distinction was drawn between statutory liability and negligence, and the defendant occupiers were entitled to be indemnified by their contractors.

Lochgelly Iron & Coal Co. v. *M'Mullan* [1934] A.C. 1, 19; 49 T.L.R. 566; *London Passenger Transport Board* v. *Upson* [1949] A.C. 155; 65 T.L.R. 9; [1949] 1 All E.R. 60; and *Hosking* v. *De Havilland Aircraft Co. Ltd.* [1949] 1 All E.R. 540 considered.

Decision of Finnemore J. affirmed.

APPEALS from Finnemore J. (Lincoln Assizes).

Prior to March, 1954, extensive work was being carried out by contractors at the Scunthorpe factory of the defendants, the United Steel Corporation Ltd., the principal contractors being the third party, the Power Gas Corporation, whose sub-contractors, W. H. Smith & Co. Ltd., were carrying out certain electrical work. Gerald Murfin, husband of the plaintiff and an experienced electrician, was an employee of Smith & Co. Some furnaces controlled by motors and operated by electrical gear had been completed and were in use on March 11 when something went wrong and a motor was burnt out. The work had not been

[1] Electricity (Factories Acts) Regulations, 1908: "Duties. It shall "be the duty of the occupier to com-"ply with these regulations. And it "shall be the duty of all agents, "workmen, and persons employed to "conduct their work in accordance "with these regulations."

Reg. 15: "Every switchboard "having bare conductors normally so "exposed that they may be touched, "shall, if not located in an area or "areas set apart for the purposes "thereof, where necessary be suitably "fenced or enclosed.

"No person except an authorised "person, or a person acting under his "immediate supervision, shall for the "purpose of carrying out his duties "have access to any part of an area "so set apart."

Reg. 24: "Portable insulating ". . . screens . . . or other suitable "means shall be provided and used "when necessary adequately to pre-"vent danger and shall be periodically "examined by an authorised person."

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taken over and the employees of the contractors and sub-contractors attended to the fault. It was decided to replace an overload trip unit on a switchboard control panel in the control house by a unit brought from another place, and it became Murfin's task to disconnect the burnt-out unit on no. 3 panel. No. 3 panel was isolated, but on either side of it were panels nos. 2 and 4, both of which were live conductors and were not being screened. In some way Murfin came in contact with no. 4 panel and was electrocuted.

The plaintiff, his widow and administratrix, sued the defendants, United Steel Companies Ltd., as occupiers of the factory, for damages, alleging breach of statutory duty or common law negligence. The defendants denied liability and brought in as third party Power Gas Corporation Ltd., claiming that in the event of their being held liable to the plaintiff they were entitled to be indemnified by the Power Gas Corporation under a contract of indemnity.

Finnemore J. held that the defendants, as occupiers of the factory, were in breach of regulation 24 of the Electricity Regulations, 1908, in that they had failed to screen the live panels and that that breach was the cause of Murfin's death. He awarded the plaintiff £7,045 damages and costs against the defendants, but further held that they were entitled to be indemnified by the third party. He did not find the defendants guilty of common law negligence.

Both the defendants and the third party appealed. The defendants contended that regulation 24 did not apply to apparatus in the contactor room. The third party, while supporting that contention, argued that a breach of statutory duty was negligence within the meaning of the indemnity clause.

The indemnity clause was in the following terms: "When "work is carried out on or goods delivered to the company's "premises or any other site or place specified by the company "the contractor shall be liable for and shall indemnify the com-"pany against every claim against the company under any "statute or at common law for (*a*) damage to property, (*b*) death "and (*c*) personal injury arising out of or in connexion with "the carrying out of the contractor's work, and from any cause "other than the negligence of the company or its employee."

G. R. Swanwick Q.C. and *Mrs. E. K. Lane* for the defendants.

H. I. Nelson Q.C. and *Bernard Caulfield* for the third party.

Fenton Atkinson Q.C. and *A. E. James* for the plaintiff.

In addition to cases referred to in the judgments the following cases were cited in argument: *Proctor* v. *Johnson and Phillips Ltd.*[2]; *Roberts* v. *Dorman Long & Co.*[3]; *Caswell* v. *Powell*

[2] [1943] 1 K.B. 533; [1943] 1 All E.R. 565.

[3] [1953] 1 W.L.R. 942, 946; [1953] 2 All E.R. 428.

Duffryn Associated Collieries[4]; *Potts (or Riddell)* v. *Reid*[5]; *Harrison* v. *National Coal Board*[6]; *Woolfall and Rimmer* v. *Moyle*[7]; *Marshall* v. *London Passenger Board*[8]; and *National Coal Board* v. *England*.[9]

SINGLETON L.J. having outlined the facts continued: The basis of Finnemore J.'s judgment against the defendants was that they, as occupiers of the factory, were in breach of regulation 24 of the Electricity Regulations, 1908, and that that was the cause of Murfin's death. The judge did not find that there was any negligence under the common law proved against the defendants.

Before I come to the regulations, I must say a little more upon the facts. Murfin was an experienced electrician. The room in which he was working at the time of his death was known as the contactor room. The switchboard had bare conductors, so exposed that they might be touched. The room was a place set apart to comply with regulation 15, and only authorized persons were allowed access to it. In the room there were a number of panels and the work of Murfin was at the back of no. 3 panel. Each of the panels has live conductors: the position of those on no. 4 panel is indicated on the plan. No. 3 panel is 2 feet wide: the position of the nuts which Murfin had removed is shown as around 3 feet 5 inches above floor level. A witness called on behalf of the defendants was one Ashton, their foreman shift electrician. He met, outside the room, the site electrical engineer of the third-party defendants, Power Gas Corporation Ltd, one Caine. Caine had already located the trouble and it was he who asked Murfin to disconnect the burnt out unit on no. 3 panel. Caine was not called as a witness. No. 3 panel was isolated: both switches were in the out position. There was thus no danger from no. 3 panel itself, but it was between and close to no. 4 panel and no. 2 panel, neither of which was isolated. The point on no. 3 panel at which Murfin was last seen working was not more than 18 inches from the live conductors on no. 4 panel, which are usually spoken of as busbars. Caine left the room to obtain the replacement unit. Ashton watched Murfin for a moment and then turned away. His attention was called by another electrician who had entered the room, and he saw that Murfin was in a crouched position with his forehead against the busbars on no. 4 panel. He was either dead or dying. The photographs show a trunking (a kind of box) on the floor in front of each panel and they also show an upright metal bar between the panels. If some other part of Murfin's body came into contact with one of the metal bars or with one of the trunkings at the time his forehead came against the

[4] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.
[5] [1943] A.C. 1; 58 T.L.R. 335; [1942] 2 All E.R. 161.
[6] [1951] A.C. 639, 666; [1951] 1 T.L.R. 1079; [1951] 1 All E.R. 1102.
[7] [1942] 1 K.B. 66, 72; 58 T.L.R. 28; [1941] 3 All E.R. 304.
[8] [1936] 3 All E.R. 83.
[9] [1954] A.C. 403; [1954] 2 W.L.R. 400; [1954] 1 All E.R. 546.

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busbars, a fatal shock was likely to be the result. No one knows precisely what happened. He may have slipped, overbalanced or fallen; he may have stooped to one side inadvertently, he may have been trying to catch, or to find, a nut which was found later behind the trunking.

It had not been thought desirable or necessary to switch current off panels nos. 2 and 4: that would have interfered to some extent with the working of the factory. According to the evidence a screen between panels nos. 3 and 4, and another between panels nos. 2 and 3, would have avoided risk. It is claimed that the failure of the defendants to provide portable insulating screens and to see that they were used was a breach of their statutory duty and was the cause of Murfin's death.

I now come to the Electricity Regulations, 1908. The preamble is as follows: "Whereas the generation, transformation, distribution, and use of electrical energy in any factory or workshop, or any place to which the provisions of section 79 of the Factory and Workshop Act, 1901, are applied by that Act, have been certified in pursuance of the said section to be dangerous:—I hereby, in pursuance of the powers conferred upon me by that Act, make the following regulations, and direct that they shall apply in all places before mentioned."

Then under "Duties": "It shall be the duty of the occupier to comply with these regulations. And it shall be the duty of all agents, workmen, and persons employed to conduct their work in accordance with these regulations."

Under the definition part of the regulations there is a definition of "insulating screen," which "means a screen of such size, quality, and construction according to the circumstances of the use thereof, that a person is thereby adequately protected from danger."

Regulation 24 provides: "Portable insulating stands, screens, boots, gloves, or other suitable means shall be provided and used when necessary adequately to prevent danger, and shall be periodically examined by an authorised person."

It is clear that there was danger to a man working in the position in which Murfin was. That appears from the evidence of Mr. Rogers, the expert witness called on behalf of the defendants. And Mr. Gardener, the expert witness called on behalf of the plaintiffs said: "This man was undertaking work and if it was necessary to have the adjacent panels alive, then to prevent danger I say that screens really were necessary." The provision and use of insulating screens would have prevented danger to a man working in that place. Was it necessary that screens should be used "adequately to prevent danger"? It seems to me that there is only one answer to this question. The work Murfin had to do was close to live busbars. There was a risk of injury to him unless precautions were taken. The precaution laid down in regulation 24 would have been sufficient

to prevent danger to Murfin; it was necessary adequately to prevent danger—and it was simple.

Ashton, when he was cross-examined by counsel for the plaintiff agreed that the busbars, when live, were dangerous to any person who might slip or stumble or overbalance and that it would be quite a simple and inexpensive protection to put a screen in front of a live panel when one was working on a dead one next door. He added that there was no reason at all why a screen should not have been put in front of nos. 2 and 4 panels while Murfin worked on no. 3.

So far as the evidence shows, insulating screens were not provided by the defendants, the occupiers. A letter of January 31, 1956, from the defendants' solicitors to the plaintiff's solicitors (in amplification of an answer to an interrogatory) says "a screen or shield was not provided for erection." There were none provided at the time of Mr. Gardener's inspection in February 1955.

The answer of the defendants is that regulation 24 does not apply, and that screens were not necessary or usual. The room in which Murfin was working was a place set apart under regulation 15 and only authorised persons were allowed in it. It is claimed that in such circumstances, there is no call for any of the safety devices required by regulation 24. I cannot accept this argument. There is just as much risk of an experienced man falling or slipping when he is working as there is of an inexperienced man doing so. The position is sufficiently shown in the evidence of the defendants' expert witness, Mr. Rogers, and in that of Mr. Ashton. The defendants further draw attention to the precautions called for when work is done on any switchboard for high pressure (regulation 19 (*d*)) and say that if regulation 24 applies to this case the same precautions are required when work is done on a switchboard for low pressure (which was this case). I am not satisfied that that is right, nor am I satisfied that, if it were so, it would dispose of the necessity of complying with regulation 24. I regard regulation 24 as a general, or sweeping up, provision in order to avoid danger and to prevent an accident such as happened in this case. The duty laid upon occupiers of a factory by regulation 24 is in the first place to provide portable insulating screens, etc., in the second place to see that they are used when necessary adequately to prevent danger, and in the third place to see that they are periodically examined by an authorised person. There is no evidence to show that they were provided: indeed, the evidence was to the contrary.

In my opinion, regulation 24 applies to the facts of this case. The defendants were in breach of it and the death of Murfin resulted from the breach. The appeal of the defendants against the judgment of Finnemore J. should be dismissed.

I must now consider the appeal of the third party, Power Gas Corporation Ltd., against the judge's determination that they

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should indemnify the defendant occupiers in respect of their liability under the judgment. Power Gas Corporation Ltd. were the main contractors and there were a number of sub-contractors. Work had been going on for some two years when the accident happened. The claim to an indemnity is based upon a clause in the contract between the defendants and the third party in these terms: "When work is carried out on or goods delivered to the "company's premises or any other site or place specified by "the company the contractor shall be liable for and shall indem-"nify the company against every claim against the company "under any statute or at common law for (*a*) damage to "property, (*b*) death and (*c*) personal injury, arising out of or "in connexion with the carrying out of the contractor's work "and from any cause other than the negligence of the company "or its employee.

"The contractor shall effect a policy of insurance against all "liability as aforesaid and shall continue such insurance during "the whole of the time that any persons are employed by him "on the company's premises or an any other site or place "specified by the company and shall when required produce "to the company such policy of insurance and the receipt for the "payment of the current premium."

The defendants claim that on the judge's finding the death of Murfin was caused by breach of statutory duty on their part and that there was no negligence on their part: thus, they say, they are entitled to be indemnified by the third party. Mr. Nelson, on behalf of the third party, submitted that the word "negligence" in the last line of the indemnity included breach of statutory duty, and that the defendants could not recover on the clause as they had been guilty of negligence in that sense.

No evidence was called on the hearing for the third party. Counsel appearing for them joined the defendants in an out and out effort to defeat the plaintiff's claim.

[His Lordship read the answers of Mr. Ashton, the defendants' foreman shift electrician, in cross-examination by Mr. Caulfield, and continued:] It would appear clear that those in control of Power Gas Corporation Ltd.'s activities on the site did not ask that portable screens should be provided, nor did they think that they were necessary. Now they claim that the defendants were negligent in not providing them and in not seeing that they were used. However, the question to be determined depends upon the construction of the clause.

The term "negligence" is wide enough to cover breach of statutory duty. In *Lochgelly Iron and Coal Co.* v. *M'Mullan*,[1] Lord Macmillan said: "Where two persons stand in such a rela-"tion to each other that the law imposes on one of these persons "a duty to take precautions for the safety of the other person, "then, if the person on whom that duty is imposed fails to take

[1] [1934] A.C. 1, 18; 49 T.L.R. 566.

"the proper precautions and the other person is in consequence "injured, a clear case of negligence arises. That is exactly the "case here alleged. Such negligence is in my opinion 'personal "'negligence' within the meaning of the Workmen's Com-"pensation Act. It appears to me quite immaterial whether "the duty to take care arises at common law or is imposed by "statute."

Lord Wright said [2]: "Thus an employer may be 'personally' "negligent in respect of the acts and omissions of himself; but "he may also, I think, be described as personally negligent in "respect of breach of a duty imposed on him by law and of such "a character that he is debarred from avoiding responsibility by "delegating its performance, or by invoking the doctrine of "common employment. . . . Hence the breach of such a duty "as that in question has been, I think, correctly described as "statutory negligence. In my judgment, therefore, such a claim "as that in question can fairly and properly be described as "based upon a case of negligence, and of personal negligence, "since it attaches to the employer personally."

Lord Wright again said [3]: "But in my opinion the breach of "the statutory duty does per se constitute the 'personal negli-"'gence of the employer,' quite independently of the following "words on which in such a case the workman has accordingly "no need to rely. In strict legal analysis, negligence means "more than heedless or careless conduct, whether in omission "or commission: it properly connotes the complex concept of "duty, breach, and damage thereby suffered by the person to "whom the duty was owing: on all this the liability depends, "and if this liability is attached by law formally to the employer, "as happens in the case of a breach of the statutory duty, the "whole position is I apprehend correctly described as 'personal "'negligence of the employer.'"

Does it follow from this that the claim to an indemnity must fail? Negligence and breach of statutory duty are usually treated as two separate causes of action from a pleading point of view. The present case is an instance of this. Particulars of each are given in the statement of claim. And in many appeals in this court a plaintiff fails on the issue of negligence, though he may succeed on the ground of breach of statutory duty, or vice versa. It appears to me that the wording of the indemnity clause "every claim against the company under any statute or at "common law" is intended to cover both types of claim. The use of the word "statute" is designed to that end: it is unnecessary for the purpose of covering a claim under an Act such as Lord Campbell's Act (as Mr. Nelson suggested), for that is covered by the word "death" which appears later. Now, in the exception clause which follows, the word "negligence"

[2] [1934] A.C. 1, 21, 22, 23. [3] Ibid. 25.

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appears alone. In other words, there is a distinction between the indemnity and the exception clause.

Breach of statutory duty may be negligence—but here they are treated as two different things. There may be a breach of statutory duty without any negligence in the sense in which that word is normally used. The present case is one such case on the finding of the judge, who said: "The only other question "I have to deal with is the question of negligence at common "law. I confess on that I think the plaintiff's position is much "more difficult. It is one thing to find that employers, or "occupiers to be quite correct, are in breach of their statutory "duty, which has been laid down as an absolute obligation, and "to say they are also, because of that, guilty of common law "negligence. Here I think that the occupier is entitled to "consider the particular sort of person he is dealing with, and "it is not necessarily negligence on his part, I think, to fail to "do what the statutory duty places on his shoulders. I confess "I would not feel able in this case to say that the defendants "have been guilty of ordinary common law negligence, although "I am satisfied they were guilty of a breach of statutory duty."

Though the third party, in paragraph 6 of their Defence, pleaded that the defendants were negligent, they did not give any evidence in support of the allegation: rather, they adopted the defence of the defendants. If the answer set up by them to the claim to an indemnity is right, it appears to me that virtually the indemnity has no value. It is included for some purpose. The commonsense way to treat it is to regard it as an indemnity against claims for breach of statutory duty, by whomsoever committed, so long as there is no negligence, in the ordinary sense in which that word is used, on the part of the company. I would dismiss the appeal of the third party.

JENKINS L.J. I agree that the appeals of the defendants and the third party in this case both fail and should be dismissed. I find nothing I can usefully add to the reasons given by my Lord in the judgment he has just delivered and to those given by my brother Parker in the judgment he is about to deliver, which I have had the advantage of reading in advance.

PARKER L.J. I have come to the same conclusion. Dealing first with the defendants' appeal, Mr. Swanwick before the judge contended, inter alia, that the deceased was not a person of a class for whose benefit the regulations were made, but having regard to the recent decision of this court in *Bryers* v. *Canadian Steamship Co. Ltd.*[4] he did not persist in this contention. He accordingly limited his argument to two points, as did Mr. Nelson for the third parties: (1) that regulation 24 does not apply to screening against the possibility of someone touching

[4] [1956] 3 W.L.R. 776; [1956] 3 All E.R. 560.

bare conductors, if they are in a place set apart pursuant to regulation 15; (2) that regulation 24 only requires screening to be used "when necessary . . . to prevent danger," and that, in the circumstances of this case, such user was not necessary.

As regards the first point, it is said that regulations 14–18 form a self-contained code in regard to switchboards. In particular, it is pointed out that regulation 15 permits bare conductors to remain so exposed that they can be touched. Is there anything, it is asked, in regulation 24, which withdraws that permission? Regulation 15, however, is clearly directed to the safety of employees generally other than authorized persons, and persons working under their direct supervision. If the argument is right, no statutory duty is imposed in regard to such persons whatever the nature of the work on which they are engaged. For myself I can see nothing inconsistent between regulation 24 and regulation 15. Regulation 24 comes within a group of regulations of general application (regulations 21–26), all of which, except possibly regulation 23, are, I think, additional precautions which apply generally in the factory, even in cases such as this, where specific precautions have been laid down. Nor do I think that regulation 18 (*d*), concerning switchboards for high pressure and extra high pressure, points to a different conclusion. It is said that this provision suggests that no screening is necessary when work is being done other than on a high pressure switchboard. I do not, however, think that that is a fair inference. The provision imposes an absolute obligation to take precautions on the basis that high pressure switchboards are always dangerous, whereas in regard to other switchboards precautions are only required "when "necessary . . . to prevent danger."

The second point turns on the meaning to be given to the words in regulation 24 "and used when necessary . . . to prevent "danger." I have omitted the word "adequately" as I do not think that it is material to this argument. It is descriptive of the precautions if such are "necessary to prevent danger." The answer to the question "Is there a danger?" is clearly "Yes." Bare conductors are undoubtedly a danger. That being so, "are steps necessary to prevent the danger?" The answer is surely "Yes, if someone is to work in close proximity thereto." It is said that even so, if the only person who is going to work in close proximity to such conductors is an authorized person or someone under his immediate supervision, the danger is so well known that no precautions are necessary. But I think it is not merely the absence of knowledge which makes precautions necessary, but the fact that any workman, however knowledgeable and skilled he is, may slip or faint, or, indeed, be guilty of some casual act of inadvertence.

So far as the facts of the present case are concerned, the equipment being dismantled was on the right of no. 3 panel and the deceased had to stoop in order to unscrew a nut with his left

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hand. That being so, he would be on the extreme right hand edge of the panel, and his body would be bound to come close to the bare conductors which were in the middle of no. 4 panel, the width of which was only 2 feet 3 inches. Though the evidence was that, in general, it is not usual in such circumstances to have screens, it seems to me that that practice, if it be a practice, ignores the fact that even the most skilled and knowledgeable workman, taking reasonable care for his own safety, may inadvertently come in contact with the bare conductors. In my judgment, once the possibility of a slip or a stumble or a casual act of inadvertence is taken into consideration—acts which may result in injury ranging from burns to death—it is impossible to say that precautions were not necessary.

I agree with the judge when he said: "It seems to me he "was working in a position which was obviously and inherently "dangerous in itself, because a slight movement to one side or "the other, a small slip, a small stumble or overbalance, would "put him, as it did, in mortal danger. Also we have to "remember that the law, while making workmen take proper "precautions for their own safety—and it is most important that "they should—says that people may be inadvertent, may make "slips in the doing of their work, and that is the very reason "why statutory duties of one kind or another are laid down to "make it incumbent upon the employer to prevent, as far as "possible, the very sort of accident which happened in the "present case." Exactly how the deceased met his death is not clear, but the evidence of the expert called by the plaintiff was that screens would have afforded complete protection. Indeed, assuming a breach, causation was not disputed. Accordingly, I think that the judge was right in holding that liability was established.

The third party's appeal raises a more difficult question. It turns on the meaning to be given to the words in the indemnity clause "other than the negligence of the company or its "employees." Does negligence there include a breach of statutory duty as well as a breach of duty at common law? That a breach of a duty laid down by statute which results in damage can properly be described as negligence is clear. Thus, in *Lochgelly Iron and Coal Co.* v. *M'Mullan*,[5] it was held that the words "personal negligence" in section 29 (1) of the Workmen's Compensation Act, 1925, included a breach of statutory duty. Passages from the speeches in that case have been cited by my Lord, and I do not repeat them.

Nevertheless, the meaning of the words must depend on the context. Indeed, in that case Lord Wright said[6]: "but the "meaning of the words in the section must, I think, be ascer-"tained by having regard to the context in the sense I have

[5] [1934] A.C. 1. [6] Ibid. 24.

"stated. In the same way in certain cases negligence or "common law negligence has been contrasted as being different "from statutory liability, though in each case the claim is a "claim at common law." Lord Wright went on to point out that to decide otherwise in that case would be to deprive a workman of an important right of action—a thing which could only be done by clear words.

In other contexts I think that "negligence" may have the narrower meaning of common law negligence. Thus, for the purpose of pleading, negligence and breach of statutory duty are considered as separate causes of action. (See Lord Wright in *London Passenger Transport Board* v. *Upson.*[7]) Indeed, the legislature itself has pointed out the distinction. (See the definition of "fault" in section 4 of the Law Reform (Contributory Negligence) Act, 1945.)

Turning to the clause in question in the present case, I think that it is impossible to read the exception of negligence in its widest sense. The effect would be to destroy entirely, or almost entirely, the indemnity given by the preceding words. Indeed, this was the view of Lewis J. in considering a somewhat similar indemnity clause in *Hosking* v. *De Havilland Aircraft Co. Ltd.*[8] On the other hand, if "negligence" is interpreted as common law negligence, it not only gives some effect to the indemnity, but an effect which is commercially reasonable. When, as here, legislation has placed duties, and in some cases absolute duties, on the occupier, regardless of the fact that he may, by reason of the presence of the contractors and sub-contractors, have no real control, an indemnity against claims for breach of such duties as opposed to a breach of common law duty is just what one would expect to be demanded of and given by the contractors, who are in effective control until the work is handed over to the occupier. Accordingly, I would dismiss both appeals.

Appeals dismissed.

Solicitors: *Corbin, Greener & Cook for Raworth, Lomas-Walker & Co. Harrogate; Carpenters for G. Keogh & Co., Nottingham; Rowley, Ashworth & Co., Manchester.*

A. W. G.

[7] [1949] A.C. 155, 169; 65 T.L.R. 9; [1949] 1 All E.R. 60.

[8] [1949] 1 All E.R. 540.

[COURT OF APPEAL.]

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SAME *v.* F. N. WORTHINGTON (H.M. INSPECTOR OF TAXES).

Revenue — Income tax — War damage — Value payments — Property dealing company—Whether profits or gains for income tax purposes —Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I—War Damage Act,* 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 36, 66, 79—*War Damage* (*Public Utility Undertakings, etc.*) *Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 36), *s.* 28 (1) (4).

War Damage.

A company, which carried on the trade of property dealing, received value payments under the provisions of the War Damage Act, 1943, in respect of some of its properties which had been damaged and destroyed by enemy action.

The Crown claimed that in computing the company's profits for taxation purposes that value payments should be included as a receipt:—

Held, that where a trader sells or disposes of his circulating capital the proceeds for tax purposes were to be treated as a trading receipt and that that principle was not confined to cases where the circulating capital was actually sold, but it applied, prima facie, to receipts which represented what had been lost by destruction of stock-in-trade, and that there was nothing either in section 66 of the War Damage Act, 1943, or in section 28 of the War Damage (Public Utility Undertakings, etc.), Act, 1949, which took value payments out of the category of trading receipts; and, accordingly, that they must be included in the company's trading receipts for taxation purposes.

Gliksten (J.) & Son v. *Green* [1929] A.C. 381; 45 T.L.R. 274; 14 T.C. 364; *Newcastle Breweries Ltd.* v. *Commissioners of Inland Revenue* (1927) 43 T.L.R. 476; 12 T.C. 927; *Crook* v. *Seaham Harbour Dock Co.* (1931) 48 T.L.R. 91; 16 T.C. 333 considered.

Decision of Upjohn J. [1956] 1 W.L.R. 858; [1956] 2 All E.R. 613 reversed

APPEALS from Upjohn J.[1]

There were before the Court of Appeal four appeals by the Crown which were heard together. Two related to income tax and two to profits tax. It was agreed that the answer to the questions raised with regard to income tax governed the questions raised in regard to profits tax and the appeals as to profits tax were not separately considered.

The case stated, so far as relevant, provided:

"1. At a meeting of the Commissioners held on December 3, "1952, the London Investment and Mortgage Co. Ltd. (herein-"after called 'the appellant company') appealed against income "tax assessments for the accounting periods for the years 1948,

[1] [1956] 1 W.L.R. 858; [1956] 2 All E.R. 613.

"49 and 1949/50 and profits tax assessments for the accounting "periods April 1, 1947, to March 31, 1948, and April 1, 1948, to "March 31, 1949.

"2. The question for determination in this appeal is whether "value payments arising under the provisions of the War "Damage Acts, 1941 and 1943,[2] and paid to the appellant "company, who carry on the trade of property dealing, are "receipts of the appellant company's trade to be brought into "account in computing the balance of profits and gains of the "appellant company for taxation purposes, and, if this is so, to "which of the appellant company's trading years should these "payments be properly assigned . . ."

"The facts as found by us are contained in paragraphs 4 to 6 "inclusive.

[2] War Damage Act, 1943, s. 36 (1): "The contributions to be made to-"wards the expense of making pay-"ments under this Part of this Act "in respect of war damage shall, "subject to the provisions of this Part "of this Act, be made in respect of "the properties, being units for the "purposes of Schedule A or for rating "valuations, which are specified in "section 39 of this Act; and a "property in respect of which such "a contribution is to be made is in "this Act referred to as a 'contri-"'butory property.' (2) The said "contributions shall be made by the "payment of five instalments, falling "due on the first day of July in the "year 1941 and each of the four "following years. (3) The amount "of an instalment shall, subject to "the provisions of this Part of this "Act, be computed as mentioned in "sections forty to forty-three of this "Act by reference to the assessment "of the contributory property for the "purposes of Schedule A or the "annual value of the property shown "in a valuation list in force for "rating purposes; and the value by "reference to which an instalment is "computed is in this Act referred to "as the 'contributory value' of the "property."

S. 66 (1): "Contributions made and "indemnities given under this Part "of this Act shall be treated for all "purposes as outgoings of a capital "nature . . ."

S. 113: [This section was amended and substantially re-enacted by s. 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949:—see below.]

S. 79 (1): "Payments by the "Commission in respect of war "damage, and payments of interest "on value payments and on pay-"ments to be made under section 18 "of this Act, shall be made out of "moneys provided by Parliament."

War Damage (Public Utility Undertakings, etc.) Act, 1949, s. 28: "(1) In computing the amount of the "profits or gains, or of the income "from any source, of any person for "any purpose of the Income Tax "Acts, or the amount of the profits "of any person for the purposes of "the profits tax or for the purposes "of excess profits tax, no sum shall "be deducted in respect of any pay-"ment or expenditure to which this "section applies . . . (4) Expendi-"ture to which this section applies "is—(*a*) any expenditure on repairing "or otherwise making good war "damage to land in so far as any "person has received or is entitled to "a payment in respect of the damage "by virtue of any of the provisions "of the principal Act (whether alone "or as applied or modified by or "under any provision of this Act), "and any expenditure on making "good detriment to an interest in "goods caused by war damage in so "far as any person has received or "is entitled to a payment in respect "of the detriment by virtue of any of "those provisions or of a policy issued "under either of the schemes operated "under Part II of the principal Act "or by virtue of section ten of this "Act; and (*b*) any expenditure on "repairing or otherwise making good "war damage being damage of a "class mentioned in any of para-"graphs (*a*) to (*d*) of subsection (1) "of section one of this Act, or on "measures for meeting the circum-"stances created by any such obstruc-"tion as is mentioned in section "eighteen of this Act."

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"4. The appellant company is a property dealing company. "During the war certain of the properties belonging to the "appellant company sustained war damage. Under the provi- "sions of the War Damage Acts, 1941 and 1943, the appellant "company has received value payments from the War Damage "Commission in respect of a number of these properties. The "amount of a value payment, by section 10 (1), War Damage "Act, 1943, 'shall be an amount equal to the amount of the "'depreciation in value of the hereditament caused by the war "'damage, that is to say, the amount by which the value of the "'hereditament in the state in which it was immediately after "'the occurrence of the damage is less than its value in the "'state in which it was immediately before the occurrence of "'the damage.'

"5. Subsequent to the receipt of the value payments certain "of these damaged properties, both freehold and leasehold, have "been disposed of by the appellant company. The remainder "continue to be part of its stock and are either being rebuilt "or are to be rebuilt. . . . It has been the practice of the "appellant company to place any value payment received in a "suspense account called the Value Payment Account. Any "money spent in making good war damage to properties for "which a value payment has been received is charged against "this Value Payment Account.

"6. By section 66 (1), War Damage Act, 1943, war damage "contributions are to be treated for all purposes as outgoings "of a capital nature.

"Section 113, War Damage Act, 1943, provides that expen- "diture on repairing or otherwise making good war damage in "so far as a person is entitled to a payment in respect of the "damage is not to be deducted in computing the profits of any "person for the purposes of the Income Tax Acts or the profits "of any person for the purposes of the national defence "contribution.

"The War Damage Acts do not specifically mention the "treatment of value payments for the purposes of the Income "Tax Acts."

"7. It is contended on behalf of the appellant company that "value payments received from the War Damage Commission "are, by implication from the provisions of sections 66 and 113,[2] "War Damage Act, 1943, as applied to the appellant company, "receipts of a capital nature which ought not to be brought "into the accounts of the appellant company as trading receipts "and that the appeal should succeed.

"8. It is contended on behalf of the Commissioners of Inland "Revenue that the sums received by the appellant company "by way of value payments are ordinary trade receipts and the "fact that section 66, War Damage Act, 1943, prohibits any

[2] See note 2, p. 117.

" deduction of war damage contributions makes no difference to " the nature of the value payments which represent stock-in-trade " of the appellant company converted into cash and that the " appeal should be dismissed.

" 10. We, the commissioners who heard this appeal, having " considered all the evidence and the arguments addressed to us, " gave our decision in writing on July 31, 1953, as follows:—

" (1) We hold that where the appellant company has received " payments under the War Damage Act, 1943, in respect of " properties which have been damaged or destroyed, such pay- " ments are prima facie to be brought in as receipts of its trade. " The properties form part of its stock-in-trade, and on well- " known principles any sum received as compensation for their " loss is a trading receipt: see *Gliksten* v. *Green* [3] and *Newcastle* " *Breweries Ltd.* v. *Commissioners of Inland Revenue.*[4] We " do not consider that section 66 (1) of the War Damage Act " (which provides that contributions made under that Act are " to be treated for all purposes as outgoings of a capital nature) " contains any sufficient implication to the contrary.

" (2) Where, however, the company expends money on " repairing or rebuilding properties which have been damaged " or destroyed, section 113 of the War Damage Act provides " in effect that such expenditure is not to be deducted in " computing the profits of the company's trade to the extent " that it is recouped by payments received under the Act. If " in addition to deducting the payments received from its " expenditure the company had to include such receipts on the " credit side of its accounts they would be included twice, and " we hold that section 113 clearly implies that such a result is " not to follow.

" (3) In the result we hold that the company should in general " include payments received under the War Damage Act, but " that where a property has been, is being, or is intended to be " repaired or rebuilt sums received in respect of it should not " be included as receipts, but should be deducted from the " amount expended on rebuilding.

" (4) We leave figures to be agreed, but we recognize that the " application of our decision to properties not yet repaired may " give rise to questions upon which the parties have not yet had " an opportunity of addressing arguments to us, and we will " re-list the case for argument upon this point if requested either " by the appellants or the Crown. . . .

" 12. Both parties immediately after the determination of the " appeal declared to us their dissatisfaction therewith as being " erroneous in point of law and in due course required us to state " a case for the opinion of the High Court. . . .

" 13. The question of law for the opinion of the High Court

[3] [1929] A.C. 381; 45 T.L.R. 274; 14 T.C. 364.

[4] (1927) 43 T.L.R. 476; 12 T.C. 927.

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"is whether or not our decision set out in paragraph 10 (above) "is correct."

Upjohn J. allowed the company's appeals from the decision of the Special Commissioners and dismissed the Crown's cross-appeals. He held that the value payments were not trading receipts, as they constituted a receipt by the taxpayer, not as a part of his trading operation, but because he was compelled under the war damage scheme to make payments with the corresponding right of receiving the benefit in his capacity, not as a trader, but as an owner of the land.

The Crown appealed.

Geoffrey Cross Q.C. and *Sir Reginald Hills* for the Crown.
John Senter Q.C. and *Desmond Miller* for the taxpayer.

The following cases were cited in argument and are not referred to in the judgments: *Pontypridd and Rhondda Joint Water Board* v. *Ostime (Inspector of Taxes)*[5]; *Kirkness (Inspector of Taxes)* v. *John Hudson & Co. Ltd.*[6]; *In re Schofield's Will Trusts*[7]; *Smith's Potato Estates Ltd.* v. *Bollard (H.M. Inspector of Taxes)*[8]; *Inland Revenue Commissioners* v. *Scottish Central Electric Power Co.*[9]

LORD EVERSHED M.R. These four cases have raised a single point for our consideration, which may be stated as follows: Where a company, which carries on the trade or business of property dealing, receives from the War Damage Commission a value payment in respect of a property held by the company in the course of its trade, is that value payment to be treated as part of the company's annual profits or gains arising to it from its business within the meaning of Schedule D, now incorporated into section 122 of the Income Tax Act, 1952?

There is also raised in each case a question as regards profits tax, but we were informed that the answer to the question as it is related to income tax necessarily involves also the answer as it relates to profits tax, and I shall therefore follow the judge, Upjohn J. in delivering a single judgment in all four cases, and I shall confine my observations to the impact of the Income Tax Acts upon this value payment.

I confess that the case has been for me one of very great difficulty. One reason is that on either view of it the conclusion inevitably produces, or is capable of producing, anomalies. If, for example, the view of the Crown is correct, then the following might be the consequence. Suppose a case in which a property owned by a property company and of a value of £5,000 is wholly

[5] [1946] A.C. 477; 62 T.L.R. 295; [1946] 1 All E.R. 688; 28 T.C. 261.

[6] [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345; 36 T.C. 28.

[7] [1949] Ch. 341; 65 T.L.R. 156; [1949] 1 All E.R. 490.

[8] [1948] A.C. 508; [1948] 2 All E.R. 367; 30 T.C. 267.

[9] (1930) 15 T.C. 761.

destroyed by enemy action. Suppose that the sum of £5,000 is in due course paid by the War Damage Commission as a value payment in respect of that property. Suppose, finally, that the company, though it is under no obligation so to do in the case of value payments, elects to reconstruct or rebuild the premises and spends £5,000 in doing so. As Mr. Senter for the company demonstrated, the result of the various relevant provisions of the War Damage Acts, and again on the hypothesis that the Crown's argument should prevail, would be that the company on the one hand could not deduct as a legitimate expense for income tax purposes the £5,000 expended by it on reconstruction, but yet it would have to pay income tax in respect of the £5,000 which it received from the commission. Thus, assuming for simplicity that income tax be taken as 10s. in the £, the entire sum received from the War Damage Commission, in effect, would have to be repaid by way of tax. Mr. Senter, not unnaturally, stressed the obvious injustice, for I think it might be so described, of such a result—which he described as being really a matter of double taxation, though I am not sure that, with all respect to him, strictly it ought to be so described.

On the other side, if the example be taken that I have already stated, but with the distinction that there is no rebuilding or reconstruction, the company (let it be assumed) sells the vacant site. In that case the £5,000 remains, so far as can be seen, perpetually franked from any possible impost in the way of income tax. Although I think it could not be suggested that that £5,000 became part of the company's fixed capital, yet it would not be liable ever to be brought into account for tax purposes. That again would appear to be anomalous.

One other matter of fact I will mention because to my mind it has an important bearing on the proper result to be reached in this case. Let me repeat that we are here dealing with a company whose trade or business is that of property dealing, so that property, be it freehold or leasehold property, will be the circulating capital of the stock-in-trade, in common parlance, of the company's trading operations. According to ordinary accounting practice, if I correctly apprehend it, there would at the beginning of each year be brought into account the value of the stock-in-trade on hand. After items giving sales and purchases there would be a corresponding item on the other side of the account showing at the end of the accounting period what remained in hand. If that is right, it would appear to follow that in the case of a property (and I will adhere to my hypothetical figure) worth originally £5,000, which was destroyed and reduced to a value, say, of £500 as a result of enemy action, that property for accounting and therefore for tax purposes would be reduced in the accounts from its figure of £5,000 to its figure of £500 and in respect of that property there would have been a loss in

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value of the stock-in-trade which would be reflected in the final liability for income tax.

As I have referred to value payments it would perhaps also be relevant to mention, though the matter is not directly before us, the case of cost of works payments. The scheme of the war damage legislation, particularly to be found in sections 6 and 7 of the Act of 1943, provides, on the one hand, that value payments are appropriate in cases of total loss, and I have already indicated that they do not proceed upon the footing that the payee, the recipient, will rebuild or reconstruct the damaged property. In the case, however, of cost of works payments, which are payable in cases other than those of total loss, the payments are made in practice, and are contemplated plainly by the language of the statute as payable, only when work of reconstructing is done and by way, so far as they go, of recoupment of cost.

It was a point made by Mr. Senter that, if the Crown is right in its contention, it would appear also to follow that cost of works payments would be liable to tax. For my part I am inclined to think that the answer to that particular criticism is to be found in the illustrative figures which Mr. Cross gave us, showing what in practice would happen in such a case. Without undue elaboration those figures indicate that the cost of repair, which as I have already said cannot be deducted, as such, for the purposes of income tax liability, would be offset by the cost of works payment received, so that the latter, in effect, eliminated the former, and no question on either side of the account in such a case would arise.

Be that as it may, the problem with which we are concerned is that of a value payment, and I propose to confine myself strictly to that problem. I say that, perhaps with added emphasis, because when the matter was before the Special Commissioners they, in an attempt to mitigate the hardship of the type of instance which I have earlier stated, made a qualification upon their determination in favour of the Crown. The qualification is expressed in these words: "We hold that "the Company should in general include payments received "under the War Damage Act, but that where a property has "been, is being, or is intended to be repaired or rebuilt sums "received in respect of it should not be included as receipts, "but should be deducted from the amount expended on rebuild-"ing." That form of words if I correctly follow it, supposes that in an account the war damage value payment would be treated in the way which I have tried to describe in the case of a cost of works payment; but Mr. Cross has observed that the laudable attempt of the Special Commissioners to achieve a just conclusion involves unfortunately certain grave administrative difficulties. Not thereby discouraged Mr. Cross, for the Crown, at an earlier stage suggested what I might call a means of gilding the philosophic pill which, no less than the method

adopted by the Special Commissioners, would, as I see it, if we adopted it, inevitably involve judicial legislation. It seems to me that the court cannot properly indulge in those exercises, however much they may be tempted so to do. We must in this case, I think, decide, for better or worse, wholly in favour of the Crown or wholly in favour of the company. Legislation to gild the pill is a matter for Parliament.

Upjohn J. in his very full and careful judgment clearly indicated his own difficulty in the matter. He concluded at the end, contrary to the determination of the Special Commissioners, that these value payments ought to be treated, by the necessary implication of the war damage legislation, as exempt in the hands of the recipient in any capacity (as I think it follows) from liability to computation for income tax purposes.

I shall come back presently to refer more fully to the judgment, but I think it right that I should say at once that, for my part, I have reached the contrary conclusion. I confess that I do so not only with diffidence, because I part company from Upjohn J., but also with some reluctance, because, although there are undoubtedly anomalies either way, I think the hardship of the decision to which I have felt compelled to come is the greater of the two anomalies. That again, however, must be a matter for legislation—subject only to this, that in assessing this company and other companies similarly placed no doubt the revenue authorities can properly exercise a certain discretion.

I return to the basis of the arguments put forward on both sides, which proceed from this. Since there is here a property company and since its properties are its liquid or circulating capital or its stock-in-trade, then, as is urged strongly by Mr. Cross, prima facie a sum of money received by way of compensation for the loss or destruction of part of the circulating capital or of the stock-in-trade is something received by the company which comes to it, arises to it, from its trade.

Mr. Senter in the end of it all was not really disposed to quarrel with that as a general proposition. I asked him a number of questions at the beginning of his argument, and, having regard to the authority of *J. Gliksten & Son* v. *Green* [1] and of *Newcastle Breweries Ltd.* v. *Inland Revenue Commissioners*,[2] I think he was disposed to concede that, prima facie, that might well be the result, though I do not forget that in some respects he qualified the general implications of those cases; but he did say, and if I may say so with due respect to his argument, I think he said rightly, that the decision in this case must really depend upon the effect of the war damage legislation. Put another way, his argument can be posed thus: the war damage legislation properly construed gives, and was intended by Parliament to give, a particular characteristic, relevant for present purposes, to value

[1] [1929] A.C. 381; 45 T.L.R. 274; 14 T.C. 364.

[2] (1927) 43 T.L.R. 476; 12 T.C. 927.

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payments paid to contributors under the Acts; and that conclusion he founds on the language of the war damage legislation itself. It is upon that part of his argument that I have felt compelled to a different view. It may be that the war damage legislation in this respect failed to be exhaustive. Whether it is fair to describe the result as a casus omissus is neither here nor there. But I have felt forced to the conclusion that the implications of the Acts, as they are expressed, have not been in this respect fully apprehended by Parliament, if they wished to avoid the conclusion for which the Crown is arguing.

The *Gliksten* case [3] (and I think it is unnecessary for me to refer to it at great length) was a case in which a trader was trading in timber. Certain of his stock-in-trade, that is, certain of his timber, was destroyed by fire. But since it had been insured the trader received from the insurers a substantial sum of money for compensation for the loss of the timber, a sum which, in fact, having regard to the current increases in timber values, was very largely in excess of the book value of the timber destroyed. It was held by the House of Lords that, since the trader's business operations in essence consisted of the purchase and subsequent resale or turning into money of timber with a view to making profits out of such transactions, the effect of what had happened must be treated in all relevant respects as any other case in which timber had been replaced by cash, as was the intended result of sales. It is quite true, as Mr. Senter has pointed out, that in a number of passages in the judgments in the Court of Appeal, as well as in the speeches in the House, it is observed that the insurance of these stocks would be itself a natural business operation; but I do not think that that circumstance is vital to the principle of the conclusion.

That much I think is shown clearly enough from the case of the *Newcastle Breweries*.[4] In that case the stock-in-trade in question consisted of rum, and under war-time legislation the Admiralty compulsorily acquired stocks of rum for which, after a good deal of protracted battling, a considerable sum of compensation was paid. Again I think Mr. Senter is justly entitled to say that the sum of money was received as though it had been the proceeds of a sale. The compulsory acquisition was treated for the purposes in hand as analogous to a sale. But the point of my reference to the *Newcastle Breweries* case [4] is to show that the circumstance in the *Gliksten* case [5] that insurance was a natural business operation cannot have been vital, since it could not possibly be suggested that the result of Government compulsory acquisition of your stock-in-trade could have been part of the contemplated business transactions of the Newcastle Brewery Company.

It seems to me that the effect of those two cases supports the view which has been fundamental to the Crown's argument,

[3] [1929] A.C. 381.
[4] 12 T.C. 927.
[5] [1929] A.C. 381.

namely, that where a trader is dealing in any kind of commodity and where for any reason part of that stock-in-trade, part of the commodity, disappears or is compulsorily taken or is lost, and is replaced by a sum of cash by way of price or compensation, then, prima facie, that sum of cash will be, and should be, taken into the account of profits or gains arising or accruing to the trader from his trade.

So far I have not departed at all from the conclusion of Upjohn J. In the course of his judgment he recited passages from those cases, and, indeed, from others; and I think there is nothing in what I have said which in any way runs counter to the views which the judge expressed. But he then (and I am reading from p. 10 of the transcript of his judgment) said this [6]: "It seems to me, with all respect to Mr. Cross's argument that his broad proposition that, whenever trading stock is turned into money it is a trading receipt, is too wide. In each case, one must take account of the circumstances. The question to be answered is whether the particular receipt has to be brought into account in computing the profits or gains. There is no doubt that the value payment is in a sense a realization, and the case no doubt bears a marked resemblance to the *Gliksten* [7] and *Newcastle Breweries* [8] cases." I agree that, although as a general rule, prima facie, the result is as I have tried to state it, it would be too wide to say that if in respect of his business property a trader receives any money, that is necessarily a trading receipt. That may well be too wide.

In his reply Mr. Senter referred us to what was said by Lord Warrington of Clyffe in his speech in the House of Lords in *Inland Revenue Commissioners* v. *Scottish Central Electric Power Co.*[9] He said [10]: "It is, I think, clear that not every sum expended by an owner of land occupied by him for the purposes of his trade can be regarded as wholly and exclusively laid out for such purposes." Then he cites certain authorities, and then the Lord continues: "Moreover, the recent decision in this house in *Fry* v. *Salisbury House Estates Ltd.*[10] throws considerable light on the question. In that case receipts consisting of rents received by a company, owner of a large building of flats, were excluded from the computation of profits and gains of a business carried on in connection with the same premises on the ground that they were received by the company in their capacity as landowners and not as traders."

The facts in *Fry* v. *Salisbury House Estates Ltd.*[10] so far as material were these. The taxpayer company owned the considerable edifice known as Salisbury House. They carried on upon and in respect of those premises a trade or business of providing services to the people to whom they sublet parts of the building,

[6] [1956] 1 W.L.R. 858, 872.
[7] [1929] A.C. 381.
[8] 12 T.C. 927.
[9] (1930) 15 T.C. 761, 780.
[10] (1930) 46 T.L.R. 336.

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and out of the supply of those services they made profits for which they were taxed under Schedule D. But as regards the premises themselves they were taxed or had been taxed under Schedule A. Their lettings of the rooms or offices in the building were not part of their business. That is to say, they were not carrying on the business of letting and managing flats. The Crown sought to tax them under Schedule D in respect of the profits made from such lettings, submitting to deduct what the taxpayer company had paid, or what they were liable to pay, under Schedule A. The Crown's claim failed, on the ground that the business for which they were taxed under Schedule D did not comprehend the business or trade of letting flats, so as to justify an assessment in respect of that business under Schedule D. So much I think appears quite plainly from the speech (which I take, for example) of Lord Tomlin.[11] "The sole "question," said he, "upon which the opinion of the court was "desired by the Special Commissioners was whether the rents "received by the respondents on letting the offices in Salisbury "House were properly to be included in the assessments as trade "receipts of the respondents for the purposes of Case I of "Schedule D of the Income Tax Act, 1918. Rowlatt J. appar-"ently took the view that the respondents were carrying on a "trade in the nature of a hotel business and that the assessments "were rightly made. The Court of Appeal however rejected "this view of the case and in substance held that a landowner "who happens to make taxable profits by rendering certain "services to his tenants"—that is, by providing them with services, heating, lifts and the rest of it—"cannot for that "reason be treated as carrying on a trade in respect of the "receipt of rents so as to be chargeable with income-tax under "Schedule D upon the excess of the actual rents over the annual "assessments to tax under Schedule A."

We were referred in the course of the very interesting arguments to *Crook* v. *Seaham Harbour Dock Co.*,[12] and I can quite well conceive that if the Government were to make to all land owners certain payments for the purpose of their being used for some specific purpose, say to make some particular construction in relief of unemployment, it would by no means necessarily follow that, because the premises of A were A's stock in trade, therefore the payments in the case I am supposing were to be brought into account as part of the profits of that trade. In other words, I am content to accept from Mr. Senter the proposition that it is not a necessary conclusion in every case that one who is a land owner and carries on property dealings with the property he owns is necessarily and inevitably to be required to bring into account for tax purposes under Schedule D every sum of money which he may receive as land owner.

But I have already indicated that it is with the conclusion

[11] 46 T.L.R. 336, 343.

[12] (1931) 48 T.L.R. 91; 16 T.C. 333.

from that premise that I find myself at variance with the judge and the argument of Mr. Senter. I go back at this stage to what the judge says,[13] and I pick up the judgment where I left it. "But, as I say, I have to consider the nature of the receipt "having regard to the War Damage Act. We start, then, with "this. There is nothing in the nature of a premium here. A "capital payment has to be made in five instalments, and it is "to be made by the owner of every acre of land in England "and Wales. It seems to me quite clear on the construction "of section 28, that, if and when a payment is received, no part "of that payment, even if it be expended in restoring the "property to its former state, can be brought into account when "the property is sold and the net profit is realized as it otherwise "admittedly would have been apart from the section. I think "those two factors are indications that the legislature was not "considering the trading aspect of the matter at all, but was "imposing on an owner of land throughout the country the "obligation to contribute, with the corresponding benefit, if "disaster happened, of receiving a sum of money, a value pay-"ment. I think the legislature considered that that would be "altogether outside the area of trading operations. It would be "very remarkable, as Lord Atkin pointed out in the *Seaham* "*Harbour* case,[14] if half of this money, which was plainly "intended to be applied in rehabilitating the property . . ."—an observation which with all respect I venture to doubt—" . . . "should be instantly taken away in tax. I think Parliament did "not intend that result."

It will be apparent from the passage which I have read that the judge reached his conclusion from the effect which he got from the war damage legislation. So far, as a general matter, I do not at all disagree. Apart from the Acts, the judge is saying that the result would no doubt be otherwise; but the import of the Acts gives this stamp to the war damage value payments in the hands of the recipient. I must therefore now turn to the war damage legislation itself, but I preface with this general observation what I shall say about it. It is, of course, quite true, as Mr. Senter says, and the argument is echoed by the judge, that a company contributed to the war damage scheme qua land owner and received the value payment as land owner; but to say that is not at all, as I venture to think, to answer the question. I quite agree that the persons to whom the payments are to be made are land owners. The question on what terms and in what capacity they hold it when they have got it is a matter, prima facie, with which the War Damage Commission is in no way concerned.

During the course of the argument illustrations were taken of cases where the land owners were trustees. The obligations of trustees in regard to value payments, when they receive them,

[13] [1956] 1 W.L.R. 858, 873. [14] 48 T.L.R. 91.

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would depend not at all upon the war damage legislation but upon the terms of the trusts under which the trustees held. But still it is no doubt plainly competent for Parliament in the legislation to provide that for all purposes these sums are capital, whatever the ordinary implications of the land owners' circumstances might otherwise be.

The principal Act for the present purpose is the Act of 1943. I shall not traverse it at any length. Our attention was directed to a number of sections, but it will suffice for present purposes (though I hope it will not be assumed that I have wholly neglected to apprehend the points made upon the other sections) just to refer to section 66 (1) which provides: "Contributions "made and indemnities given under this Part of this Act shall "be treated for all purposes as outgoings of a capital nature"; from which it follows, as I fully agree and as the judge said, that the contributions paid over a period of years were capital outgoings so far as the company was concerned and had to be treated as such in its accounts.

Section 113 of the Act of 1943 dealt with expenses and other matters, but it has been replaced by section 28 of the Act of 1949 upon which, as will be recalled from the judge's judgment, the real basis of the argument for the taxpayer is founded. I turn, therefore, to section 28 of the Act of 1949. Subsection (1): "In computing the amount of the profits or gains, or of "the income from any source, of any person for any purpose "of the Income Tax Acts . . ."—and then there is a reference to profits tax—" . . . no sum shall be deducted in respect of "any payment or expenditure to which this section applies." Subsection (4): "Expenditure to which this section applies is— "(*a*) any expenditure on repairing or otherwise making good "war damage to land in so far as any person has received or "is entitled to a payment in respect of the damage by virtue "of any of the provisions of the principal Act"—that is the War Damage Act, 1943—"(whether alone or as applied or modified "by or under any provision of this Act) . . . ," and then there follows certain language relating to goods damaged by enemy action. Subsection (5) makes the preceding provisions of the section retrospective.

Subsection (6): "Where before the passing of this Act the "liability of any person in respect of income tax or excess "profits tax or in respect of profits tax . . . has been reduced, "or any person has been repaid any amount in respect thereof, "by reason of the deduction or inclusion of any sum which "under the provisions of subsection (1) . . . of this section "would not have fallen to be deducted or included, the amount "by which his liability has been so reduced . . . shall be "recoverable, . . ." Now it is, I think, tolerably plain that the compendious terms of the section or of the subsections apply, and in terms are intended to apply not only to private persons who might be affected as regards their liability under Schedule A

but also to traders; and I think it is plain that subsection (4) is expressly so phrased as to apply, at least among other cases, to property dealers.

That has been strongly relied upon by Mr. Senter in this fashion. He says that first of all section 66 of the Act of 1943 had made what one might call a "premium payment" capital. This section, section 28 of the 1949 Act, comes in to prevent the recipient, the contributor, including the property dealer, who has receved a war damage payment whether by way of a cost of works or value payment, from making any deduction for income tax purposes for the expense of restoration to the extent that he receives war damage payments in respect of the property restored. So is produced undoubtedly, on the Crown's view, the anomalous, if not unjust, result which I mentioned at the beginning of this judgment. And, says Mr. Senter, it is impossible sensibly to read this provision save on the assumption that Parliament is treating throughout all the payments made either into or out of the war damage fund as capital payments from whomsoever or into whosesoever's hands they come. That, of course, is a forcible argument, and it is at the very least tempting to suppose that Parliament, if it gave its mind to this matter at all, was assuming that in the hands of the recipient, whatever his circumstances might be, whether he was a private owner, whether he was a manufacturer whose principal capital asset, a factory, was damaged, or whether he was a property dealer, in every case the sums received would be capital sums. My difficulty is that Parliament has not said so.

What is worse to my mind is that this section, as Sir Reginald Hills observed in the course of his address to the court, and as Mr. Cross emphasized in his reply, is a section which is in terms directed to a modification of the ordinary fiscal results, which would otherwise be applicable to these war damage contributions and payments. The section is, as Sir Reginald pointed out, in effect an addition or a modification to the fiscal code. By providing that the expenditure mentioned in subsection (4) should not be deducted for income tax purposes, it is accepting the proposition that, were it not for the subsection, such would be an ordinary fiscal consequence in such a case as that with which we are dealing. Parliament has said that, notwithstanding the prima facie result, this other result will apply. But, unhappily, it has forborne to go on to say "and any sums "received by a property dealer or by any trader in respect of "loss of stock shall in his hands not be brought in as part of his "profit or gains but shall be capital." Where Parliament has directed its attention expressly and specifically to the fiscal results of the legislation, but has made no provision for dealing with the ordinary prima facie results in any particular respect, then it seems to me that the court cannot proceed to say that it intended so to do or that the implication of the Act is such that we must interpret it as though it did.

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I earlier said that I felt compelled to this conclusion with some reluctance, but once the proposition is accepted that prima facie receipts of this kind (which represent what has been lost by destruction of stock in trade) are themselves properly profits or gains arising to the trader from his business, then, unless there is something in the Act with which we are here concerned, which impresses those payments with some other characteristic. I think the court is unable to do so by way of implication.

I venture to repeat that, if this was an ordinary insurance case, it could not be doubted that the sums received from the insurers by way of compensation for the loss of the property insured would be annual profits or gains. The general character of the war damage legislation is to provide through the State, and by a scheme for which the Act has provided, the equivalent of insurance money; and although it has in certain respects expressly and specifically modified what would otherwise be the fiscal conclusions of the scheme, it has upon this matter remained silent. I have felt accordingly unable to extract from section 28 in particular, and from the legislation in general, so extensive an implication as that which appealed to the judge.

For those reasons I think this appeal must be allowed.

BIRKETT L.J. I am of the same opinion. I must say I feel a little diffident in adding anything at all to the judgment which has just been delivered by the Master of the Rolls, but in view of the argument which has been presented to us in this court, and the decision of Upjohn J., I add a few words of my own.

This happens to be one of those cases where, whatever the decision may be, someone will be entitled to say that it causes an injustice in this particular direction or the other. It is not always possible to arrive at a result which wipes out all anomalies, particularly in matters relating to taxation. But my Lord has dealt with the anomalies which arise and the arguments which have been addressed to us both by Mr. Cross and by Mr. Senter on that topic.

I think the essential point always to be kept in mind is that the company in this case were dealers in property. In the case stated it is put in this way: "The appellant company is a "property dealing company." Then it goes on to relate certain of their trade transactions during the war, and the receipt of the value payments to which my Lord the Master of the Rolls has already referred and to which I need not refer again.

This is also stated quite plainly in the case stated [15]: "The "question for determination in this appeal is whether value pay-"ments arising under the provisions of the War Damage Acts, "1941, and 1943, and paid to the appellant company, who carry "on the trade of property dealing, are receipts of the appellant "company's trade to be brought into account in computing the

[15] [1956] 1 W.L.R. 858.

"balance of profits and gains of the appellant company for "taxation purposes. . . ."

During the last few days the whole of the controversy has ranged round that point. Upjohn J., in this most careful judgment, reviewing all the arguments and the cases, put the whole matter in one simple, single sentence when he said of the value payment [16]: "It was a contribution made and a payment received "by the taxpayer, not as a part of his trading operations at all, "but because he was compelled under the war damage scheme "to make payments with the corresponding right of receiving the "benefit in his capacity, not as a trader, but as an owner of "the land." Whilst it would not be right to say that Mr. Senter had concentrated wholly on this one point, because he had many, it is perfectly plain that this was the most important point. "I cannot deny," said Mr. Senter, "that my company trades "in properties. It is plain on the face of it; but merely because "it does that, and merely because it receives a value payment, "that does not of necessity bring it within the charging sections," to which he referred us.

I quite agree with what my Lord the Master of the Rolls said. I can quite conceive of a land owner, who is also a trader, receiving payments, which are not payments which are to be brought in as trading receipts accruing to the business. The point in this case, as put in the summary of Mr. Senter's argument with which he supplied us, is this: "Is the value pay-"ment a trade receipt arising in the course of carrying on a trade "in the ordinary way?" To that he makes the answer, "No."

He did not receive the value payment in his capacity as a trader at all; he received it, as everybody else in the country received it, because he was compelled to pay the five instalments under the Act. They were instalments of a capital nature, and he was entitled in the case of property which was damaged, to the value payment which the Act prescribed and laid down. Indeed, at the conclusion of Mr. Senter's argument, when he summarized for our benefit the points which he endeavoured to support, this point again loomed large. He said: "The source "of the payment to the land owner in this case is his statutory "right under the Act of Parliament; it is not a source of profit "from trading activities. The land owner is not allowed to deduct "the premiums paid under the War Damage Act by section 66 "of the Act of 1943, and the whole scheme of that Act and the "Act of 1949 indicates that the payments which he receives "because of those capital premiums are not to be regarded at "all in the light of trade receipts but they are received by him "in his capacity as a land owner. All persons were compelled "to make the payments, and as Upjohn J., recognizing the "strength of the argument which was put, said [16]: 'We start, "'then, with this. There is nothing in the nature of a premium

[16] [1956] 1 W.L.R. 858, 873.

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"'here. A capital payment has to be made in five instalments, "'and it is to be made by the owner of every acre of land in "'England and Wales. It seems to me quite clear on the "'construction of section 28 that, if and when a payment is "'received, no part of that payment, even if it be expended in "'restoring the property to its former state, can be brought into "'account when the property is sold and the net property is "'realized as it otherwise admittedly would have been apart "'from the section.'" Then he deals with the trading aspect.

Now, on that contention, Mr. Senter is saying: "This is "received not as a trader at all. It is quite wrong to consider "a value payment in that capacity, even though it does so "happen that the company I represent admittedly trades in "property and in land. That factor must be entirely disregarded, "and you must consider the company exactly as you consider "any other land owner who was not a trader and who was com-"pelled, as this company was compelled, to pay the five sums "and to receive the statutory benefit in case their property was "damaged." That is the argument.

As against that it was said: "You cannot ignore the fact "that the company in this case was in fact trading in property. "It makes the whole distinction." When the circumstances of the case are considered, it is said by the Crown: "This is a value "payment. You cannot really divorce this value payment from "the ordinary trading of the company."

Reliance was placed upon two cases which it is not necessary to cite again: *J. Gliksten & Son* v. *Green*,[17] the case of the timber, and the *Newcastle Brewery* case,[18] the case of the rum. Mr. Senter attempted to show that those cases really did not affect the point in this case, and primarily I think for this reason. So far as the *Gliksten* case[19] was concerned it would appear that both in the court below and in this court he was contending that it was because of the payment of the insurance premiums that the money came, and that it was not a trading receipt in the ordinary sense at all. Nevertheless what really happened in that case may be put as simply as this: the traders' stock of timber, through no wish of theirs or through no fault of theirs, was transformed into money; and the effect was the same as though they had in fact sold it; and therefore it must be brought into account.

Similarly, with regard to the rum, the case which went all the way to the House of Lords. The point taken there was that this rum had not been treated as being sold in the ordinary course of trade; it was requisitioned. But there again the decision in simple language came to this: You had rum which was part of your stock in trade, in its natural state if you wish; but if you had sold it in that condition and received cash for it you would admittedly have had to bring that into your trading accounts. What

[17] [1929] A.C. 381.
[18] 12 T.C. 927.
[19] [1929] A.C. 381.

happened was that by this elaborate process of requisitioning you had the rum taken out of your possession, and in its place you had a sum of money; and you must bring that into account.

I think, despite all the valiant efforts which Mr. Senter made, those two cases are really very strong authorities in this case. My Lord has covered every point, and my own conclusion is that I can find nothing, either in section 66 of the Act of 1943 or in section 28 of the Act of 1949, upon which reliance was placed, which takes this value payment out of the category of a trading receipt properly falling within the charging section and puts it into some other category. For those reasons I agree that this appeal ought to be allowed.

ROMER L.J. I agree, and I only wish to add a very few words because we are differing from Upjohn J., who has considerable experience of tax matters, and to whose judgments one always and naturally attributes considerable weight. I think there is only one point really on which we do differ from him. Where a trader sells or disposes of part of his circulating capital it is a well settled principle that the proceeds, for tax purposes, are treated as a trading receipt, and it is not confined to cases where the circulating capital, be it timber or other property, is actually sold, because, as Lord Reid said in the case of *John Hudson & Co. Ltd.* v. *Kirkness* (*Inspector of Taxes*)[20] "A sum may well "be a trading receipt although it does not come to the trader as "the price of goods sold." The *Gliksten* case[21] was not a case of a sale but a case of a loss of circulative capital, which was timber, by fire; and it was there held that the insurance money which was recovered was to be treated as a trade receipt. Nor is it relevant that the transaction, which led to the loss or the disposal of the asset, is a compulsory transaction enforced upon the owner; that sufficiently appears from the *Newcastle Brewery* case.[22]

I myself feel little doubt that the analogy of those cases is close enough for the application of the principle to a case such as the present, where property forming part of the trading company's circulating capital was lost or destroyed as a result of war damage and was compensated for by a payment under the War Damage Act of what is called a "value payment." So far I have no reason to suppose that Upjohn J. took a different view.

Mr. Senter, without I think going so far as to concede the applicability of the *Gliksten* case[23] principle to the present case, from a prima facie point of view, said: "In any case, if you look "at the War Damage Act, the whole structure and the scheme "of the Act, and in particular at section 66 of the Act of 1943 "and section 28 of the Act of 1949, it becomes clear that it was "the intention of Parliament that 'value payments' should be "capital and nothing else."

[20] 36 T.C. 28, 74.
[21] [1929] A.C. 381.
[22] 12 T.C. 927.
[23] [1929] A.C. 381.

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Following from that premise Mr. Senter said that there is a dichotomy of character in which this company may have received a value payment, and if in one character the money in their hands would be capital and in the other character it would be income, then in conformity with the intention of the Act they are to be taken as receiving that payment in the character which would enable the payment to preserve its capital nature. In other words, they must be taken to have received the money in the character of property owners and not as traders.

Then he proceeded to say, as has already been pointed out by my brethren, that the source of the company's right to receive these value payments was not to be found in the fact that they were traders; it was to be found solely in the fact that they were owners of property upon whom had been imposed an obligation to pay capital instalments, so that, if a certain contingency happened, which it did, they would receive a payment under the Act; and that neither that payment had anything whatever to do nor had the contributions which they paid anything whatever to do with the fact that they were traders. They were solely referable to their position as property owners, and as such were brought within the provisions of the Act both as to contributions and as to payments.

He then pointed out that it was quite a different thing from a voluntary insurance under which the company would pay premiums out of revenue and would be entitled to bring them in as deductions from their taxable profits.

He finally pointed out that the amounts of the instalments they paid as contributions had no reference, apart altogether from being capital payments, to trading receipts or the trading position at all. They simply paid on the basis of the Schedule A valuation of the property.

That is an attractive way of presenting the case, especially when one bears in mind that hardship falls upon the traders in some circumstances if the Crown's contention is right, hardships to which the Master of the Rolls has referred, but I do not think myself that the argument, although it commended itself to the judge, is one which can really be accepted.

Of course, generally speaking, it is perfectly true to say that value payments made under the Act would be, in the hands of the recipients, capital. For example, if they were paid to trustees of a settlement, to trustees who held property under a trust for sale, then, as between the tenant for life (unless there was some unexpected and unusual provision in the settlement) and the remaindermen, the sums in the hands of the trustees would be capital and not income, and more especially having regard to the fact that the contributions had been paid out of corpus.

It seems to me that the answer really to Mr. Senter's way of putting the case is that there is no sufficient indication in the Acts that Parliament intended the value payments to be capital in the hands of the recipients, whoever the recipients

might be. The truth is, as I think, that Parliament was not concerned with the fate of the payments after they had been received. If they were paid to trustees, that was the end of the matter so far as the War Damage Commission was concerned. In such a case one looks at the terms of the trust, and one finds that the capital sums have to be dealt with in accordance with the provisions thereof. So also, in my judgment, if they are paid to a company in respect of the loss of part of the company's circulating capital, they are to be treated as such and dealt with as such in the hands of the recipients. I do not think there is any room or justification to be found in the Act for this suggested dichotomy of which Mr. Senter spoke. As the Master of the Rolls has pointed out, section 28 of the Act of 1949, which is expressly directed to the fiscal aspect of the matter, makes no mention of this point at all, although it was manifestly directed to the position of people in trade.

That is all I wish to say on the matter, except with regard to the suggested harshness, indeed not only the suggested but the actual harshness, in cases where a company such as the present applies a value payment towards restoring the damaged property. They are, of course, in a worse position than a private individual, or a company which has received a payment in respect of a loss of fixed capital as distinct from circulating. On the other hand, there is the very important consideration to which the Master of the Rolls has referred, that a trading company such as the present company which loses a valuable item of circulating capital by war damage in any given year could, according to accepted practice, deduct the value of that property from its taxable profits for that year, which no individual could do, and which no company could do which suffered a loss of some house or property which formed part of its fixed capital. That consideration does, to some extent at all events, mitigate the undoubted harshness of the result for which the Crown is contending.

Finally, although I have every sympathy with the gallant endeavour which the Special Commissioners made to put the matter right from an equitable point of view, there is no justification or warrant for introducing words into a taxing statute which are not there, that being a matter for the legislature, and not for this court, which can only take the language as it finds it and put such interpretation as it thinks right upon that. For those reasons I agree that the appeal should be allowed.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; R. C. Bartlett & Co.*

B. A. B.

[HOUSE OF LORDS.]

H. L. (E.)† 1956 Oct. 31; Nov. 1; Dec. 5.

* FAIRCLOUGH, DODD & JONES LTD. . APPELLANTS;

AND

J. H. VANTOL LTD. . . . . RESPONDENTS.

Sale of goods—C.I.F.—Cancelling clause—Prevention of shipment—Prohibition of export—Extension of shipping time "by two "months"—When operative—London Oil and Tallow Trades Association, Form 5A.

Commercial Court—Practice—Declaratory judgment—Value of.

A written contract dated November 27, 1950, for the sale of 100 tons of Egyptian washed cottonseed oil to be shipped during the months of December, 1950/January, 1951, from Alexandria at a price of £146 10s. a ton c.i.f. Rotterdam contained the following clause: "Should the shipment be delayed by . . . prohibition of "export . . . or any other cause comprehended in the term force "majeure . . . the time of shipment shall be extended by two "months. Should the delay exceed two months, buyers shall have "the option of cancelling the contract forthwith or accepting the "goods for shipment as soon as possible . . . The option to be "declared as soon as shippers announce their inability to ship . . ."

The sellers had previously purchased 200 tons of the commodity from suppliers in Egypt, who held a valid but withdrawable export licence from the Egyptian Government. On December 19, 1950, the export of all cottonseed oil was prohibited by the Egyptian Government. On January 3, 1951, the licence granted to the suppliers was renewed. On February 17 the export of cottonseed oil was again prohibited and the prohibition continued until the end of April. On February 22 the sellers notified the buyers of the prohibition. The buyers contended that the sellers were in default and claimed damages:—

Held, that the words "shipment be delayed," giving rise to the extension of time by two months, should not be construed as "shipment by the contract date be prevented" and accordingly, on the facts of this case, the sellers had the benefit of the extension and were not in default.

Decision of the Court of Appeal [1955] 1 W.L.R. 1302; [1955] 3 All E.R. 750 reversed.

APPEAL from the Court of Appeal (Singleton, Jenkins and Parker L.JJ.).

This was an appeal from an order of the Court of Appeal dated November 24, 1955, reversing an order of McNair J. dated May 5, 1955, on an award in the form of a special case stated for the decision of the court by the Board of Appeal of the London Oil and Tallow Trades Association and dated March 15, 1955. The award found that the imposition of a prohibition on export on December 12, 1950, operated to give the appellants, Fairclough, Dodd & Jones Ltd., an extension of two months in which to ship goods under their contract with the respondents.

† *Present*: VISCOUNT SIMONDS, LORD GODDARD, LORD MORTON OF HENRYTON, LORD TUCKER and LORD SOMERVELL OF HARROW.

J. H. Vantol Ltd., and thereby upheld the award of the umpire, Mr. A. O. Howard, dated February 4, 1953, that the respondents had no claim against the appellants. The order of McNair J. affirmed the findings of the Board of Appeal that the appellants had a further two months in which to ship the contract goods. The order of the Court of Appeal reversed the finding of McNair J., the Board of Appeal and the umpire and affirmed the alternative award in favour of the respondents for £6,150 damages and certain costs. The Court of Appeal gave leave to appeal to the House of Lords.

The facts are fully set out in the opinion of Lord Tucker.

Thomas Roche Q.C. and *Andrew Bateson* for the appellant company.

Alan Mocatta Q.C. and *John Donaldson* for the respondent company.

The following cases were cited in argument: *E. Clemens Horst Co.* v. *Biddell Brothers*[1]; *Johnson* v. *Taylor Brothers & Co. Ltd.*[2]; *Ross T. Smyth & Co. Ltd. (Liverpool)* v. *W. N. Lindsay Ltd. (Leith)*[3]; *Geipel* v. *Smith*[4]; *Bowes* v. *Shand*[5]; *Medway Oil & Storage Co. Ltd.* v. *Russian Oil Products Ltd.*[6]; *Tennants (Lancashire) Ltd.* v. *C. S. Wilson & Co. Ltd.*[7]

Their Lordships took time for consideration.

December 5. VISCOUNT SIMONDS. My Lords, I have had the privilege of reading the opinion which my noble and learned friend, Lord Tucker, is about to deliver, and agree so fully with his reasoning and conclusions that I do not find it necessary to add to it. I would, however, express in particular my concurrence in his final observations. Where the substantial issue between the parties raises a question of law of general importance such as the construction of a commercial instrument in common use, which must to the knowledge of the parties ultimately be determined by a court of law, it is difficult to see what advantage is to be gained by pursuing the tortuous and expensive course of arbitration and then a statement of a special case. The comments of the learned judge who tried the case will, I hope, receive the attention that they deserve. In accordance with the opinion of my noble and learned friend I would allow the appeal with costs here and below.

LORD GODDARD. My Lords, the facts relating to this appeal are set out in the opinion about to be read by my noble and learned friend, Lord Tucker, and I need not recapitulate them.

[1] [1912] A.C. 18; 28 T.L.R. 42.
[2] [1920] A.C. 144; 36 T.L.R. 62.
[3] [1953] 1 W.L.R. 1280; [1953] 2 All E.R. 1064.
[4] (1872) L.R. 7 Q.B. 404.
[5] (1877) 2 App.Cas. 455.
[6] (1931) 40 Ll.L.Rep. 90, 93–94; 47 T.L.R. 402.
[7] [1917] A.C. 495; 33 T.L.R. 454.

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The question that falls for decision depends, in my opinion, entirely on the true construction of the opening sentence of clause 11.B of the contract under consideration. While this is a matter on which opinions may well differ, I prefer the construction placed on it by McNair J. to that which the Court of Appeal adopted. It is, I think, most material that clause 11.A, which deals with the event of war, uses the words "preventing the "shipment," while 11.B enumerates events which may "delay "the shipment." Effect must be given to this difference, and clause 11.B should be regarded as dealing with matters which it is contemplated will cause a temporary hindrance but are unlikely to frustrate the contract. In my opinion the true construction of the clause is that on one of the enumerated events happening during the period prescribed for shipment that period is automatically extended by two months and the shipper can avail himself of that extension or as much of it as he requires. Like McNair J. I see nothing unreasonable in this. The association which provides this form of contract for common use in the trade presumably knows the time that would or at least might be required to make alternative arrangements once the shipment is delayed by one of the enumerated causes. Commercial men may well prefer that the contract should provide for a definite period of extension rather than leave it to be decided in each case as it occurs what extension should be allowed. I would allow the appeal. I am glad that the learned judge pointed out that the lengthy period it has taken to reach a final decision in this matter is in no way the fault of the courts.

LORD MORTON OF HENRYTON. My Lords, the facts of this case are fully stated in the speech which is about to be delivered by my noble and learned friend, Lord Tucker. I agree with that speech, but out of respect for the Court of Appeal I shall state briefly, in my own words, why I differ from the conclusion reached by that court.

I have not found it at all easy to construe clause 11.B of the contract of November 27, 1950, but I have formed the view that in the present case the shipment was "delayed" within the meaning of that clause. Accordingly, the time of shipment was extended for two months and the sellers (the appellants) were never in default.

As I read the special case, and especially paragraph 44 (6), the sellers satisfied the Board of Appeal that the goods would have been shipped on board the ss. *Mentor* on or about December 20, 1950, if the export of cottonseed oil had not been prohibited by the Egyptian Government on December 12. The goods could not be so shipped by reason of the prohibition, and the vessel sailed without them. Thus, the shipment was undoubtedly "delayed" in one sense, because this specific arrangement for shipping the goods had to be abandoned. Counsel for the buyers, however, contended that "the shipment"

is not "delayed" within the meaning of the first sentence of clause 11.B unless the cause of delay continues to operate up to the end of the contract period, that is, in the present case, up to January 31, 1951.

My Lords, I fully realize that there is weight in this argument, which is, to some extent, supported by the immediately succeeding sentences of clause 11.B, but I have come to the conclusion that the argument fails. It involves, to my mind, the insertion by implication of some such words as "within the "contract period" after the word "shipment"; but if these words were inserted, the word "delayed" would be quite inappropriate. The appropriate word would be "prevented." There is, however, a marked contrast between the use of the words "in the event of war, hostilities or blockade *preventing* "shipment" in clause 11.A and the words "Should the ship-"ment be *delayed* by . . . prohibition of export" in clause 11.B. The former clause, as I read it, applies to a case where shipment remains impossible up to the end of the contract period, while the latter clause applies to a case in which shipment is delayed for a period, whether or not the cause of delay persists throughout the contract period. The submission of counsel for the buyers would give the same effect to two strongly contrasted phrases.

I think that the prohibition imposed on December 12, 1950, did "delay the shipment," in the ordinary meaning of these words, and the considerations which I have just mentioned outweigh, to my mind, the arguments put forward by counsel for the buyers.

It was pointed out by counsel for the buyers that a decision in favour of the sellers would lead to the result that if (for instance) the sellers had arranged to ship the goods in the first week of December, and the prohibition of export had operated for that week and had then been lifted, the sellers would be entitled to an extension of two months. This, they submitted, was a wholly unreasonable result. It would certainly appear to be more logical to give only an extension equal in length to the period of delay, but it must be borne in mind that clause 11.B is a printed clause forming part of Form 5a issued by the London Oil and Tallow Trades Association, which might be used for a large number of transactions differing widely in the length of the contract period. I would say, in the words of McNair J.[1]: "I am by no means satisfied that such a result would be "unreasonable as I can well imagine that the parties familiar with "the trade who drew up this contract—which it is to be "remembered may provide for a period of shipment extending "over many months—may have taken the view that such an "extension would afford a reasonable time to make alternative "arrangements."

[1] [1955] 1 W.L.R. 642, 646–647; [1955] 2 All E.R. 516.

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My Lords, Singleton L.J. said that he arrived at his conclusion after considerable hesitation. I can say the same.

I would allow the appeal and restore the order of McNair J.

LORD TUCKER. My Lords, the only question in the present appeal is the meaning of the words "Should the shipment be "delayed by . . . prohibition of export . . . the time of shipment "shall be extended by two months" appearing in a c.i.f. contract for sale of Egyptian washed cottonseed oil.

The contract in question was dated November 27, 1950, and made between the appellants (hereinafter called "the sellers") and the respondents (hereinafter called "the buyers") for the sale of 100 tons washed cottonseed oil to be shipped during the months of December, 1950/January, 1951, from Alexandria at £146 10s. 0d. per ton of 2,240 lb. c.i.f. to Rotterdam.

The contract was in the standard form of the London Oil and Tallow Trades Association for oriental oils c.i.f. terms continental. This form has been in use for a number of years during which time the courts do not appear to have been called upon to pronounce on the meaning of the words now in question.

The contract contained the following clauses which must be set out in full:—

"2. Particulars of shipment, with date of bill or bills of "lading, marks and numbers of drums (if any) to be duly "declared by the original seller in writing with due dispatch, "but not later than 42 days from the date of the bill of lading."

"11.A. In the event of war, hostilities or blockade preventing "shipment this contract or any unfulfilled part thereof shall be "cancelled If required sellers must produce proof to justify "cancellation."

"11.B. Should the shipment be delayed by fire, strikes, lock-"outs, prohibition of export, riots, or revolution, or any other "cause comprehended in the term force majeure other than "war, hostilities, blockade, the time of shipment shall be "extended by two months. Should the delay exceed two "months, buyers shall have the option of cancelling the contract "forthwith or accepting the goods for shipment as soon as "possible, but should the shipment not be possible within eight "months from the date of shipment originally stipulated, con-"tract to be void. The option to be declared as soon as shippers "announce their inability to ship within the extended period "of two months, a reasonable time being allowed for passing "on such announcements. Should buyers fail to exercise their "option in due time, contract to be void. If required sellers "must produce proof to justify their claim for cancellation or "extension."

The facts so far as now material are set out in the award in the form of a Special Case of the Appeals Committee of the London Oil and Tallow Trades Association and are as follows. On September 27, 1950, the Egyptian Salt and Soda Co. Ltd.

(hereinafter called "the suppliers") obtained a licence from the Egyptian authorities to export at least 200 tons of cottonseed oil. The licence was valid until December 26, 1950, subject to withdrawal at any time. On November 10, 1950, the sellers purchased 200 tons of cottonseed oil from the suppliers. This contract provided for 100 tons to be shipped during December and 100 tons during December/January. The terms were for shipment f.o.b. Alexandria, freight to be provided by the buyer for shipment to Rotterdam. On the same day the sellers sold or agreed to sell 100 tons to the Irish Oil and Cake Mills Ltd. c.i.f. Rotterdam, to be ready for shipment the first half of December and to be shipped by the first available steamer. On November 27 the sellers entered into the contract now in question. On December 12 the Egyptian Government imposed a ban on export of cottonseed oil which extended to include holders of existing licences. On December 14 the suppliers informed the sellers of their present inability to ship. The suppliers had previously arranged to ship these 200 tons by the ss. *Mentor*, due to load on December 20. On January 3, 1951, the suppliers succeeded in getting their licence renewed for a period of three months. The suppliers intended shipping the first 100 tons by the end of January and the balance during February, and on January 30 they shipped 100 tons under their contract with the sellers and the sellers appropriated that 100 tons to their contract with the Irish Oil and Cake Mills Ltd. On February 17 the ban on export was reimposed and remained in force until the end of April. The award further found that goods of the contract description and quantity were available for shipment between January 4 and 31, 1951.

By letter dated March 2, 1951, the buyers repudiated the contract on the ground of non-delivery by January 31, 1951.

The position, therefore, was that the ban was in force from December 12 to January 3, during which period the shipment intended to be made by the ss. *Mentor* was not possible, and accordingly the sellers contended that the shipment had been delayed with the result that they were entitled to the two months' extension provided by clause 11.B and the buyers had wrongfully repudiated before the expiration of the extended period. The buyers, on the other hand, contended that the extension clause only applies if for one of the specified causes the sellers are unable to ship until a date later than January 31, 1951. They say that in the absence of a finding that in consequence of the ban on export of December 12, 1950, shipment was impossible thereafter up to January 31, 1951, the extension clause will not avail the sellers.

The umpire in the arbitration and the Appeals Committee (subject to the case stated) decided in favour of the sellers. Their decision was upheld by McNair J. in the Commercial Court, but reversed on appeal by the Court of Appeal.

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McNair J., in dealing with the contention that the construction relied on by the sellers would lead to a wholly unreasonable result in that a week's delay in shipment early in December would result in two months' extension even if shipment was easily procurable for the remainder of the period, said he was by no means satisfied that such a result would be unreasonable, adding that he could well imagine the parties familiar with the trade who drew up this form of contract may have taken the view that such an extension would afford reasonable time to make alternative arrangements. Dealing with the argument that the words "Should the delay exceed two months" point to the conclusion that the clause contemplates a delay which initially continues throughout the remaining part of the contract period, he expressed the view [2] that on either construction effect cannot be given to these words according to their literal and grammatical meaning, but should be regarded as equivalent to "if the "cause of delay continues to operate during the two months by "which the period of shipment has been extended." He held there was no justification for reading into the first sentence of the paragraph the words "during that part of the contract "period which remains after the cause of delay has come into "force." So to do would, in his view, be, in effect, to read the word "delayed" as if it were "prevented," and thus disregard the marked contrast between the words "preventing ship-"ment" in clause 11.A and "shipment be delayed" in clause 11.B. He accordingly upheld the award of the Appeals Committee.

The Court of Appeal accepted the buyers' construction.

Singleton L.J. said [3] he had arrived at his decision after considerable hesitation, but was satisfied the word "the" in front of the word "shipment" in clause 11.B meant that the clause was intended to apply if delay is caused beyond the end of the contract period. "Delayed" in the first line of the clause meant, he thought, delayed as between buyers and sellers in relation to this contract.

Jenkins L.J. considered [4] that in a clause such as 11.B references to delay should be related to the time set by the contract for its performance. He thought the proper time at which to decide whether there has been delay due to one of the specified causes is the last day for shipment allowed by the contract. If the sellers could in fact have shipped by that date but chose not to do so, then the only relevant delay was due to their own choice and not to any of the specified causes. He considered this construction accorded better with the words "the delay" in the second sentence and the remainder of the clause, which point to a delay from one of the named causes by reason of which it

[2] [1955] 1 W.L.R. 642, 647.

[3] [1955] 1 W.L.R. 1302, 1307; [1955] 3 All E.R. 750.

[4] [1955] 1 W.L.R. 1302, 1310.

proves impossible to effect shipment by the date originally stipulated.

Parker L.J., in reaching the same conclusion, was influenced by the fact that the clause is a force majeure clause. He said [5]: "Whether viewed as a clause which extends the time for shipment or as an exception clause, it is a clause which operates to prevent what otherwise might be a breach from being a breach. Such a clause would normally, at any rate, not be construed as being operative, unless in its absence the party protected would have been in breach." He thought "the shipment" which had to be delayed was "shipment in accordance with the contract," i.e., by January 31.

My Lords, faced with these differing views both judicial and commercial, as to the meaning of five ordinary English words, I confess I am much influenced by the context in which they appear. It seems to me quite natural that merchants should for their convenience make provision for what is to happen in the event of difficulties arising in the performance of their contracts, even if such difficulties are not such as to render performance impossible. Sellers, who for one of the specified causes are unable to make use of the vessel on which they intended to ship the goods, may have difficulty in making other arrangements and have to plan some way ahead. It seems to be altogether reasonable to provide in such circumstances for a fixed and definite period of extension which will facilitate commerce rather than to think only in terms of escape from breach or of impossibility of performance.

In my opinion, the first sentence of clause 11.B is designed and worded to meet such a situation. The use of the word "delay" in contrast to "prevent" seems to me decisive in favour of the sellers, and I can see no justification for construing "shipment be delayed" as "shipment by the contract date be prevented." The words "the delay" in the second sentence contemplate that the delay previously referred to has persisted up to and beyond the contract date and provides what is to happen in such a case, but they do not, in my opinion, justify the view that there can be no delay under the first sentence unless it or its consequences have persisted up to the last date for shipment. It seems to me that the first part of 11.B is designed to keep the contract alive, whereas the remainder provides for what is to happen when these attempts have failed and performance has eventually become impossible.

Force majeure clauses are of different kinds. In the case of an exception clause it is generally true to say that it only operates on the happening of an event which would otherwise result in a breach, but there is nothing to prevent the parties providing for an extension of the time for performance or for a substituted mode of performance on the occurrence of a force

[5] [1955] 1 W.L.R. 1302, 1310, 1312.

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majeure event whether or not such event would have prevented performance. It therefore seems to me that the words "force "majeure" in the clause and their presence in the margin on the printed contract form as well as in the nature of the specified events afford little assistance in the interpretation of the words in question, more especially when clause 11.B is contrasted with 11.A.

For these reasons I respectfully prefer the construction adopted by McNair J. and the Arbitration Appeals Committee to that of the Court of Appeal, and in so doing I am, at any rate, fortified by the fact that the construction which I favour does not appear to have been considered unreasonable by business men with experience in this trade.

My Lords, at the end of his judgment McNair J. said[6]: "I "cannot, however, part with this case without making one "comment. This matter arose out of events which took place "in the months of December, 1950, and January/February, 1951, "and it has taken until May, 1955, to reach this court. I have "little doubt that if the parties had been minded to make use "of the machinery of this court in January or February of 1951, "the whole matter could have been disposed of in two or three "months, and, indeed, it would have been quite possible, and it "seems to me business-like, since there was this dispute between "the parties about the effect of that contract, to ask this court "for a declaratory judgment, which could have been given with "possibly a delay of a week or so even while the contract was "still running." The case eventually reached your Lordships' House in October, 1956. The time that has elapsed since January/February, 1951, has not been due to the "delays of "the law" but to the failure of the parties to avail themselves of the facilities provided for the speedy hearing of commercial suits involving questions of law. I desire to associate myself with the observations of the learned judge.

I would allow the appeal and restore the award.

LORD SOMERVELL OF HARROW. My Lords, the facts and the rival submissions have already been stated. There are arguments of force in favour of either construction. That adopted by McNair J. commends itself to me. The change from the word "prevented" in clause 11.A to the word "delayed" in 11.B is, I think, of great weight. If it had been intended to provide for an extension if, and only if, strikes, fires, etc., prevented shipment in the contract period, I find it difficult to explain the avoidance of the word "prevention." The fact that if shipment was "prevented" for the contract period there was to be a further two months does not explain the change of language.

On the appellants' construction it was necessary for the seller to establish that some specific arrangement made by him

[6] [1955] 1 W.L.R. 642, 648.

for effecting shipment had to be postponed or abandoned through one of the mentioned causes. It was said, on the other side, that no shipment is a shipment under the contract until it has been effected and declared under clause 2. This would, I think, lead to the conclusion that the shipment cannot be "delayed" and therefore the expression "the shipment" must have some other meaning than a shipment declared under clause 2. The words in their context are, in my view, apt to cover an intended shipment which has to be postponed or abandoned although the operating cause and its effects may not last for the whole of the contract period. The cause which may, on this construction, not render shipment impossible will have limited the time available and rendered it necessary for the seller to make fresh arrangements. There is certainly no absurdity in a provision which, in such an event, makes an extension for a definite period.

The second sentence in the paragraph, it is said, assists the respondents' argument. The "two months" are clearly intended to be the two months' extension, and the excess over two months would involve the "delay" operating at the end of the original contract period. Therefore, it is said, the delay covered by the first sentence must necessarily be a "delay" which continues to operate till the end of the original contract period. This is, I think, a non sequitur. The fact that the second sentence deals with a case where the delay operates up to the end of the original contract period and beyond does not mean that the first sentence may not come into operation when the delay does not operate up to the end of the original contract period. The wording is, in any event, inapt on the respondents' construction. The "delay" might operate for more than two months, for example, from January 1 to March 2, leaving the seller with the rest of March to fulfil the extended contract. Again, one would expect the latter part of the clause to operate if the cause of the delay continued into February, then ceased but came on again towards the end of March, the seller not having shipped in the meantime. The "delay" might well, in such a case, have not exceeded two months. There is, therefore, in my mind, no sufficient implication from the second sentence to negative or modify the natural meaning of the first.

Parker L.J. said that a force majeure clause is one which operates to prevent what otherwise might be a breach from being a breach. This is the effect of clause 11.A and, indeed, may be the effect of 11.B. It is, I think, applying an over nice standard of drafting to assume that extension as a result of force majeure which only cuts down the time available to the shipper could not be provided for, inter alia, in a clause with the side-note, "Force "Majeure."

It was further suggested by the respondents that if the appellants' construction was right, there would have been a provision for notification to the buyer of the seller's claim that the contract time had been extended. Whichever construction

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is right, it would be convenient for the buyer to know whenever one of the enumerated causes began to operate with the possibility of extension. The absence of any such provision may be due to the fact that the recited causes, if they occurred, would become known to all interested.

McNair J. at the beginning of his judgment said this[7]: "Generally, a seller cannot claim the protection of the clause "which provides that the contract shall be cancelled if shipment "is prevented by certain specific causes unless he proves both "(*a*) that he was himself so prevented from shipping and (*b*) that "it was impossible for him to fulfil the contract by buying goods "afloat which had been shipped during the contract period." It was submitted by the appellants that (*b*) went beyond any decided case. The respondents, in their case, sought to rely on a failure to prove that goods afloat could be purchased. Whatever may be the position under some exception clauses, it became clear in the course of the argument that this point could not arise in this case. If the appellants' construction is right, the delay or postponement of an intended shipment is sufficient. If the respondents' construction is right, the appellants admit they were in breach.

I would allow the appeal.

Appeal allowed.

Solicitors: *Thomas Cooper & Co.; Stephenson, Harwood & Tatham.*

F. C.

[7] [1955] 1 W.L.R. 642, 646.

[COURTS-MARTIAL APPEAL COURT.]

C.-M. A. C.
1956
Dec. 11.
Lord Goddard C.J., Hilbery and Slade JJ.

* REGINA *v.* NICHOLSON.

Military Law—Service property—Fraudulent misapplication—Whether "service property" includes property of sergeants' mess—Army Act, 1881 (*as re-enacted*), *ss.* 17, 190.

The appellant, a soldier formerly employed as a caterer in a warrant officers' and sergeants' mess, was convicted by a court-martial of five offences of fraudulently misapplying "service "property" contrary to section 17 of the Army Act. The appellant petitioned, seeking to have the convictions quashed on the ground that the term "service property" did not include mess property, which was the property to which the charges related. The petition was rejected. He appealed:—

Held, that the term "service property" in section 17 was wide enough to cover the property of a warrant officers' and sergeants' mess.

[Reported by D. TRAFFORD OWEN, Esq., Barrister-at-Law.]

APPEAL against conviction.

The appellant, Herbert Nicholson, formerly a bombardier (acting sergeant) in the Royal Artillery, employed as a caterer in a warrant officers' and sergeants' mess, was charged before a court-martial sitting at Hilden in Germany with 12 offences relating to the fraudulent misapplication and conversion of mess property. He was convicted of five charges under section 17 of the Army Act, which makes provision for the punishment of persons subject to military law, who, inter alia, fraudulently misapply any public or service property when charged with or concerned in the care or distribution thereof; he was acquitted of the other seven charges. The appellant was sentenced to be reduced to the ranks and to undergo nine months' detention. His petition asking for the convictions to be quashed on the ground that the judge advocate was wrong in law in advising the court-martial that the expression "service property" included the property of a warrant officers' and sergeants' mess was rejected. He appealed.

Peter Lewis for the appellant.
E. Garth Moore for the Crown.

No cases were cited in argument.

SLADE J., delivering the judgment of the court, stated the facts and continued: The only substantial ground of this appeal is a pure point of law. It is contended that the judge advocate was wrong in law in advising the court-martial that the expression "service property" in section 17 of the Army Act included the property of a service mess. When a person who is subject to military law commits the offence of fraudulent misapplication or fraudulent conversion it is possible that he may be charged under one of three sections of the Army Act. He may be charged with having committed the civil offence of fraudulent conversion under section 41. He may be charged under section 18 (4), as indeed the appellant was in this case on some of the other charges.

Under section 18 (4) any person subject to military law commits an offence if he "Steals, embezzles or fraudulently "misapplies or receives, knowing it to have been stolen or em-"bezzled, any property belonging to a person subject to military "law, or belonging to any service mess or band or to any service "institution, or to the Navy, Army and Air Force Institutes, or "any public property." The only requirements of that subsection are that he should be a person subject to military law and that his offence should relate to one of the matters set out in subsection (4). It is not necessary that he should occupy any fiduciary position in relation to the property alleged to have been stolen, embezzled, etc.

Section 17 deals, inter alia, with persons subject to military law who commit the offence of fraudulent misapplication while

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occupying a position of trust. Section 17 provides: "Every "person subject to military law who commits any of the following "offences; that is to say, Being charged with or concerned in "the care or distribution of any public or *service property*, steals, "fraudulently misapplies, or embezzles the same, or is concerned "in or connives at the stealing, fraudulent misapplication or "embezzlement thereof, or wilfully damages any such property, "shall, on conviction by court-martial," be liable to receive a higher punishment than he can receive under section 18 (4).

The word "service" when used as an adjective is defined by section 190 of the Army Act in these terms: "'service,' when "qualifying institution, necessaries, books, band, mess or "*property*, means belonging to, or connected with, Her Majesty's "military forces (other than Dominion forces) or any body of "Her Majesty's military forces (other than Dominion forces)." The only question this court has to decide is whether or not the property of a warrant officers' and sergeants' mess is property "connected with, Her Majesty's military forces . . . or any body "of Her Majesty's military forces. . . ." In the opinion of this court the term "service property" is amply wide enough to cover the property of a warrant officers' and sergeants' mess, and, therefore, this appeal fails.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Army Legal Services.*

[COURT OF APPEAL.]

C. A.
1956
Dec. 14.
Denning, Hodson and Morris L.JJ.

* WILLIAMS *v.* WILLIAMS.

[Plaint No. L. 398.]

Husband and Wife—Maintenance—Agreement—Consideration—Wife in desertion—Covenant by husband to pay weekly sum—Covenant by wife to maintain herself to indemnify husband against debts and not to pledge his credit—Subsequent decree of divorce on ground of wife's desertion—Action by wife for arrears accrued due before decree nisi—Whether any consideration for husband's promise.
Contract—Consideration.

The parties were married in 1945 and had no children. On January 24, 1952, the wife deserted the husband. On March 26, 1952, the parties entered into an agreement which provided, inter alia: "(1) The husband will pay to the wife for her support and "maintenance a weekly sum of One Pound Ten Shillings . . . "during the joint lives of the parties so long as the wife shall lead "a chaste life. . . . (2) The wife will out of the said weekly sum "or otherwise support and maintain herself and will indemnify "the husband against all debts to be incurred by her and will not "in any way or at any time hereafter pledge the husband's credit." The husband subsequently petitioned for divorce on the ground of

desertion; a decree nisi was pronounced on October 12, 1955, and on December 2 the decree was made absolute.

On a claim by the wife for certain arrears of payments up to the date of the decree nisi, the husband contended that there had been no consideration for his promise, the wife being in desertion at the time. The county court judge gave judgment for the wife. On appeal:—

Held, dismissing the appeal, that there was consideration, as the wife by her desertion had not forfeited but merely suspended her right to be maintained by her husband; such right would revive if she made a genuine offer to return, in which case the wife's promise would be of no value to the husband.

Goodinson v. *Goodinson* [1954] 2 Q.B. 118; [1954] 2 W.L.R. 1121; [1954] 2 All E.R. 255 applied.

Per Denning L.J.: There was also consideration in that a promise to perform an existing duty was a sufficient consideration, and the wife's promise afforded to the husband an additional and simplified defence to unfounded claims which might be made against him by the National Assistance Board or unpaid creditors of the wife.

APPEAL from Judge Trevor Morgan, sitting at Aberystwith County Court.

The facts are stated in the judgment of Denning L.J.

Stuart Priestley for the husband.

H. Edmund Davies Q.C. and *W. M. Bayne-Powell* for the wife.

The following cases cited in argument are not referred to in the judgments: *Tulip* v. *Tulip* [1]; *Johnston* v. *Sumner* [2]; *Ward* v. *Byham*.[3]

DENNING L.J. In this case a wife claims sums due to her under a maintenance agreement. No evidence was called in the court below because the facts are agreed. The parties were married on April 25, 1945: they have no children. On January 24, 1952, the wife deserted the husband. On March 26, 1952, they signed the agreement now sued upon, which has three clauses: "(1) the husband will pay to the wife for her support "and maintenance a weekly sum of One Pound Ten Shillings "to be paid every four weeks during the joint lives of the parties "so long as the wife shall lead a chaste life the first payment "hereunder to be made on the Fifteenth day of April 1952. "(2) The wife will out of the said weekly sum or otherwise "support and maintain herself and will indemnify the husband "against all debts to be incurred by her and will not in any way "at any time hereafter pledge the husband's credit. (3) The "wife shall not so long as the husband shall punctually make the "payments hereby agreed to be made commence or prosecute "against the husband any matrimonial proceedings other than

[1] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.
[2] (1858) 2 H. & N. 261.
[3] [1956] 1 W.L.R. 496; [1956] 2 All E.R. 318.

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"proceedings for dissolution of marriage but upon the failure of "the husband to make the said weekly payments as and when "the same become due the wife shall be at full liberty on her "election to pursue all and every remedy in this regard either by "enforcement of the provisions hereof or as if this agreement "had not been made." So far as we know, the parties have remained apart ever since. On June 1, 1955, the husband petitioned for divorce, on the ground of his wife's desertion; and on October 12, 1955, a decree nisi was made against her. On December 2, 1955, the decree was made absolute. In this action the wife claims maintenance at the rate of £1 10s. a week under the agreement for a period from October, 1954, to October, 1955. The sum claimed is £30 5s. 9d., which is the appropriate sum after deduction of tax.

The husband disputes the claim, on the ground that there was no consideration for his promise. Clause 2, he says, is worthless, and clause 3 is unenforceable.

Let me first deal with clause 3. It is settled law that a wife, despite such a clause as clause 3, can make application to the magistrates or to the High Court for maintenance. If this wife made such an application, the husband could set up the fact of desertion as an answer to the claim, but he could not set up clause 3 as a bar to the proceedings. The clause is void, and as such is no consideration to support the agreement: see *Bennett* v. *Bennett*.[1]

Now let me deal with clause 2. The husband relies on the fact that his wife deserted him. If there had been a separation by consent, he agrees that the agreement would have been enforceable. In that case the husband would still be under a duty to maintain, and the sum of 30s. a week would be assumed to be a quantification of a reasonable sum for her maintenance having regard to her own earning capacity. The ascertainment of a specific sum in place of an unascertained sum has always been held to be good consideration. So long as circumstances remained unchanged, it would be treated by the courts as binding on her and she could not recover more from him: see *National Assistance Board* v. *Parkes*.[2] But in the present case the husband says that, as the wife deserted him, he was under no obligation to maintain her and she was not entitled to pledge his credit in any way. Clause 2 therefore gives him nothing and is valueless to him. The husband says that *Goodinson* v. *Goodinson*[3] is distinguishable because there was no finding in that case that the wife was in desertion, and moreover the wife promised to maintain the child as well as herself.

Now I agree that, in promising to maintain herself whilst she was in desertion, the wife was only promising to do that which

[1] [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413.
[2] [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1.
[3] [1954] 2 Q.B. 118; [1954] 2 W.L.R. 1121; [1954] 2 All E.R. 255.

she was already bound to do. Nevertheless, a promise to perform an existing duty is, I think, sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest. Suppose that this agreement had never been made, and the wife had made no promise to maintain herself and did not do so. She might then have sought and received public assistance or have pledged her husband's credit with tradesmen: in which case the National Assistance Board might have summoned him before the magistrates, or the tradesmen might have sued him in the county court. It is true that he would have an answer to those claims because she was in desertion, but nevertheless he would be put to all the trouble, worry and expense of defending himself against them. By paying her 30s. a week and taking this promise from her that she will maintain herself and will not pledge his credit, he has an added safeguard to protect himself from all this worry, trouble and expense. That is a benefit to him which is good consideration for his promise to pay maintenance. That was the view which appealed to the county court judge: and I must say that it appeals to me also.

There is another ground on which good consideration can be found. Although the wife was in desertion, nevertheless it must be remembered that desertion is never irrevocable. It was open to her to come back at any time. Her right to maintenance was not lost by the desertion. It was only suspended. If she made a genuine offer to return which he rejected, she would have been entitled to maintenance from him. She could apply to the magistrates or the High Court for an order in her favour. If she did so, however, whilst this agreement was in force, the 30s. would be regarded as prima facie the correct figure. It is a benefit to the husband for it to be so regarded, and that is sufficient consideration to support his promise.

I construe this agreement as a promise by the husband to pay his wife 30s. a week in consideration of her promise to maintain herself during the time she is living separate from him, whether due to her own fault or not. The wife cannot throw over the agreement and seek more maintenance from him unless new circumstances arise making it reasonable to allow her to depart from it. The husband cannot throw it over unless they resume married life together (in which case it will by inference be rescinded) or they are divorced (in which case it is a post-nuptial settlement and can be varied accordingly), or perhaps other circumstances arise not envisaged at the time of the agreement. Nothing of that kind has, however, occurred here. The husband must honour his promise.

I would dismiss the appeal accordingly.

HODSON L.J. I agree. The facts, so far as they are circumstances surrounding the document that we have to consider, are these. On April 25, 1945, the parties to the agreement were

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married. There are no children of the marriage. On January 24, 1952, the wife deserted the husband. On March 26, 1952, the agreement was entered into. It is to be inferred, and it was conceded, that the desertion which started on January 24, 1952, was continuing at the date of the agreement. The agreement is what is called a "maintenance" agreement, providing for payments by the husband to the wife of 30s. a week. The wife has sued upon the agreement. The husband's answer is that there is no consideration—that, the agreement not being under seal, the contract requires consideration to support it.

The agreement describes the parties by their names, followed in the one case by the description "hereinafter called the "husband" and in the other case by the description "herein-"after called the wife," giving separate addresses for each party. Paragraph 1 provides: "The husband will pay to the wife for "her support and maintenance a weekly sum of One Pound Ten "Shillings to be paid every four weeks during the joint lives of "the parties so long as the wife shall lead a chaste life." There is nothing in that agreement to control the duration of the payments except the joint lives of the parties. There is nothing to say that the payments shall only be made while they shall be living apart, or while they shall remain husband and wife, or indeed any other limitation except life and chastity. Then provision is made for the first payment to be made on April 15, 1952.

In view of the terms of that agreement and the vagueness and uncertainty whether this is to cover periods when the parties are living together, or living apart, or both, it might be arguable that this document is not enforceable at all but void. But I think that it is too late now to argue that, as a document in almost exactly the same form was regarded as valid in this court in *Goodinson* v. *Goodinson*.[4] Clause 2 of the agreement that we are considering provides that "The wife will out of the said "weekly sum or otherwise support and maintain herself and will "indemnify the husband against all debts to be incurred by her "and will not in any way at any time hereafter pledge the "husband's credit." That is the clause which is particularly to be noticed, because the following clause, clause 3, it has been agreed between the parties, does not provide any consideration. Clause 2 is in the same form as a clause which was considered in *Goodinson's* case.[4] It was held in that case that such a clause provided good consideration by the wife, moving from the wife to the husband. Clause 2 of this agreement is in three parts—first, that she will out of the weekly sum or otherwise support and maintain herself; secondly, she will indemnify the husband against all debts to be incurred by her; and thirdly, she "will "not in any way at any time hereafter pledge the husband's "credit." It was pointed out in *Goodinson's* case that there was nothing to be said against such an agreement: although it

[4] [1954] 2 Q.B. 118.

was not an agreement for separation there was a provision for the maintenance of the wife, and although the wife could not be excluded from access to the court by such an agreement, yet that did not mean that the agreement of itself was bad.

Without referring in detail to the judgment of the court in *Goodinson's* case, I think it is sufficient to say that the reasoning of the judgments in *Goodinson's* case [5] applies to this case—as, indeed, the county court judge thought. How, then, is *Goodinson's* case to be distinguished here? Mr. Priestley has argued that it can be distinguished in two ways. He says, first of all, that in *Goodinson's* case it was not one of the facts that at the time when the agreement was entered into the wife was in desertion, whereas in this case she was in desertion: therefore she had forfeited all right to be maintained by her husband and so she was giving no consideration at all when she said she would maintain herself, because that is what she would have to do anyway. The short answer to that is, I think, that she had not forfeited her right to be maintained by her husband by being in desertion: she had only suspended her right and not destroyed it. Authority for that proposition is contained in the judgment of Lord Reading C.J. in *Jones* v. *Newtown and Llanidloes Guardians* [6]: "There "is no doubt that at common law if a wife chooses wilfully and "without justification to live away from her husband she cannot, "so long as she continues absent, render him liable for necessaries "supplied to her, or for her maintenance by the union, for the "reason that she has of her own free will deprived herself of the "opportunity which the husband was affording her of being main-"tained in the home. But the relief of the husband from the "obligation of maintenance continues only so long as she volun-"tarily remains absent. Her absence, although wrongful, does "not affect the relationship of husband and wife." That passage applies to this case, looking at it, as we must do, as at the time when the agreement was entered into. The wife had then deserted the husband and was temporarily wrongfully away from home; but she might at any time return. In those circumstances, if she returned or offered to return, her husband's liability to maintain her would revive. So that there was good consideration there to meet that contingency, which was a real contingency and not a fanciful one at that time. It is not affected by the fact that (as we now know, as a matter of history) the parties never have come together again but have been divorced.

It was urged by Mr. Edmund Davies, on behalf of the wife, that, whether the point which I have just put was good or not, nevertheless it was a valid consideration even if the wife was in desertion, because it was some benefit to the husband to be protected from the embarrassment of invalid claims against him. For my part, I would prefer not to rest my judgment upon that, because once it is conceded that there is no basis for a claim by

[5] [1954] 2 Q.B. 118.

[6] [1920] 3 K.B. 381, 384; 36 T.L.R. 758.

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a wife, no consideration for giving an indemnity by the wife appears to me to emerge. But it is unnecessary to express any concluded opinion upon that matter, since I am entirely in agreement with my Lord on the other point—that this desertion by the wife did not destroy her right to be maintained but only suspended it.

An additional point was taken in this court in an attempt to distinguish *Goodinson's* case,[7] namely, that there was a child and that the wife promised to support not only herself but the child; whereas in this case there is no child and so different considerations might apply. I am bound to say that I find no substance in that distinction. The judgments in the case of *Goodinson* proceeded on the footing that the promise by the wife to maintain herself, etc., was sufficient consideration and did not depend on the additional fact (which, it is true, did appear in that case) that the consideration might be found in the promise to maintain the child.

For these reasons, therefore, I think that this appeal must be dismissed. I would only add that, as I have already indicated, on the face of the document it is expressed to be between A and B, the two parties, for joint lives, and there is nothing on the face of the contract to say that it shall ever end so long as these two people live and so long as the wife leads a chaste life. But that is not fatal to the husband's future, because it is on the face of it also a post-nuptial settlement, which is under the control of the court after divorce and can be cancelled or varied.

I have not forgotten a subsidiary argument put forward by Mr. Bayne-Powell, on behalf of the wife, that something is added to the case by the promise that the wife would lead a chaste life and that she was thereby giving the husband something he would otherwise not obtain. I do not think that that adds or subtracts anything in this case. The husband would not be able to rely on the unchastity of the wife at common law, if the unchastity were brought about by his own conduct—certainly not if he had connived at it, because no man can take advantage of his own wrong. I have found no assistance, in construing this document, from the limitation (which is additional to the provision that the payment shall remain during the joint lives) that the payment shall only continue so long as the wife shall lead a chaste life.

MORRIS L.J. I also agree. I think that the county court judge came to a correct conclusion in this matter. He, I think, based his decision on the case of *Goodinson* v. *Goodinson*,[8] in this court. The county court judge in his judgment first summarized the submissions made by the husband: then he summarized the submissions made by the wife: and then in coming to his conclusion he based himself upon *Goodinson* v. *Goodinson*, and very considerably upon the sentence in the judgment of Romer L.J. where he said[9]: "But clause 3 carries

[7] [1954] 2 Q.B. 118.
[8] Ibid.
[9] Ibid. 126.

"here an indemnity from the wife and other promises by her, "all of which are presumably and, indeed, manifestly, of value "to the husband; otherwise, they would not have been introduced "into the agreement."

Mr. Priestley seeks to distinguish *Goodinson* v. *Goodinson* on two grounds. He said that in *Goodinson* v. *Goodinson* clause 3 (which is to be compared with clause 2 now under consideration) included a reference to a child, and he said that the husband would have been obliged to maintain the child, but that by clause 3 in that case the wife was undertaking to support and maintain not only herself but the child. In his judgment in *Goodinson's* case Somervell L.J. said [10]: "Although, I think, "the point was not taken below, I should have thought that the "undertaking by the wife to have the custody and control of the "child and bring it up until it was 16 years old, in the terms of "clause 4, was also a consideration." I think that from that, and from the whole case, it appears that the judgments proceeded on the basis that, apart from the reference to the child, there was consideration.

The other point on which Mr. Priestley relied as a distinction of *Goodinson's* case was that in that case the question of desertion was not before the court. There had been a defence, apparently, that the wife was in desertion, but that was presumably not persisted in: at all events, that matter was not before the court. So Mr. Priestley submits that *Goodinson* v. *Goodinson* is to be distinguished. I consider that we must proceed on the basis that at the date this agreement was entered into, March 26, 1952, the wife was then in desertion. But it seems to me that the wife might thereafter have offered to return and might have ceased to be in desertion, and that clause 2 would at that stage and in that event have been in operation: therefore it does not seem to me that it can be said that clause 2 was not of value to the husband. The probability of the happening of such events need not be measured, for the court does not inquire as to the adequacy of consideration.

I think that for that reason the county court judge came to a correct conclusion. Like my Lord, Hodson L.J., I prefer to base my judgment on that ground rather than on the alternative ground—that apart from any question of an offer by the wife to return, while she was still in desertion, there might have been trouble, expense or embarrassment if the wife had incurred debts.

I, therefore, agree that the appeal fails.

Appeal dismissed.

Solicitors: *Pennington & Son for Barker, Son & Isherwood, Andover; Haslewood, Hare, Shirley Woolmer & Co. for Smith, Davies & Jessop, Aberystwyth.*

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[10] [1954] 2 Q.B. 118, 124.

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* BILES *v.* CAESAR.

[Plaint No. M. 60B.]

Landlord and Tenant — Act of 1954 — *Business premises (Security of tenure)—Notice of opposition to new tenancy—Form—Notice by joint landlords of intention to demolish and reconstruct the "whole "of the" premises—Application to court for new tenancy—Death of one landlord—Hearing of application before grant of probate—Evidence by surviving landlord and named executor of intention to demolish and reconstruct substantial part of premises—Sufficiency of landlords' objection — Competence of witnesses — Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 25 (1) (6), 26 (6), 30 (1) (*f*).

Practice—Pleadings—Greater includes less. Executor and Administrator—Executor—Position before probate.

Two brothers, F. and P., the joint owners of business premises, gave notice in 1955 to their tenant to terminate the lease pursuant to section 25 (1) of the Landlord and Tenant Act, 1954, stating, in purported compliance with the terms of section 30 (1) (*f*),[1] that it was their intention "to demolish and reconstruct the whole of the "premises comprised in your holding." On an application by the tenant to the county court for the grant of a new tenancy, the landlords gave notice pursuant to section 25 (6) of an objection expressed in like terms.

In February, 1956, P. died, having appointed his son C. and one W. as executors. At the hearing in the county court, which took place before the grant of probate, it was proved by the evidence of F. and C. that the landlords' intention was to demolish and reconstruct not the whole, but a substantial part of the demised premises. Judgment was reserved. On the grant of probate, C. and W. were added as opponents. The judge gave judgment for the landlords.

On appeal:—

Held, dismissing the appeal (1) that, in accordance with the ordinary rules of pleading, the landlords' objection was sufficient in form, as they were clearly referring to paragraph (*f*) and the greater included the less; (2) that the evidence of F., as surviving legal joint owner of the freehold was by itself sufficient to prove intention; (3) that, if the intention of P.'s executors was material, as the title of C. as executor dated back to the will, he was entitled before grant of probate to give evidence as to such intention.

Chetty v. *Chetty* [1916] 1 A.C. 603 applied.

APPEAL from Judge Rawlins sitting at Aldershot County Court.

The facts are stated in the judgment of Denning L.J.

[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a "landlord may oppose an application "[for a new tenancy] under sub-"section (1) of section 24 of this "Act are such of the following "grounds as may be stated in "the landlord's notice under s. 25 "of the Act, or, as the case may be, "under subs. (6) of s. 26 thereof, that "is to say . . . (*f*) that on the ter-"mination of the current tenancy the "landlord intends to demolish or re-"construct the premises comprised in "the holding or a substantial part of "those premises . . ."

L. A. Blundell for the tenant.
R. E. Megarry Q.C. and *M. G. Polson* for the landlords.

Case cited in argument not referred to in the judgments: *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[2]

DENNING L.J. Two brothers, Francis George Caesar and Percy Joseph Caesar, owned some premises at 47, Union Street, Aldershot. In 1947 they let off a shop on the ground floor with a workship behind, to Mr. Biles, a jeweller. Mr. Biles has been there for many years, holding on a tenancy which was at common law determinable by three months' notice. The premises were, however, business premises coming within the new Landlord and Tenant Act, 1954, so the landlords after that Act had to give the tenant six months' notice of termination. They did so. On October 4, 1955, the brothers Caesar gave a notice to Mr. Biles to terminate his tenancy to expire on April 6, 1956. In that notice they gave their reasons for refusing the tenant a new tenancy. They said: "We would oppose an application to the "court . . . for the grant of a new tenancy on the ground that "on the termination of your tenancy we intend to demolish and "reconstruct the whole of the premises comprised in your "holding." Thereupon Mr. Biles took them to court: he made application against the brothers Caesar for a new tenancy in accordance with the new Act.

Unfortunately, before the case came on for hearing one of the brothers, Percy Joseph Caesar, died: he died on February 13, 1956. He had made a will in which he had appointed his son Cyril John Caesar to be one executor of his will and an accountant, Mr. Waldron, to be the other executor. Those two gentlemen applied to come into the proceedings as respondents in place of their testator. They sought to put in an answer which followed the exact words of sub-paragraph (*f*) of section 30, subsection (1), of the Act. But when the case came on for hearing on March 27 they were required by the judge to confine their answer to the very terms of the notice to quit which I have read, namely, that they intended to demolish and reconstruct *the whole* of the premises. The case was heard on that day, but the judge did not give judgment straight away because the two executors had not taken out probate: they did not take out probate till May 25. Eventually they were joined in the suit as personal representatives. On July 24 the judge gave judgment in favour of the landlords.

The tenant appeals to this court. He takes two points. The first point he takes is that the landlords did not prove an intention to reconstruct *the whole* of the premises. The tenant says that, although the landlords intend to pull down a large part of these premises, they do not intend to pull down the whole of them.

[2] [1956] 1 W.L.R. 678; [1956] 2 All E.R. 497; reversed [1956] 3 W.L.R. 1134; [1957] 1 All E.R. 1, C.A.

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There is one flank wall which is not going to be taken down. Another wall is going to be left standing although a window in it is going to be bricked up. Some part of the ceiling of the shop is to be left. This point taken by the tenant is, however, a very technical one. It is quite clear that, if the landlords had given a notice of opposition in comprehensive terms, they would have been in order. Section 30 (1) (*f*), says that a landlord is entitled to refuse a new tenancy on the ground that "on the "termination of the current tenancy the landlord intends to "demolish or reconstruct the premises comprised in the holding "or a substantial part of those premises." Although the landlords here do not intend to reconstruct the whole, they certainly intend to reconstruct a substantial part. But Mr. Blundell says that they ought not to be allowed to avail themselves of the subsection because in their notice of opposition and in their answer they relied on "the whole" of the premises; and they ought not to be allowed, he says, to rely on "a substantial part."

In my judgment, the tenant's argument on this point is not correct. It is sufficient for the landlords in their notice of opposition to specify the particular paragraph—(*a*), (*b*), (*c*), (*d*), (*e*), (*f*) or (*g*) of section 30 (1) upon which they rely. It is not necessary for them to specify any of the subsidiary portions of a paragraph, so long as they make clear which is the paragraph on which they rely. It seems to me quite plain that the landlords here in their notice and in their answer were relying on ground (*f*). Although they did not prove the full extent of their notice—they did not prove that *the whole* was to be reconstructed—nevertheless they proved a sufficient portion to entitle them to refuse a new lease. It is a settled rule of pleading that if a pleader alleges more than is necessary, he is entitled to rely on any lesser facts covered by that allegation which are sufficient for the purpose he has in hand. So here, it seems to me, that as long as the landlords prove (as they did) that they intend to reconstruct a substantial part of the premises, that is sufficient. The greater allegation includes the less.

The second point was this. It was said that the landlords had not proved the necessary intention because probate had not been taken out at the time of the hearing. The surviving brother, Francis George Caesar, went into the witness box and gave evidence of his intention to reconstruct a substantial part of the premises. The executor named in the will, Mr. Cyril John Caesar, the son of the dead man, went into the witness box and confirmed that intention on his part. To my mind that was sufficient evidence of the intention of the landlords, for two reasons: firstly, in regard to this sub-paragraph (*f*), the "land-"lord" means the landlord with the legal title to the land. At this date the legal landlord was the surviving brother, Francis George Caesar. He and his deceased brother had been joint owners, and when the deceased brother died the surviving brother became in law the sole owner. He was a trustee, no doubt, but

in law he was the sole legal owner, and his intention was all that mattered. But, secondly, even if the intention of the executors was material, it has to be remembered that the title of the executor derives from the will and speaks from the will, as Lord Parker pointed out in the case of *Chetty* v. *Chetty*.[1] In this case the executor, the son, was well qualified and entitled to go into the witness box at the hearing of the case and give evidence of the intention of the executors, although probate was not taken out till some time afterwards. The judge I think did quite rightly to adjourn the case before any formal order was made until probate had been obtained, because until probate had been obtained the court could not enter judgment.

It seems to me that the intention of the landlords was sufficiently established, and I would therefore dismiss the appeal.

HODSON L.J. I agree. I think that the appellant fails on both the grounds which have been raised in this court. The landlords gave notice of their objection to a new tenancy on the ground that on the termination of the existing tenancy they intended to demolish and reconstruct the whole of the premises comprised in the holding. It is submitted that in the evidence given at the hearing they fell short of proving that. Although we have not heard the landlords on this point, I am prepared to assume that that is right and that the evidence given at the hearing fell considerably short of proof of an intention to demolish and reconstruct the whole of the premises. The tenant argues that if the landlord has not set out the grounds as directed by section 30 (1) of the Act of 1954, and proved that ground as set out in his notice, he must fail. Section 30 (1) is as follows: "The grounds on which a landlord may oppose an application "under subsection (1) of section twenty-four of this Act are such "of the following grounds as may be stated in the landlord's "notice under section twenty-five of the Act": and then there are set out the grounds (*a*) to (*g*). I think that the correct interpretation of section 30 (1) is that the grounds are indicated separately in the subheadings (*a*) to (*g*) and that the landlord is not accordingly bound to sub-divide each ground further. When one looks at (*f*), the ground relied upon here, one finds that the words are: "that on the termination of the current tenancy the "landlord intends to demolish or reconstruct the premises com-"prised in the holding or a substantial part of those premises or "to carry out substantial work of construction on the holding or "part thereof." There is no use of the word "whole" there, although in the notes on the back of the form which is in the appendix to the Landlord and Tenant (Notices) Regulations, 1954, the word "whole" appears. No doubt the right construction of (*f*) is to contrast the demolition of the whole of the premises or the reconstruction of the whole of the premises with

[1] [1916] 1 A.C. 603.

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a similar operation in the case of a substantial part, and all that the landlords have proved here is an intention to demolish and reconstruct a substantial part as against the whole. In my judgment there is no difficulty in the landlords' way on that account. All that they had to do was to indicate the ground—that is, ground (*f*)—and that they have done. The fact that they did not go the whole way and prove the widest extent to which sub-paragraph (*f*) went does not mean that they failed because they only succeeded in proving the "substantial part," which means that they travelled a lesser distance than the distance which they would cover by their notice. In other words, I agree that the greater includes the less, as it would in the case of an ordinary pleading; and I see no reason why a different argument should apply on the construction of this particular section.

On the second point I also agree. What happened was this. There were joint landlords, and one of the landlords had died before the hearing. When the answer was put in in accordance with the rules, although the executors of the dead landlord had not obtained probate, the answer was headed as if they were substituted already for the deceased landlord, and when the matter came on for hearing the surviving landlord and his nephew gave evidence as executors of the brother who was one of the original joint landlords, and evidence of intention having been given by both those persons, the second deposing that he intended to continue the intention which had been formed by his predecessor, the judge left the matter in this way: he reserved his judgment and did not deliver his judgment until the executors had obtained probate and therefore confirmed the position which had been taken up by one of the executors in evidence.

If it be right to say that in view of the way in which this case went it is not right to rely solely upon the evidence of the survivor of the joint landlords on whom the legal tenancy devolved because of the answer put in by the one remaining landlord and the two executors, I would say that the executors were entitled to prove their intention before obtaining probate. It is an a fortiori case compared with *Chetty's* case,[1] to which reference has been made, from which it is clear that an executor derives his title and authority from the will so that he can institute an action in the character of executor before he proves the will. If he can do that, surely he can give evidence of an intention which he has in his capacity as an executor before probate has been obtained?

I agree, therefore, that the appeal must be dismissed.

MORRIS L.J. I agree. It seems to me that by the notice of termination and by the answer, which was amended to accord with the notice of termination, the landlords were clearly referring

[1] [1916] 1 A.C. 603.

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to ground (*f*) of section 30 (1). I think that paragraph (*f*) of section 30 (1) constitutes one ground of opposition, which ground may be satisfied in a variety of ways. Mr. Blundell submits that a landlord may discard something, but may not add to what he has asserted. It does not seem to me that the landlord is adding anything in this case. It seems to me that the greater includes the less, and that the landlord here has proved enough to bring him within ground (*f*) of section 30 (1).

On the other part of the case I do not desire to add anything. I am in agreement with the judgments which my Lords have delivered.

Appeal dismissed.

Solicitors: *Reid, Sharman & Co. for Herrington & Carmichael, Aldershot; Foster, Wells & Coggins, Aldershot.*

F. R. D.

[COURT OF APPEAL.]

C. A.
1956
Dec. 5.
Denning and Hodson L.JJ. and Ormerod J.

* TRUCKELL *v.* STOCK.

[Plaint No. M. 267.]

Vendor and Purchaser—Conveyance—Parcels—Projecting footings or eaves—"All that land dwelling-house (etc.) situate in East Street "... and delineated and coloured pink ... on the plan attached "hereto"—Footings of side wall projecting beyond coloured boundary—Whether footings included in conveyance.

Trespass—Building—Projecting—Building on footings of next door house. Injunction—Mandatory injunction.

By a conveyance made in 1952 the plaintiff acquired the fee simple of certain premises, described in the parcels as "all that "land dwelling-house office garages outbuildings and premises "situate in East Street Colchester aforesaid . . . and delineated and "coloured pink and red on the plan attached hereto the dwelling-"house and office being known as No. 45 East Street aforesaid." On the side where the plaintiff's premises adjoined No. 44, East Street, the edge of the coloured portion on the plan indicated the outside of the side wall of the plaintiff's house, No. 45, but that wall rested on certain brick footings which projected some inches beyond the edge of the coloured portion.

In 1953 the defendant acquired No. 44 from the same vendor, and proceeded to build a wall which rested on the said footings and almost touched the plaintiff's side wall. In an action for trespass, in which the plaintiff claimed damages and a mandatory injunction directing the defendant to pull down his wall, the county court judge held that the footings did not pass to the plaintiff by the conveyance, but indicated that he would otherwise have been disposed to grant a mandatory injunction. On appeal:—

Held, that the whole structure of No. 45, including the footings and eaves, had been conveyed to the plaintiff, so that the defendant's

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act constituted a trespass; and the plaintiff was entitled to the relief claimed.

Manning v. *Fitzgerald* (1859) 29 L.J.Ex. 24 and *Corbett* v. *Hill* (1870) L.R. 9 Eq. 671 applied.

APPEAL from Judge Southall, sitting at Colchester County Court.

The facts are stated in the judgment of Denning L.J.

C. H. Duveen Q.C. and *C. W. S. Lubbock* for the plaintiff.
R. E. Megarry Q.C. and *John T. Turner* for the defendant.

The following cases, cited in argument, are not referred to in the judgments: *Fox* v. *Clarke* [1]; *Micklethwait* v. *Newlay Bridge Co.* [2]; *Wallington* v. *Townsend.* [3]

DENNING L.J. This is a quarrel between neighbours in Colchester. Mr. Truckell bought a house there—No. 45, East Street—in 1952. Just over a year later Mr. Stock bought the adjoining house, No. 44, East Street. Previously the houses were in common ownership. After Mr. Truckell had bought his house—which was separated by the wall of his house from the next door yard—he increased the size of a window. The window previously had been, I think, 2 ft. high. He extended it and made it deeper by another 2 ft. 6 ins. below the existing window. Mr. Stock objected to this extension of the window and put up a wall (forming part of a shed) which blocked out the added portion of the window. In these circumstances, Mr. Truckell, finding his window half blocked up, brought an action for trespass against his neighbour.

The basis of Mr. Truckell's claim is this: He says that Mr. Stock put the new wall close up to Mr. Truckell's wall. It was only half an inch away from it. It was so close that it rested on the footings of the wall of Mr. Truckell's house. Mr. Truckell says: "That is a trespass: he has built on my land, because my "land does not end with the actual wall, it extends out so as to "include the footings."

In order to see what land or property belongs to Mr. Truckell we must look at the conveyance to Mr. Truckell. These are the material words: "All that land dwelling-house office garages "outbuildings and premises situate in East Street Colchester "aforesaid and lying to the west of the right of way or roadway "hereinafter mentioned and delineated and coloured pink and red "on the plan attached hereto the dwelling-house and office being "known as No. 45 East Street aforesaid." Those words clearly refer to a "dwelling-house." I should have thought that that meant all the parts of the dwelling-house, including the eaves and

[1] (1872) L.R. 7 Q.B. 748; (1874) L.R. 9 Q.B. 565.
[2] (1886) 33 Ch.D. 133; 2 T.L.R. 844.
[3] [1939] Ch. 588; 55 T.L.R. 531; [1939] 2 All E.R. 225.

the footings and any projection of the house. But when the judge examined the plan he was quite clear that the pink and red portion did not extend as far as the outer side of the footings but only showed the boundary of the wall itself at ground level. Inasmuch as the plan did not, by its red markings, extend as far as the footings, he held that the footings did not belong to Mr. Truckell and therefore Mr. Truckell could not allege that there was a trespass.

On consideration of the matter, and in particular of the cases of *Manning* v. *Fitzgerald*[1] and *Corbett* v. *Hill*,[2] I am quite satisfied that the conveyance of this house to Mr. Truckell included not only the walls but the eaves and the footings of the house. It did not include the column of air between the footings and the eaves, but it included the footings and the eaves.

So there we have the position. The house, eaves and footings belonged to Mr. Truckell, but the column of air forming part of Mr. Stock's yard remained belonging to Mr. Stock. I am quite satisfied, on the evidence (and the judge has so found), that Mr. Stock, when he came to build his wall, actually put it on the brickwork of the footings which were Mr. Truckell's footings. He did it without any consent by Mr. Truckell, and that is a clear trespass. In so far as it actually touched the footings it was a trespass. It would seem to me also that if it exerted a thrust on the outer footings by means of the intervening earth that too would be a trespass.

What should be done? The judge has said that he was reluctant to come to the conclusion to which he did but that if he was wrong (as we think he was) then he would have considered it a proper case for the granting of a mandatory injunction to compel Mr. Stock to take down the wall which is trespassing on Mr. Truckell's footings. It seems to me that that is the order we should make. One has only to read the evidence in this case to see that the presence of this wall which Mr. Stock has put up is very damaging to Mr. Truckell's wall, because the damp can get in, and there is no ventilation to clear it away. The judge said: "If it is a trespass, I would order that this wall be taken "down and I would award £50 damages because of the damage "done to Mr. Truckell." I am of opinion that this appeal should be allowed, and that there should be an order for a mandatory injunction on the defendant to pull down the wall, trespassing as it does on the plaintiff's land, and for damages of £50.

I would allow the appeal accordingly.

HODSON L.J. I agree. I think that the county court judge's finding of fact was this, that the wall which the defendant built "impinged" upon the footings of the plaintiff's house. The word "impinged" which he used must, I think, be taken to mean that he found as a fact (and there was evidence to support

[1] (1859) 29 L.J.Ex. 24. [2] (1870) L.R. 9 Eq. 671.

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such a finding) that there was direct contact between this wall and the footings. Accordingly, if the footings were the plaintiff's footings, there was a direct trespass.

I prefer to express no opinion as to what would be the effect if there were an indirect thrust; the matter has not been fully argued before us. Mr. Megarry cogently pointed out that there must always be indirect thrust between one house and another when they are built upon adjoining ground. But that question need not be debated here. The plaintiff no doubt would have succeeded before the county court judge on the basis which I have stated but for the fact that the judge found himself (as he said, reluctantly) unable to find that the footings of the plaintiff's house were his property at all. He took great care over the matter: he inspected the house: but he was controlled in his decision on this matter by the conveyance; and the relevant parts of the conveyance are these. The conveyance is dated February 1, 1952, made between the vendor of the one part and the purchaser of the other, and it is of 45 East Street, Colchester, which is the house in question. In the parcels it is stated that what is conveyed is: "First all that land dwelling-house office "garages outbuildings and premises situate in East Street "Colchester aforesaid and lying to the west of the right of way "or roadway hereinafter mentioned and delineated and coloured "pink and red on the plan attached hereto the dwelling-house "and office being known as No. 45 East Street aforesaid."

It has been contended before us (and more successfully contended before the county court judge) that the conveyance and the description of the property contained in the conveyance were dependent on the plan for their accuracy; and the plan which is attached to the conveyance (which is, of course, a ground plan) shows the footings in question, and indeed the eaves of the house, as being outside the area conveyed. The county court judge found himself in those circumstances, as he thought, bound to follow the plan and to hold that the footings of the house, and indeed the eaves, had not been conveyed to the plaintiff at all. The argument is that if there is no qualifying clause such as "this plan is for "identification only," and the words of description contained in the conveyance are inadequate, the plan controls, in accordance with the speech of Lord Wrenbury in *Eastwood* v. *Ashton*,[3] where he said: "My Lords, I find that the description by plan "is couched in the words 'all which said premises are more "'particularly described.' The words 'more particularly' "exclude, I conceive, that they have already been exhaustively "described. These words seem to me to mean that the previous "description may be insufficient for exact delimitation, and that "the plan is to cover all deficiencies, if any."

That, says Mr. Megarry, is this case. But I do not accept that there is any falsa demonstratio, either in the conveyance

[3] [1915] A.C. 900, 920.

itself or in the plan: the two seem to me to be quite consistent with one another if one remembers that the plan is a ground plan and only shows the boundary of the plaintiff's property on the ground; whereas the conveyance of the house and the parcels show the actual physical thing conveyed. That a property—a house—may stick out over the land of the adjoining neighbour is a common feature which has caused trouble, as shown by the reported cases. Such a case was *Corbett* v. *Hill*.[4] I need not refer to the facts of that case, but the particular feature which was the subject of the decision was the feature that there were overhanging portions of one house protruding over the land of another, and notwithstanding that it was held that "the vertical "column of air over so much of the room as overhung the "defendants' site, belonged not to the plaintiff, but to the "defendants." So that, although the ground plan (as I understand it) would control the ownership of the air above, it does not in the least prevent the plaintiff owning the parts of his house which protrude over the line marked on the ground plan.

With all respect to the county court judge I think that he was wrong in law in coming to the conclusion, to which he did come, that the ownership of the footings was not in the plaintiff. Once the conclusion is reached which I reach—namely, that on the true construction of this conveyance the ownership of the footings was in the plaintiff—I think the rest follows: the trespass is proved; and I agree with my Lord that the order which the county court judge would have made should be made by this court.

ORMEROD J. I agree, and have nothing I wish to add.

Appeal allowed.

Solicitors: *Corbin, Greener & Cook for Thompson, Smith & Puxon, Colchester; Church, Rendell & Co. for Marshall & Sutton, Colchester.*

F. R. D.

[4] L.R. 9 Eq. 671.

[COURTS-MARTIAL APPEAL COURT.]

* REGINA v. CARR.

C.-M. A. C.
1956
Nov. 29.
Lord Goddard C.J., Hilbery and Ormerod JJ.

Criminal Law—Corruption—Bribe—Accepting bribe as inducement to show favour—No necessity to prove that favour in fact shown—Prevention of Corruption Act, 1906 (6 *Edw.* 7, *c.* 34), *s.* 1 (1).

The acceptance of a bribe as an inducement to show favour amounts in itself to an offence under section 1 (1) of the Prevention of Corruption Act, 1906, and there is, therefore, in such a case

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no necessity for the prosecution to prove that the person accused did in fact do that for which the bribe was given to him.

APPLICATION for leave to appeal against conviction.

The applicant, then a major in the Royal Engineers, was convicted by a court-martial at Agaba, Jordan, of taking a bribe contrary to section 1 (1) of the Prevention of Corruption Act, 1906,[1] and, under section 40 of the Army Act, of improper disposal of stores. The applicant applied for leave to appeal against conviction on grounds not relevant to this report.

Dennis Lloyd and *Julian Byng* for the applicant.
E. Garth Moore.

LORD GODDARD C.J. Leave to appeal will not be given in this case, but I must say one word for the guidance of prosecuting officers and judge advocates.

The applicant was charged with taking a bribe, an offence against the Prevention of Corruption Act, 1906. The judge advocate told the officers of the court-martial that they must not only be satisfied that he received a bribe as an inducement to show favour, but also that he did show favour. That is not so; the bribe was given to him as an inducement to show favour. It does not matter if he did show favour. If a person does what is called a double-cross, and does not do what he was bribed to do, that is no reason why he should be acquitted of taking a bribe. Of course, if a person takes a bribe and goes straight off to someone in authority and says: "Here is the bribe he has "given me," that may show that he was not acting corruptly. In the present case the direction given was quite wrong, but it was given in favour of the applicant, not against him. I have merely made these observations because if there is an idea that in such an offence it is necessary to show that the person did that which the bribe was given him to do, it is an impression that should be corrected.

Application dismissed.

Solicitors: *Lomer & Wheater; Director of Army Legal Services.*

J. F. L.

[1] Prevention of Corruption Act, 1906, s. 1: "(1) If any agent "corruptly accepts or obtains . . . "from any person, for himself or for "any other person, any gift or con-"sideration as an inducement or "reward for doing or forbearing to "do . . . any act in relation to his "principal's affairs or business, or for "showing or forbearing to show "favour or disfavour to any person "in relation to his principal's affairs "or business . . . he shall be guilty "of a misdemeanour . . ."

[CHANCERY DIVISION.]

* SUMMERFIELD v. HAMPSTEAD BOROUGH COUNCIL.

1956
Nov. 8, 9, 12, 13, 14; *Dec.* 11.

Harman J.

[1955 S. No. 3241.]

Housing—Rent—Scheme by local authority—Differential rent scheme—Whether rent "economic"—Whether "reasonable"—Method of calculation—Authority not tied to original cost—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 83.

The plaintiff was the tenant of a council house on one of the defendants' housing estates, which had been allotted to him in 1934 soon after it was built. At that time he paid a rent of 13s. a week; he was subject to certain increases in rent which by 1948 brought his rent to 22s. a week. Owing to the rising costs of building and maintenance which produced a deficit on the housing revenue account, the defendants decided in 1951 to introduce a differential rent scheme, under which maximum rents were fixed, and rebates granted to tenants who could not afford the full rent. The scheme was applied first to new tenancies, but in 1954 it was extended to all houses on the defendants' housing estates. The plaintiff's rent under the scheme was £2 a week, and it was conceded that his income precluded him from qualifying for a rebate.

By this action he asked for a declaration that the decisions of the defendants introducing the differential rent scheme were ultra vires and null and void on the ground that the rent demanded was not a reasonable rent within the meaning of section 83 of the Housing Act, 1936, inter alia, since it was higher than the economic rent. He alleged that an economic rent should cover the loan interest, sinking fund contribution, and cost of maintenance and management; and that any rent which substantially exceeded this—which he alleged £2 a week did—was not an economic rent.

The defendants contended that the rent was reasonable having regard to the price which the house would fetch on the open market. They fixed their rents by grouping their housing estates, and ascertaining the highest economic rent chargeable for houses in the group, and not by reference to any one house:—

Held, that the only financial limitation under section 83 was that the rent should be a reasonable one, and a local authority in determining rents was entitled to spread its costs over all its properties to an extent which was not unreasonable from the point of view of the open market value; and in the calculation of an economic rent the authority was not bound to limit the rent by reference to the prime cost of the house when built. The rent of £2 a week was not in the circumstances unreasonable.

Belcher v. *Reading Corporation* [1950] Ch. 380; 65 T.L.R. 773; [1949] 2 All E.R. 969 applied.

ACTION.

The plaintiff, Leonard Arthur Summerfield, applied on November 14, 1934, for a tenancy of a house on the then newly completed housing estate of the defendants, Hampstead Borough Council, called the Westcroft Housing Estate. These houses were built under the Housing Act, 1925, and did not attract any

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Exchequer subsidy. The plaintiff described himself as a painter and stated that he lived in the borough for three years in two rooms at 60, Gayton Road. The reason he gave for wishing to move was convenience, his family then consisting of his wife, a daughter aged five, a son aged three and a baby of a week old. He stated his income as £3 4s. 5d. a week. The plaintiff was duly allotted a house on the estate consisting of three bedrooms, a living room, kitchenette and bathroom, and the amount he paid was 13s. a week, 10s. being rent and 3s. rates. He had lived there ever since. His rent had risen, to some extent before the events which caused this action. The last increase of 4s. 1d. in 1948 brought the total to 22s., consisting of 14s. 9d. rent and rates which amounted to 7s. 3d.

The revision of rents in 1948 still left the defendants, as regards the income from the estate, with a deficiency payable out of the general rates; a table showed an average annual loss on the estate from 1934 to 1955, inclusive, of £1,773. The loss reached a peak figure of £12,196 in 1949, and stood at £6,625 in 1955, notwithstanding the fact that in 1951 the defendants transferred to the tenants on the estate the liabiliy for some of the internal repairs, a liability amounting to possibly £13 a year for each house.

The plaintiff's wages had risen to £11 a week, if he suffered no stoppages; his wife worked part-time and earned about £3 a week; and he had one child at home, a son, who contributed £2 10s. a week.

In 1951 the defendants introduced a differential rent scheme on account of the increasing costs of building and maintenance. Under this scheme the defendants charged maximum rents but granted rebates to tenants who could not afford to pay them. The scheme was at first only applied to new tenancies but in 1954 they extended it to all tenants, and accordingly included the plaintiff. The facts relating to the differential rent scheme are discussed in the judgment.

The plaintiff by this action claimed a declaration that a decision of the defendants made on November 22, 1951 and amended by them on September 30, 1954, purporting to authorize the introduction and operation of a differential rent scheme in respect of houses provided by the defendants under Part V of the Housing Act, 1936, was ultra vires and null and void; alternatively he claimed a declaration that the said decision was ultra vires and null and void to the extent that the same purported to authorize the introduction and operation of the said differential rent scheme to houses provided by the defendants in their Westcroft Estate.

Dingle Foot Q.C., *Ralph Millner* and *Miss J. R. Bisschop* for the plaintiff.

Sir Andrew Clark Q.C. and *Kenneth Jones* for the defendants.

Case cited in argument not referred to in the judgment: *Smith* v. *Cardiff Corporation (No. 2)*.[1]

Cur. adv. vult.

Dec. 11. HARMAN J. having stated the facts read the following judgment: The plaintiff's house is not all a man could desire and the plaintiff made a number of complaints about it, as any man will who knows his own home's defects; but being a very candid witness he said he was not so much dissatisfied with the house as with the rent which the defendants proposed to ask for it from April, 1955, and which he has refused to pay on the ground that it is unreasonable. This rent would now be 40s. a week, having risen by increments of 7s. 6d. each between April, 1955, and last month. The rates on the new assessment amount to 9s. 2d. a week. This is a stiff increase, and I am not surprised that the plaintiff dislikes it; but the truth is, though he has probably not realized it, that he has been living for years at the expense of his neighbours.

The Housing Act, 1936, is now the principal statute regulating what are called council houses, of which the plaintiff's is one. Part V of the Act (sections 71 to 104) before its amendment dealt with the "Provision of Housing Accommodation for the Working "Classes." Section 71 laid upon local authorities the duty of providing such houses in various ways, and section 83 (1), read as follows: "The general management, regulation, and control "of houses provided by a local authority under this Part of "this Act shall be vested in and exercised by the authority, and "the authority may make such reasonable charges for the tenancy "or occupation of the houses as they may determine."

It is around the words "reasonable charges" that the whole controversy turns. There is, so far as I can find, no statutory provision now giving guidance to what is meant by "reasonable."

Under section 85 (5) of the Act of 1936 the following obligation was put upon the local authority: "In fixing rents the "authority shall take into consideration the rents ordinarily "payable by persons of the working classes in the locality, but "may grant to any tenant such rebates from rent, subject to "such terms and conditions, as they may think fit."

By the Housing Act, 1949, all references in the Act of 1936 to "working classes" were abolished, and section 85 (5) of that Act, as amended, now reads as follows: "The authority may "grant to any tenant such rebates from rent, subject to such "terms and conditions, as they may think fit."

Section 85 (6) of the Housing Act of 1936 is in the following terms: "The authority shall from time to time review rents and "make such changes, either of rents generally or of particular "rents, and rebates (if any) as circumstances may require."

Beyond Exchequer contributions to council houses the Act

[1] [1955] Ch. 159; [1955] 2 W.L.R. 126; [1955] 1 All E.R. 113.

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of 1936 provided for certain contributions out of the rates—see section 114. In addition, paragraph 8 of the Eighth Schedule to the Act of 1936 reads as follows: "Where in any financial year "a deficit is shown in the Housing Revenue Account, a contri- "bution (in this Act referred to as an additional contribution) for "that financial year of an amount equal to the amount of the "deficit." However, all such obligations except the last have been abolished by section 8 of the Housing (Subsidies) Act, 1956.

In or about the year 1950 the defendants became concerned about the rapidly rising deficiency in their housing revenue account, caused in particular by the rising costs of building and maintenance which made the expensively erected new estates a heavy burden on the rates. After much debate and inquiry the defendants decided to attempt to bridge the gap by the adoption of what has become known as a differential rent scheme. Schemes of this kind were given statutory authority by section 85, subsections (5) and (6) of the Housing Act, 1936, which I have read, although they were legal before that as is shown by the decision of the Court of Appeal in *Leeds Corporation* v. *Jenkinson*.[1] Such schemes vary in detail, but in principle are operated by fixing maximum rents for houses and granting rebates to tenants who cannot afford to pay the maximum. This has, of course, involved some inquiry into the income of the tenant and his family if he wants a rebate, and has incurred the rather unreasonable odium attached to the words "means test," an echo no doubt from the unhappy days in the thirties when so many were unemployed. In fact, however, there is no reason for this dislike, for disclosure of means is accepted by every citizen who pays income tax.

In 1951 the rebate scheme was only applied to new tenancies on the estate; old tenants, like the plaintiff, still paid the old fixed rents. It is not surprising to find that there was almost no change of tenants. The result was that the gap, instead of closing, continued to widen, and in these circumstances the defendants decided, in 1954, to apply the scheme to all tenants. The £2 a week now demanded of the plaintiff is a maximum rent and it is admitted that his means are such that he would not qualify for any rebate. It is the same figure as has been charged to new tenants of similar houses on this estate since 1951.

The burden of his complaint is: firstly that the rent asked is more than what is called the "economic rent" of the house which he occupies; secondly that it is higher than the quality of the accommodation offered would justify; and thirdly that it is higher than is charged by some other local authorities for similar or comparable accommodation. An attempt was made at the trial to extend this comparison by reference to houses in private ownership, but this was abandoned, and it seems to me wisely.

[1] [1935] 1 K.B. 168; 51 T.L.R. 19.

for privately-owned houses of this type are subject to the Rent Restriction Acts and no true comparison is possible.

The defendants' case is that the words "reasonable charges" in the ordinary connotation mean charges reasonable by the test of the open market, whether looked at from the landlord and tenant point of view or tested by the price which such a house would fetch freehold and the rent which would be charged in order to obtain a fair return on the money invested. The plaintiff quarrels with this view on the ground that there is virtually no free market in small houses nowadays, and moreover that considerations valid between buyer and seller are not the proper criterion when considering the obligations of a local authority to the tenants of its council houses.

There seems no doubt that, if the defendants' test be the right one, £2 a week is a reasonable rent for this house. If it were put on the market, as it is within the powers of the defendants to do under section 79 (1) (*d*) of the Housing Act, 1936, it would fetch, according to the evidence, not less than £1,700; and the plaintiff's own expert witness, a Mr. Curtis, who objected to the defendants' suggestion that £130 a year was a fair rent, himself put the rent at £112 a year.

The plaintiff called officials from other boroughs, Willesden, St. Pancras and Hendon, who showed that council houses whose rents are fixed by those boroughs are lower than those charged for comparable houses by the defendants; but these rents in each case had brought about very large deficiencies in the housing revenue accounts of the authorities concerned. No notice was taken, in those boroughs, of what was called the economic rent, and in my judgment testimony of this sort is of no value whatever. Moreover, the obligation to have regard to rents ordinarily payable in the locality contained in section 85 (5) of the Act of 1936 has, as I have shown, been repealed. It must be the duty of a local authority to try to hold the balance evenly between the council house tenants and the general body of ratepayers in the borough, and in this I concur with the decision of Romer J. in *Belcher* v. *Reading Corporation.*[2] I will read just one passage from the headnote[2]: "*Held*, that the question whether or not "the increased rents contravened section 83"—that is, of the Act of 1936—"did not depend on whether certain items were "wrongly debited to the housing revenue account, but on whether "they were 'reasonable'; that the authority had to consider the "welfare of the tenants on the one hand and the interests of the "ratepayers as a whole on the other; that it was their duty "to maintain a balance between those two sections of the "community so far as possible, having regard to the specific "requirements of the Act."

Most council houses already enjoy both an Exchequer and a rate subsidy and thus are already a burden on the taxpayers and

[2] [1950] Ch. 380; 65 T.L.R. 773; [1949] 2 All E.R. 969.

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the ratepayers, and it seems to me that it should be the object of a local authority at least not to produce a deficiency exceeding the amounts which Parliament has thought fit to allow by way of subsidy. Accordingly, I put aside comparisons of this sort.

The only financial limitation of the charges which a local authority may impose in the management of its housing estate is as before mentioned, that the charges must be reasonable.

As to the class of accommodation afforded by this house, the evidence was that it was well up to the standard usual in 1934 when the house was built but lacked certain amenities which more modern houses incorporate. The cupboard room is deficient; the house is said to be rather damp because there is no heating running up the stairs; and there was a complaint about the hot water system, but this admittedly is in course of being remedied by the defendants. It was also said that the house had suffered twenty years' wear and tear, but I have no doubt that the plaintiff, who has been the only occupier, has not allowed it to be much the worse for that. The complaint that the pattern of the power plug is obsolete was really a trivial matter. On the whole it does not seem to me that these complaints add up to much.

The plaintiff, by his statement of claim, seeks to extend the ambit of the action so as to include all the houses on the estate, but they are by no means uniform and no evidence was offered about the rest. In any event, this is in no sense a representative action and my judgment is confined to this house alone.

The main argument turned on what was called the "economic "rent." The sense in which this phrase was used is to be found in a document issued by the Minister of Housing in 1953 called "Transfers, Exchanges and Rents," in which I find the following definition: "Economic Rent—The rent at which a house must "be let in order to cover loan interest and sinking fund contribu- "tion and the cost of maintenance and management." The plaintiff argued that no rent which substantially exceeded this figure could be a reasonable rent, and for this house it was argued on his behalf that the figure was in the neighbourhood of £1 a week.

The defendants pointed out that to keep to this figure would mean: firstly, that each house must be kept separate; secondly, that the only variable figure would be cost of maintenance, so that in fact you would be tying council houses to the system of the Rent Restrictions Acts, which does not apply to local authorities; thirdly, that when the loan was amortized and loan charges disappeared the only charge which could be made would be maintenance; and fourthly, that there was nothing in the Housing Acts to tie rents to building costs of individual houses or, for that matter, of housing estates.

The defendants have been at great pains to explain the method by which they arrived at their figure. It was not reached capriciously, but was in fact related to the economic rent not by

taking any house or estate separately but by grouping the defendants' housing estates and then ascertaining the highest economic rent chargeable for houses in that group. Exchequer housing subsidies were also pooled for the purposes of this calculation. The lowest priced group included the Westcroft Estate, the Garnett House Estate and others offering comparable accommodation. In this calculation the economic rent for a four-roomed house on the Westcroft Estate worked out, according to the defendants, at £1 9s. 6d., yet that for a smaller house on the Garnett House Estate, built at a later date and more expensively, amounted to £1 19s. 6d. Using this yardstick it was considered fair to put the maximum rent of four-roomed houses in the group at a figure of £2. The objection taken to this was that if the Westcroft Estate were taken by itself the figure would be substantially lower, even assuming that the defendant's figure of 29s. were right and not the plaintiff's figure of 20s. or less. The plaintiff's advisers in their calculation did not attempt to arrive at a figure applicable house by house, but took costs based on the entire estate.

The question for me is whether a charge was arrived at which can be said to be unreasonable. In my opinion it clearly cannot, especially when accompanied by rebates designed to help the less wealthy members of the community. It is true that thus the richer contribute to some extent towards the rents of the poorer, but this is an inescapable feature of any rebate scheme, for if the maximum rents are based on the economic rent and rebates are given off that figure it must follow that every rebate scheme will produce a deficiency which has to be supplied by the general body of ratepayers. It is also true that tenants on the older estates will pay more because new estates are built at greater cost, but I can see no reason why a local authority may not spread its costs over all its properties at any rate to the extent within a figure which is not unreasonable from a market point of view. The notion that a council house or estate must necessarily be run at a loss seems to me to find no justification in the Housing Acts, which do contemplate losses but also contemplate profits—see section 130 of the Housing Act, 1936, and do not provide that if a surplus is produced by some estate or other that surplus must necessarily go to reduce the rents on that or other council estates. Money may, in fact, in certain circumstances, be repaid to the Exchequer so as to recoup at least to some extent the State subsidies.

There is, to my mind a more fundamental flaw in the argument thus advanced on the plaintiff's behalf. I demur to the whole theory that there is, as the law now stands, some duty placed on local authorities to limit the rent they charge by reference to the prime cost of their houses when built. No other house-owner does so, and I can see no reason why local authorities alone should be so constrained. The value of money changes, wealth shifts from one part of the community to another, and in my

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judgment the tenant of a council house is not entitled to insist on being favoured above his neighbours who live outside the charmed circle. The needy must be succoured, wants must be supplied, charges must not be unreasonable; but for the tenant who can afford it a rent is not unreasonable if it be no higher than his neighbour will pay who has to rely on the open market.

Therefore I dismiss the action.

Action dismissed.

Solicitors: *Pearce & Sons*; *B. H. Wilson.*

I. G. R. M.

[COURT OF APPEAL.]

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1956 *Dec.* 10, 11, 17.

Lord Evershed M.R., Birkett and Romer L.JJ.

* ESCOIGNE PROPERTIES LTD. *v.* INLAND REVENUE COMMISSIONERS.

Revenue — Stamp duty — Conveyance or transfer on sale — Company having contracted for purchase of property agrees to re-sell to second company—Conveyance to second company by executors of original vendor when first company beneficial owner of not less than 90 *per cent. of other company's share capital—Conveyance or transfer of beneficial interest from one company to another—Whether conveyance executed in pursuance or in connexion with arrangement whereunder beneficial interest had been previously conveyed or transferred—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 54, 58 (4), *Sch. I—Finance Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 28), *s.* 42—*Finance Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 50.

In 1950 C entered into an agreement to sell certain properties to company No. 1 in consideration of an allotment of shares in that company. The agreement was duly stamped and the shares allotted to C, but no conveyance or transfer of the properties to company No. 1 was executed either by C or, after C's death in 1951, by his executors.

In 1954 company No. 1 orally agreed to sell the properties to the appellants, company No. 2, in consideration of an allotment of shares in the appellant company. In November, 1954, at a time when company No. 1 was the beneficial owner of not less than 90 per cent. of company No. 2's issued share capital, C's executors at the direction of company No. 1 executed five instruments conveying or transferring the properties to company No. 2, which duly allotted the agreed amount of shares to company No. 1.

The instruments were presented to the Inland Revenue Commissioners for adjudication under section 12 of the Stamp Act, 1891. The commissioners were of the opinion that the instruments were within the definition of "Conveyance on sale" in section 54 of the Act[1] and were liable to stamp duty under the heading

[1] Stamp Act, 1891, s. 54: "For "the purposes of this Act the expression 'conveyance on sale' includes "every instrument . . . whereby any "property, or any estate or interest "in any property, upon the sale "thereof is transferred to or vested "in a purchaser, or any other person "on his behalf or by his direction."

S. 58 (4): "Where a person "having contracted for the purchase "of any property, but not having "obtained a conveyance thereof, contracts to sell the same to any other

"Conveyance or Transfer on sale" in the first Schedule to that Act assessed ad valorem, by virtue of section 58 (4) of the Act, upon the value of the shares allotted by the appellant company to company No. 1. They assessed stamp duty accordingly. Company No. 2 appealed against this assessment on the ground that the instruments were exempted from duty under section 42 of the Finance Act, 1930.

Vaisey J. held that the instruments of conveyance or transfer were exempted from stamp duty by section 42 of the Finance Act, 1930:—

Held, that the instruments represented the completion or performance of two separate and distinct transactions: (1) the sale by C to company No. 1 and (2) the sub-sale by company No. 1 to company No. 2; and that the effect of the instruments was to achieve both these objects and not only the transfer of the beneficial interest in properties from the one company to the other which transaction alone was within the exception conferred by section 42 of the Finance Act, 1930, and, accordingly, ad valorem stamp duty was payable on the instruments.

Quaere whether, if the instruments had been within the protection of section 42 of the Finance Act, 1930, they would have been taken out of such protection as being instruments "executed in "pursuance of an arrangement" within section 50 of the Finance Act, 1938.

Decision of Vaisey J. [1956] 1 W.L.R. 980; [1956] 3 All E.R. 33 reversed.

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"person, and the property is in consequence conveyed immediately to "the sub-purchaser, the conveyance "is to be charged with ad valorem "duty in respect of the consideration "moving from the sub-purchaser. . . . "(6) Where a sub-purchaser takes an "actual conveyance of the interest of "the person immediately selling to "him, which is chargeable with ad "valorem duty in respect of the consideration moving from him, and is "duly stamped accordingly, any conveyance to be afterwards made to "him of the same property by the "original seller shall be chargeable "only with such other duty as it may "be liable to, but the last-mentioned "duty shall not exceed the ad valorem "duty."

Finance Act, 1930, s. 42: "(1) "Stamp duty under the heading "'Conveyance or Transfer on Sale' "in the First Schedule to the Stamp "Act, 1891, shall not be chargeable "on an instrument to which this "section applies: . . . (2) This "section applies to any instrument "as respects which it is shown . . . "—(*a*) that the effect thereof is to "convey or transfer a beneficial "interest in property from one company with limited liability to "another such company; and (*b*) that ". . . one of the companies is beneficial owner of not less than 90 per "cent. of the issued share capital of "the other company."

Finance Act, 1938, s. 50: "(1) "Section forty-two of the Finance "Act, 1930 . . . shall not apply . . . "unless it is shown . . . that the "instrument was not executed in pursuance of or in connection with an "arrangement whereunder—(*a*) the "consideration for the transfer or "conveyance was to be provided "directly or indirectly by a person "other than a company which at "the time of the execution of the "instrument was associated with "either the transferor or the transferee; or (*b*) the beneficial interest "in the property was previously "conveyed or transferred directly or "indirectly by such a person as aforesaid. (2) For the purpose of this "section, a company shall be deemed "to be associated with another company if, but not unless, both are "companies with limited liability, "and . . . one of them is the beneficial owner of not less than ninety "per cent. of the issued share capital "of the other."

[2] [1956] 1 W.L.R. 980; [1956] 3 All E.R. 33.

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The facts, as set out in a case stated by the Commissioners of Inland Revenue, appear in [1956] 1 W.L.R. 982–987.

Vaisey J. held that instruments were, by section 42 of the Finance Act, 1930, exempted from ad valorem stamp duty as conveyances or transfers on sale and that the instruments were not executed pursuant to an arrangement within the meaning of section 50 (1) of the Finance Act, 1938, and the exemption conferred by section 42 was not excluded by section 50. The commissioners appealed.

Geoffrey Cross Q.C. and *E. Blanshard Stamp* for the commissioners.

John Pennycuick Q.C. and *John Warner* for Escoigne Properties Ltd.

The following cases were cited in argument: *Inland Revenue Commissioners* v. *G. Angus & Co.*[3]; *Curzon Offices Ltd.* v. *Inland Revenue Commissioners*[4]; *Inland Revenue Commissioners* v. *Payne*[5]; *A. G. Chamberlain* v. *Inland Revenue Commissioners.*[6]

LORD EVERSHED M.R. The question on this appeal is whether duty under the Stamp Act, 1891, as upon "conveyances or "transfers for sale," is exigible in respect of certain instruments, some transfers of registered land, some conveyances of unregistered land, dated November 2, 5 and 6, 1954.

The parties to all these instruments are: (1) three gentlemen, as executors of Samuel Cohen, deceased; (2) Samuel Cohen (Properties) Ltd., to whom I shall hereafter refer as "company "No. 1"; and (3) Escoigne Properties Ltd., the respondents before us, to whom I shall hereafter refer as "company No. 2."

By these instruments very numerous properties, some freehold and some leasehold, were conveyed or transferred to company No. 2, company No. 1 joining in fact as beneficial owners of the properties and in order to direct the conveying party.

My last statement arises from the circumstance, as later appears, that company No. 2 were in the position of sub-purchasers from company No. 1, the original contract for the sale of the properties by Mr. Cohen to company No. 1 never having been completed.

It is not in doubt, first, that all the instruments constitute conveyances or transfers on sale, or, second, that apart from the Finance Acts of 1930 and 1938 the case would be within section 58 (4) of the Stamp Act, 1891; that is to say, ad valorem duty would have been exigible in respect of all the instruments based upon the consideration payable by company No. 2.

[His Lordship read subsections (4) and (6) of section 58 and continued:] The claim of company No. 2 is that the instruments

[3] (1889) 23 Q.B.D. 579.
[4] [1944] 1 All E.R. 606.
[5] (1940) 23 T.C. 610.
[6] [1943] 2 All E.R. 200; 59 T.L.R. 343; 25 T.C. 317.

are wholly exempted by the effect of section 42 of the Finance Act, 1930, and that they are not brought again subject to charge by section 50 of the Finance Act, 1938. The Crown disputes both these propositions.

I must now state certain dates. The contract for the sale of all these properties between Mr. Cohen and company No. 1 was dated June 30, 1950. Mr. Cohen himself died in 1951. In August, 1954, company No. 2 was formed, and although there appears to have been no written contract between company No. 1 and company No. 2, the transfers of the properties direct from Mr. Cohen's executors to company No. 2 took place at the beginning of November, 1954.

The first point, therefore, is whether, as company No. 2 say, the instruments are within the terms of section 42 of the Finance Act, 1930. [His Lordship read section 42 (1) and (2).] In the present case it is not in doubt that the terms of section 42 (2) (*b*) are satisfied. The question is whether the terms of subsection (2) (*a*) are satisfied, and that question turns substantially, if not exclusively, upon the use of the three words "the effect thereof."

There is no doubt that the transactions are within the terms of the subsection if the words "the effect thereof" are, as company No. 1 say, equivalent to "are effective to." But the Crown, pointing to the definite article, say that the words signify that the true and real effect or purpose of the instruments must be the specified result achieved; in other words, that the phrase "the effect thereof" means "the substantial effect thereof."

It is not in doubt that in many, if not in most, cases a transfer of a beneficial interest will not be the sole and exclusive purpose of the instrument of transfer. For example, the legal estate will commonly also be conveyed or transferred, and there may well be covenants restrictive of user in the instrument. But in such cases these effects are subsidiary or incidental to the main purpose, which is to achieve the transfer from A to B of the beneficial interest in the property the subject of the instrument.

These last observations, however, are not, in my judgment, applicable in the present case; for these instruments represented, as I think, the completion or performance of two separate and distinct transactions, namely: (1) the sale by Mr. Cohen to company No. 1, and (2) the sub-sale (and, be it observed, at a slightly different price) from company No. 1 to company No. 2.

The effect of the instruments was to achieve both these objects and not the second object which I have stated only; and it is only the second which is within the terms of subsection (2) (*a*) of section 42, for it is only the second which constituted a transfer of the beneficial interest from one limited company to another.

This conclusion—and the point being a short one, the conclusion can be stated equally shortly—disposes of the appeal in favour of the Crown.

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But I would add, in deference to the arguments, these further points. First, I am not seeking to dissect the instruments by having recourse to subsection (4) of section 4 of the Stamp Act, 1891. Such a process is, in my judgment, unnecessary. I am solely concerned with the meaning of the words used in subsection (2) of section 42 of the Finance Act, 1930. Second, I am not, I conceive, writing words into the section but stating their effect in the context. On either view, some paraphrase must be stated of the words "the effect thereof." On the other hand, it is right to come to a conclusion as to the meaning of this section against the background of the Stamp Act legislation. Subsections (4) and (6) of section 58 of the Act of 1891 seem to me to show that where an uncompleted sale is followed by a sub-sale and there is a conveyance direct to the sub-purchaser, only one duty is payable; but they also show, to my mind, that the existence of the two distinct transactions is recognized. For example, it is stated in subsection (6) that where, as might happen, ad valorem duty is payable on the transfer of the beneficial interest as such by the purchaser to the sub-purchaser, then, and only then, a subsequent conveyance is, subject to the limited qualifications stated, exempt from duty.

Having regard to my answer to the question raised under the Finance Act, 1930, it is not strictly necessary for me to express any view on the second question involved, namely, if the case is covered by section 42, is it taken out of the exemption of that section by the terms of section 50 of the Finance Act, 1930? But since the matter was fully argued, I think it right to indicate my views also on that second question.

Section 50 of the Act of 1938, so far as relevant, reads as follows: "(1) Section 42 of the Finance Act, 1930"—and then there is stated in parenthesis what the effect of that section is—"shall not apply to any such instrument, unless it is shown to "the satisfaction of the Commissioners of Inland Revenue that "the instrument was not executed in pursuance of or in connec-"tion with an arrangement whereunder—"—and (*b*) is the relevant matter for this case—"the beneficial interest in the "property was previously conveyed or transferred directly or "indirectly by such a person as aforesaid." And "such a "person," as appears from the previous paragraph, is "a person "other than a company which at the time of the execution of "the instrument was associated with either the transferor or the "transferee."

The problem posed under the section is of a three-fold nature: First, was what I have called the original sale from Mr. Cohen to company No. 1 "an arrangement" within the meaning of the subsection? Second, if so, were the instruments sought to be charged entered into in pursuance of or in connexion with that arrangement? And third, was the arrangement one whereunder the beneficial interest in the property was directly or indirectly

conveyed or transferred by a person such as there stated, namely, as is admitted in this case would be a just description of him, Mr. Cohen?

As to the first part of the problem, Mr. Pennycuick says "No." He says that the word "arrangement" is one of deliberately imprecise import, but involving something in the nature of a series of transactions; and he refers to the definition in the Oxford English Dictionary: "disposition of measures for a particular purpose." He therefore says that, whatever the word "arrangement" means, it is not apt in this context to cover a single instrument, a single contract for sale. I shall not attempt any definition of the word "arrangement." I think it sufficient to say that what occurred in 1950 was not an isolated contract for sale; for it appears that company No. 1 was formed the day before the contract; and, in my opinion, the relevant events of 1950 consisted at least of the formation of the company and the agreement to transfer to it the beneficial interest in a very large number of properties, freehold and leasehold, for a purpose which was no doubt good to Mr. Cohen; and I think all that together at least constitutes "an arrangement."

As to the second question (namely, if it was an arrangement, were the instruments here in suit executed in pursuance of or in connexion with it), I am inclined to think, with all deference to Mr. Blanshard Stamp, that they were not executed in pursuance of that arrangement, since those words import to my mind that the thing done was contemplated by the original arrangement itself, in pursuance of which it was done, and there is no suggestion that the formation of company No. 2 was ever contemplated in 1950. On the other hand, I think they were in connexion with the arrangement, because the essence of what was done in 1954 was the completion of the sales made under the arrangement of 1950; they constituted, in other words, a perfecting of that arrangement. As Mr. Cross put it, if the question were asked: "Why did Mr. Cohen's executors join in the transfers?" the inevitable answer is: "Because they were bound to do so by reason of the contract in 1950 entered into by Mr. Cohen as part of the arrangement." In truth, what I have already said in answer to the first question arising under the Act of 1930, I think, necessarily answers this question also.

Mr. Pennycuick did say that the transfer of the legal estate in the properties was never contemplated at all when the arrangement of 1950 was made. In other words, Mr. Cohen never contemplated that these sales would ever be completed. I cannot agree. It seems to me that that view is quite unrealistic, and it is perhaps a sufficient commentary upon it if I read paragraphs 4 and 5 of the contract which Mr. Cohen in fact made. Paragraph 4 reads: "The purchase shall be completed at the offices "of Messrs. Tredgold, Idris & Gernat of 71, Lincoln's Inn Fields, "W.C.2." Paragraph 5 is: "The company shall be entitled to "the receipt of the rents and profits of the said hereditaments as

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"from" a past date, "and the consideration shall be satisfied" as stated, "and the vendor and all other necessary parties (if "any) shall forthwith at the expense of the company execute "and do all such assurances and things for vesting the said "respective hereditaments in the company and giving to it the "full benefit of this agreement as shall be reasonably required."

I pass, therefore, to the third heading of this question, namely, was the arrangement one whereunder the beneficial interest in the property was conveyed or transferred directly or indirectly by Mr. Cohen? Logically I think this part of the question should have been dealt with secondly, but I have left it until last because I have found the greatest difficulty in it. Like the other points, however, it is a short one, and the conclusion to which I am inclined, as at present advised, can be shortly stated. There is no doubt that the beneficial interest in the property was transferred and, I think, was transferred under the arrangement, since that was its effect in equity. But it is said that the form of words used, whereunder the beneficial interest was conveyed or transferred "by" Mr. Cohen, according to their ordinary significance contemplates an instrument adapted and directed to a transfer, i.e., an instrument of transfer properly so called. The argument is undoubtedly enforced on my mind by the use of the phrase "by a person," for the transfer here was in truth, as I have alearly said, by operation of law. Although I prefer not to express any concluded opinion on this point, I am on the whole inclined to think that the Crown is right upon it. In the first place, I place, in support of that view, reliance on the word "whereunder." No doubt that word is more appropriate than the word "whereby" in connexion with the word "arrange-"ment." But the meaning of the word "whereunder" seems to me substantially to be equivalent to "the effect or conse-"quence of which was that." Secondly, there is the use of the words "directly or indirectly," and I observe that although the section speaks of the beneficial interest being transferred "by "such person," it does not go on to say "to any person or "corporation." If it did, the words "directly or indirectly" would naturally cover any intermediate stages if the transfer was not direct from the one to the other. But in the absence of any added words in reference to the transferee, I think that the word "indirectly" when applied to the phrase "by such "person" may reasonably mean that the transfer, though by operation of law, was the effect of the arrangement which the person made or entered into. Thirdly, I turn again to the last two paragraphs of the contract. Although, no doubt, the transfer did take effect by operation of law, there can equally be no doubt that the result was the result which Mr. Cohen deliberately intended. Therefore, although if the phrase used had been "from or by such person" it would have made the meaning to which I am inclined clearer, I still, without expressing any final view, am disposed to think that the Crown is right on this, as

it was on the other points which arose under section 50 of the Act of 1938. But I am content to rest my judgment upon this appeal on the view which I take on section 42 of the Act of 1930.

I would add that the case is one in which the common sense and justice of the case seem to favour the Crown. I agree, of course, that the question which we have to determine is the claim of the Crown to duty, and that question must depend upon the proper construction of the intention which Parliament has expressed in the Revenue statutes, and not upon what one may think to be a fair or just result. I think that the view which I have taken involves no distortion or undue stretching of the Parliamentary language but emerges from its fair reading according to its context, and although I regret to differ from Vaisey J., my regret is perhaps less, because it seems to me that the result I have reached is one which accords with common sense and fairness. For, if I am wrong, it is plain that whenever an individual desires to transfer property to a company, the device of the incorporation of two companies will be likely to have the effect of avoiding any ad valorem stamp whatever. I would allow the appeal.

BIRKETT L.J. I agree and would like to add that although this appeal is determined by section 42 of the Finance Act, 1930, and the point which has been argued and has been dealt with by my Lord in his judgment, under section 50 of the Finance Act, 1938, therefore does not strictly arise, I should like to say that, had it arisen and had it called for a decision, I should have been inclined to follow the reasoning of the Master of the Rolls and to have come to the same conclusion. On the whole, I agree with the Master of the Rolls in the decision which he has announced.

ROMER L.J. The first point for decision on this appeal is whether the five instruments of conveyance or assignment which are in question qualify for the relief from stamp duty which is conferred by section 42 of the Finance Act, 1930. At the time when the instruments were effected Samuel Cohen (Properties) Ltd. (hereinafter called "the properties company") held not less than 90 per cent. of the issued share capital of the appellant company to whom, by the instruments, freehold and leasehold properties were conveyed and assigned. Accordingly, the requirements of section 42 (2) (*b*) are satisfied, and the only question is whether the instruments were within section 42 (2) (*a*). This depends on whether "the effect thereof" was "to convey "or transfer a beneficial interest in property" from the properties company to the appellant company. It is quite clear that one of the effects of the instruments was to convey or transfer a beneficial interest in property to the appellant company. The instruments were, however, designed to effect another purpose as well, namely, to obtain the vesting of the legal title

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to the properties in the appellant company. This title was in the executors of Mr. Cohen, because the contract which this gentleman had entered into in 1950 for the sale of the properties to the properties company had never been completed. The terms in which section 42 are drawn show that the attention of the draftsman was concentrated on the passing of beneficial interests in property from one associated company to another; and the immunity from transfer stamp duty was confined to instruments "the effect" whereof was to produce that result. This is not to say that an instrument which conveyed the legal title as well as the beneficial interest from one company to the other would be outside the section; but, in such a case, the instrument would be exempted not because of, but in spite of, the passing of the legal title. In such a case the conveyance of the legal title would be no more than incidental to the passing of the beneficial interest, but, subject to this, the words "the effect" seem to me to show that the instruments which were in contemplation were those which were operative to produce only one result, namely, the conveyance or transfer of a beneficial interest. If the intention of Parliament were wider in scope than this, one would have expected to find "an effect" or "which are effective" instead of the language which in fact appears.

If this be the proper interpretation of section 42 (2) (*a*) of the Act, it is clear that the instruments in question do not fall within it. The conveyances and assignments were certainly effectual to pass the properties company's beneficial interests in the properties to the appellant company. They achieved, however, in addition to this, another and different purpose, viz. to complete the contract of 1950 (which would, as an independent transaction, have attracted ad valorem stamp duty) and to introduce the appellant company as sub-purchasers. This involved the joinder of Mr. Cohen's executors as parties to the instruments and the vesting by them in the appellant company of the legal estate in the properties. The instruments accordingly had a dual effect, the conveyance or transfer of a beneficial interest by one associated company to another and the getting in of the legal title, in completion of the earlier contract of sale, which was still outstanding in a third party. By reason of this composite object of the relevant instruments, and their consequent width and scope, it cannot, therefore, be said, in my judgment, that "the effect" thereof was that envisaged by section 42.

The view which I have expressed regarding the meaning and effect of section 42 of the Finance Act, 1930, is sufficient to decide the appeal in favour of the Crown; and it therefore becomes unnecessary to decide the questions, which were argued before us upon section 50 of the Finance Act, 1938. I am, however, in agreement with the view which the Master of the Rolls has indicated, that the activities in which Mr. Cohen engaged in 1950 constituted "an arrangement" for the purposes of section 50 and

that the instruments now in question were executed in connexion with (though not, I think, in pursuance of) that arrangement. I do not desire to add anything to what the Master of the Rolls has said upon these points. I am, however, for myself more than a little doubtful whether the beneficial interest in the properties was, under that arrangement, "conveyed or transferred directly "or indirectly by" Mr. Cohen to the properties company. The beneficial interest certainly passed from Mr. Cohen to the properties company in 1950 but it passed by operation of law by reason of Mr. Cohen receiving the full consideration payable by the company under the contract of sale. It seems to me that it is difficult to say that a beneficial interest which only passed because of the operation of equity upon that position was conveyed or transferred by Mr. Cohen, whether directly or indirectly. The word "by" appears to me to be of significance and when used in connexion with "conveyed or transferred" suggests the execution or signature of some document by the owner of a beneficial interest or by someone who is subject to his control and direction. I would only add that the somewhat looser phraseology "the effect whereof," which is used at the beginning of section 50 in reciting the general scope of section 42 of the 1930 Act, is not repeated in the operative part of the section, which is framed in stricter language. I am inclined, therefore, to the view that there was no conveyance or transfer by Mr. Cohen within the meaning of section 50; but, with my Lord, I would prefer to express no concluded opinion upon a point which is not necessary for the determination of this appeal.

Upon the ground, however, that the instruments in question are not within the protection afforded by section 42 of the Finance Act, 1930, I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Nicholson, Graham & Jones; Solicitor of Inland Revenue.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

* PRACTICE DIRECTION (FIXED DATES FOR NON-JURY ACTIONS.)

1957
Jan 14.

Lord Goddard C.J., Cassels and Lynskey JJ.

Practice—Trial—Date—Non-jury actions—Fixed dates—Procedure for fixing date for trial.

LORD GODDARD C.J. I have an announcement to make with regard to the fixing of dates for non-jury actions.

(1) It is intended that four judges should be available each sittings to take cases for which fixed dates have been given.

(2) Four lists will be kept by the clerk of the lists and cases will be put in any one of the four in which there is a vacant date

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convenient to the parties but no list will be allocated to a particular judge.

(3) As soon as a case is set down it will be entered in the General List. Subject to paragraph 9 hereof a party may then apply to the clerk of the lists for a date on giving notice to the other side and after obtaining an appointment from the clerk of the lists. The notice should state the date proposed by the party giving it who should also state the estimated length of trial. The party to whom notice is given may suggest an alternative date and he also should give his estimate of the length of trial. Suitable forms of notice may be obtained at the office of the clerk of the lists. If neither party has applied for a date within four weeks of setting down the case will remain in the General List subject to paragraph 8 hereof. If an order for a speedy trial has been made the party who applied for a speedy trial shall apply to the clerk of the lists for a date within one week of the making of the order and shall give notice of the date on which he will apply to the other party or parties. It is most desirable that the views of counsel as to the probable length of a case should be ascertained.

(4) When the application is made to him the clerk of the lists shall, in default of any agreement between the parties, fix a date, but either party may on giving two days' notice to the other side apply to the judge in charge of the lists to vary the date so fixed. An application to the judge must be made within a week of the application to the clerk of the lists, and the judge may vary the date fixed by the clerk of the lists or may order the case to remain in the General List. Where a date is given for a case estimated to last three hours or over, no other case will be entered in the same list for that day.

(5) When any fixed case is settled or withdrawn it shall be the duty of the plaintiffs' solicitors so to inform the clerk of the lists and a reasonable fee may be allowed on taxation for doing so. When a date has been vacated the parties in any case fixed for a later date may if they agree apply for their case to be fixed for the date so vacated.

(6) A list will be posted outside the office of the clerk of the lists (Room 419) showing the fixtures for each day as they are allocated and the free dates. The list will be brought up to date each day at or after 4 p.m.

(7) Once a date has been fixed no alteration except on an application to take an earlier vacated date will be granted without the leave of the judge in charge of the lists. Leave to alter a date by postponement will be given only on exceptional and urgent grounds. The judge may in any case order as a condition of postponement that the case should go into the General List. The parties may at any time agree that a fixed case should go into the General List and they must then inform the clerk of the lists and the fixed date will be vacated.

(8) At any time before a case in the General List has

appeared in the Warned List for the week the parties by consent may apply for a fixed date.

(9) This scheme will not apply to cases already appearing in the printed list for the week ending Friday, January 18, 1947. Applications on special grounds in respect of those cases must be made to the judge in charge of the lists. Applications may be made on or after January 14 to fix a date for any other case already set down. No application to fix a date for a case not already set down will be entertained before Monday, February 11, unless an order for a speedy trial has been ordered.

I desire to add one other word: It will be remembered that Lord Evershed's Committee [1] were of opinion that nothing would more conduce to the saving of costs than having fixed dates for trial. This scheme has been framed with that object; it is of course an experiment and time will show if and what alterations may be needed. I should like to point out that fixed cases may take somewhat longer to come on for trial than do those in the list at present. In former days there were often complaints about the law's delay: during last sittings and for some time previously cases were heard within 3½ months of being set down and judging by the number of applications for postponement it is clear that that interval was by no means too long for their adequate preparation. As the postponement of fixed cases will only be granted for the most compelling reasons it will be advisable for parties to choose dates sufficiently far in advance to make sure that they will be ready when the time for trial arrives and they will no doubt consider that if that involves some delay it is not too high a price to pay for the convenience and certainty of a fixed date.

It should also prove a great convenience for witnesses, more especially experts and medical men, to know well in advance the day that they will be required to attend. The scheme will I hope work without any or at least with only a mimimum of formality: no summons will be required for applications either to the clerk of the lists or to the judge; a notice is all that is necessary. I also hope that parties will make every effort to agree on a date, having first ascertained at the office what days are open. All that then need be done is to notify the office by leaving there the convenient form which Mr. Fell has prepared. I am arranging that the same judge should for the future be in charge of both the General and Fixed Lists during the whole of a sittings, and Ashworth J. will be in charge till Easter.

J. F. L.

[1] Committee on Supreme Court Practice and Procedure, appointed April 22, 1947. The final report was presented in July, 1953 (Cmd. 8878).

[CHANCERY DIVISION.]

1956
Oct. 30.

Vaisey J.

* *In re* QUIBELL, DECD.
WHITE *v.* REICHERT AND OTHERS.

[1956 Q. 154.]

Will — Construction — Direction to executors performed by testator — Trustees directed by will to form company to acquire business— Income of shares after wife's death to daughter for life—Ultimate trusts—Gift by codicil of shares and business premises to daughter absolutely — Company formed by testator himself after codicil executed—Shares vested in testator and daughter—Daughter chairman and governing director of company after testator's death— Whether entitled to testator's shares.

A testator by his will bequeathed to his trustees the goodwill, stock in trade and premises of his business of a chemist and directed his trustees as soon as possible after his death to convert the business into a private limited company and for that purpose to promote a company to take over the business and to sell or transfer the business and the property (other than the premises) to the company in consideration of fully paid ordinary shares. He directed his trustees to stand possessed of the shares on trust to pay the income thereof to his wife for life and after her death to his daughter for life and after her death on trust for his sister and her children or remoter issue as therein mentioned. By a codicil reciting the relevant provisions of the will he provided that after his wife's death his trustees should hold the shares in the company and the business premises in trust for his daughter absolutely. Subsequently, despite these testamentary provisions, he himself promoted a company which acquired the business and carried it on on the premises, which remained vested in the testator. The company had a capital of 1,000 £1 shares, all issued for cash, 510 to the testator, 488 (including a subscriber's share) to the daughter, one (which ultimately belonged to the daughter) to the testator's wife and one to the then secretary of the company. The testator died two years and his wife eight years after the formation of the company. The daughter, a qualified pharmacist, had in that capacity helped him in the business and after his death had, pursuant to his will and the company's articles of association, been appointed chairman and governing director of the company:—

Held, in deciding that the 510 shares went to the daughter for her own use and benefit absolutely:

That the fact that the shares were in a company formed not by the trustees but by the testator, and the circumstances that the codicil purported to deal with shares in a company contemplated as having been formed by the trustees, were immaterial: and that the testator's language indicated an intention that his daughter, a qualified pharmacist well able to carry on the business, should be absolute owner of the shares in the company, an intention emphasized by his including in the gift as one object the business and the premises on which it was carried on.

In re Russell (1882) 19 Ch.D. 432 applied.

ADJOURNED SUMMONS.

By his will dated April 8, 1935, a testator, John William Quibell, appointed his wife Elizabeth Maud Quibell, his daughter

Audrey Maud Quibell (hereinafter called "Mrs. Reichert") and John Henry White his executors and trustees and gave certain legacies. By clause 4 he bequeathed to his trustees free of duty the goodwill of his trade or business as a chemist and the stock in trade and effects employed therein or belonging thereto together with the leasehold premises known as 885, Finchley Road, N.W.11, on which the same was carried on and all other, if any, the freehold or leasehold premises belonging to him at his death and used solely for the purposes of the said business and the benefit of all contracts subsisting in respect of the business and all book debts and moneys due to him in respect thereof or standing to the credit of his business account at his bankers at his death. By clause 5 (1) he directed his trustees at the expense of his estate as soon as possible after his death to convert the business into a private company limited by shares and for that purpose to promote a private company (hereinafter called "the company") to take over the business and to sell or transfer the business and the property bequeathed by clause 4 (other than 885, Finchley Road and any other freehold or leasehold premises belonging to him at his death) to the company in consideration of ordinary shares in the company fully paid up. By clause 6 he directed his trustees to stand possessed of the shares in the company (a) on trust to pay the income thereof to his wife for life and after her death; (b) on trust to pay it to Mrs. Reichert for life and after her death; (c), as to the capital and income of the shares, on the trusts and subject to the powers and provisions thereinafter declared concerning his residuary estate. By clause 7 he devised and bequeathed all the real and personal estate not by his will or by any codicil thereto otherwise specifically disposed of and which he could dispose of by will to his trustees on trust for sale and conversion but without in terms conferring any power to postpone sale. By clause 9 he directed his trustees to stand possessed of investments and property thereinafter called "the "trust fund" on trust to pay to Mrs. Reichert for life £200 a year and subject thereto in trust to pay the income thereof to his wife for life, after her death in trust to pay the income thereof to Mrs. Reichert for life and after her death in trust as to both capital and income thereof for Mrs. Reichert's children and grandchildren as therein provided. By clause 10 he directed that, should there be no person or persons living at Mrs. Reichert's death who should attain a vested interest in the shares and in his residuary estate, the trustees should hold the shares and the income to arise therefrom, and also his residuary estate, both as to capital and income, in trust for his sister Daisy Wright absolutely or, should she have predeceased Mrs. Reichert, in trust for such of Daisy Wright's children or remoter issue as should be living at Mrs. Reichert's death absolutely if more than one in equal shares.

By a codicil dated February 7, 1940, the testator, after reciting

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the provisions of clauses 4 and 5 of the will, provided: "Now I "hereby declare that upon the death of my said wife my trustees "shall stand possessed of the shares in the said private company "and the said leasehold premises number 885, Finchley Road, "N.W.11 aforesaid or any other freehold or leasehold premises "belonging to me at my death and used solely for the purpose of "the said business upon trust for my said daughter Audrey Maud "Quibell absolutely. . . ."

Having thus given his business to his trustees and directed them to promote a company, sell the business to it and hold the shares in it on the trusts hereinbefore set out, the testator himself promoted a company to acquire the business. John W. Quibell Ltd. (the name whereof was later changed to J. W. Quibell Ltd. and which is hereinafter called "the company") was incorporated on May 30, 1940, and took over the business, but not the premises, which remained vested in the testator, the company carrying on the business in them. It had a share capital of 1,000 £1 shares, all issued for cash on or before July 11, 1940. 510 were issued to the testator, 488 (including one subscriber's share) to Mrs. Reichert, one (which at the date of this summons belonged to Mrs. Reichert) to the testator's wife and one to the then secretary of the company.

On October 15, 1942, the testator died, and on February 11, 1948, his wife died. The trustees, on the advice of their solicitors, formed the opinion that the 510 shares issued to the testator and held by him at his death were carried by the legacy in the codicil to Mrs. Reichert, to whom, accordingly, they were transferred. They were, however, subsequently advised that it was uncertain whether the shares did belong to her, or whether they ought to be retained as part of the testator's residuary estate despite his clear desire that, on his wife's death, Mrs. Reichert should be absolutely entitled to the shares in the company carrying on his business and to the premises on which it was carried on. The only premises ever used by the testator for his business were 885, Finchley Road and leasehold premises at Finchley, both of which were vested in him at his death and were given by the codicil to Mrs. Reichert absolutely. The company's business was still being carried on at those premises at the date of the summons, under the personal control of Mrs. Reichert, a qualified pharmacist, who had, as such, assisted the testator. After his death she was, in purported pursuance of the company's articles of association and of the testator's will, appointed chairman and governing director of the company, of which, in further pursuance of the will, the testator's wife and John Henry White were appointed directors.

Mrs. Reichert was married in January, 1950, and there had been no child of the marriage. Daisy Wright had had one child, a son, who had had three children, all infants at the date of this summons.

By the summons, which was taken out on January 24, 1956, and to which Mrs. Reichert and Mrs. Wright and her son and

grandsons were defendants, the plaintiff, John Henry White, asked, inter alia, whether, on the true construction of the will and codicil and in the events which had happened, the 510 shares of which the testator was the registered holder at the date of his death ought to be held by the plaintiff and Mrs. Reichert on trust for Mrs. Reichert for her own use and benefit absolutely, or as part of the testator's residuary estate and on the trusts applicable thereto under the will and codicil.

G. B. H. Dillon for the plaintiff.
Hector Hillaby for Mrs. Reichert.
S. L. Newcombe for Mrs. Wright and her son and grandsons.

Cases cited in argument not referred to in the judgment: *In re Slater* [1]; *In re Rhagg.* [2]

VAISEY J. stated the facts and continued: The question is now raised whether the gift in the codicil which I have read does affect and dispose of the 510 shares in the company of which the testator was the registered owner at the date of his death, or whether, on the other hand, the codicil does not operate on those shares at all so that they fall into and form part of the residuary estate of the testator.

The codicil in terms refers to shares in a private company which never came into existence if the words are read strictly and literally, because it refers to shares in the private company which was in the contemplation of the testator to be incorporated by and established by the trustees of his will. When the testator died he had already done for himself what he had directed by his will that his trustees should do, and, if one looks forward a few weeks or months after the testator's death, one finds exactly the situation which the testator appears to have contemplated by his codicil, namely, the chemist's business was in the possession of a limited company. There were certain shares in that limited company which belonged to the testator, and it seems to me not to make the slightest difference from the practical and straightforward common-sense point of view that the shares which were in fact part of the testator's estate at the conclusion of the administration of his estate were shares in a company which had not been formed by the trustees but had been formed by the testator himself. In other words, the testator himself anticipated the operations which he had directed the trustees to carry out by carrying them out himself, and the fact that the shares which the codicil purported to deal with were not shares in a company which had been formed by the testator himself, but a company which was intended to be formed by his trustees, makes not the remotest practical difference.

[1] [1907] 1 Ch. 665.

[2] [1938] Ch. 828; 54 T.L.R. 990; [1938] 3 All E.R. 314.

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Nor can I hesitate for one moment when I am asked to suppose that what the testator wanted his daughter to have were the shares in the company which owned his chemist's business. I do not forget that the daughter is an expert pharmacist and well able to carry on the business which her father had founded and carried on, and I should have thought that the testator intended that the shares in the company which owned that business were to go to his daughter. I think that that intention is emphasized and established by the inclusion in the gift, as one combined subject of gift, of the shares in the future private company and the leasehold premises in Finchley Road. I can feel no doubt at all that the testator wanted his daughter to have, at the death of his wife, the shares in the private company which was carrying on his business at that time.

In a sense this case may perhaps turn on section 23 of the Wills Act, 1837, and I think the conclusion at which I have arrived is to some extent fortified by the decision of Bacon V.-C. in *In re Russell.*[1] In that case the testator purported to give away a business by his will, but in point of fact he owned only a share in the business. In my judgment I am driven conclusively to apply the principle in that case to the present case.

The fact that the testator had anticipated the operations which he directed his trustees to carry out by carrying them out himself merely brought about, I should have thought, the situation which his codicil plainly contemplated. I hold, as a matter of construction derived from the words of the codicil and having regard to the estate as it existed at the date of the death, that the shares in this company are held on trust for the daughter, Mrs. Reichert, for her own use and benefit absolutely.

Declaration accordingly.

Solicitors: *Zeffertt, Heard & Morley Lawson; Theodore Goddard & Co.*

K. R. A. H.

[1] (1882) 19 Ch.D. 432.

[COURT OF APPEAL.]

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Dec. 11, 12.

Lord Evershed M.R., Birkett and Romer L.JJ.

* PYRAH (INSPECTOR OF TAXES) *v.* ANNIS & CO. LTD.

Revenue—Income tax—Capital or income expenditure—Licence—Claim to deduct expenses incurred in application for extension of public carrier's licence—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 123, *Sch. D, Case I.*

Revenue—Income tax—Appeal to High Court—Remission to commissioners—Remission by Court of Appeal—Principles applicable.

A company had obtained an "A" licence for four articulated vehicles. In an endeavour to bring the number of articulated

vehicles authorized by its "A" licence up to seven, the company in 1952 incurred expenses of £1,272 in applying to the appropriate authorities to vary its licence by the inclusion of a further three articulated vehicles. The company claimed that these expenses might properly be deducted from its trading profits for the purpose of computing its liability to income tax under Case I of Schedule D. On appeal from a decision by Vaisey J. (reversing a decision of the General Commissioners) that the expenses were attributable to capital and not to income, it was said that the decision had been founded on an assumption, unsupported by evidence, that the "A" licence was a capital asset analogous to an excise licence granted in respect of a public-house:—

Held, (1) that the decision was not founded on any assumptions as to the nature of the "A" licence in question but on a correct application of the appropriate principles.

(2) That, in any event, the assumption made could be justified on the material available at the hearing and it was unlikely to involve injustice. Accordingly, no special circumstances had been shown which would justify the court in exercising its discretion to remit the case for a rehearing.

Murphy v. *Australian Machinery and Investment Co. Ltd.* (1947–1948) 30 T.C. 244 applied.

Decision of Vaisey J. [1956] 1 W.L.R. 974; [1956] 2 All E.R. 858 affirmed.

APPEAL from Vaisey J.[1]

The following statement is taken from the case stated by the General Commissioners for the purposes of the Income Tax Acts for the division of Uxbridge, Middlesex.

1. Annis & Co. Ltd. (hereinafter called "the company") appealed against an assessment to income tax made on it for the income tax year 1953–1954 under Case I of Schedule D in accordance with section 123 of the Income Tax Act, 1952, in respect of the [estimated] profits of the trade of haulage contractors.

2. The accounts [furnished by the company to disprove the estimated profits] included a debit of £1,321 9s. 8d. in respect of certain legal charges. There was no dispute between the parties concerning £49 of this amount. The balance, £1,272, related to an application made by the company in 1952 before the licensing authority for the metropolitan traffic area for variation of its existing "public carrier's licence" (as defined in section 2 of the Road and Rail Traffic Act, 1933, and therein and hereinafter described as an "A" licence) and an appeal from the decision of the licensing authority to the Transport Tribunal.

The following facts were proved to the satisfaction of the commissioners:

At the outbreak of war in 1939 the company held an "A" licence for seven rigid tipper vehicles. After the war had begun "A" licences were replaced by "A Defence Permits" and the company was accordingly granted such permits for the seven rigid tipper vehicles. This holding of "A Defence Permits" was subsequently varied as follows in consequence of applications by the company:—

[1] [1956] 1 W.L.R. 974; [1956] 2 All E.R. 858.

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(a) 1943: five rigid tipper vehicles and one articulated vehicle consisting of a tractor vehicle and trailer suitable for transporting abnormal indivisible loads.

(b) 1945: four rigid tipper vehicles and two articulated vehicles as above described.

(c) 1947: one rigid tipper vehicle and five articulated vehicles.

In 1948, "A" licences having been restored, the company applied to the licensing authority for an "A" licence for the said five articulated vehicles. The authority granted an "A" licence for five tractor vehicles but for only two trailers. The company appealed to the appeal tribunal set up under the Road and Rail Traffic Act, 1933, which tribunal varied the order of the licensing authority by granting an "A" licence for three tractor vehicles and three trailers, i.e., three articulated vehicles. Subsequently the licensing authority included one further articulated vehicle on the "A" licence, making four in all.

In 1952 the company applied to the licensing authority to vary the said "A" licence by the inclusion of a further three articulated vehicles in an endeavour to bring the number of vehicles authorized by the said "A" licence up to seven. The application was refused. The company appealed against this refusal to the Transport Tribunal, which dismissed the appeal.

The General Commissioners upheld the company's claim; but on appeal Vaisey J.[1] held that the expenses could not be deducted because they were attributable to capital expenditure. The company appealed.

F. Heyworth Talbot Q.C. and *William Lindsay* for the company.

Cyril King Q.C. and *Sir Reginald Hills* for the Crown.

In addition to the cases referred to in the judgments the following were cited in argument: *British Insulated and Helsby Cables Ltd.* v. *Atherton*[2]; *Anglo-Persian Oil* v. *Dale*[3]; *A. G. Moore & Co.* v. *Hare*[4]; *Smith's Potato Crisps (1929) Ltd.* v. *Inland Revenue Commissioners*[5]; *Rushden Heel Co. Ltd.* v. *Inland Revenue Commissioners*[6]; *Southern* v. *Borax Consolidated Ltd.*[7]

Lord Evershed M.R. The question which was raised in this case was whether the appellant company could properly make a deduction, in ascertaining the sum for which they were liable to be taxed under Schedule D in respect of their business as road haulage contractors, of a sum of £1,272, the amount of legal charges fruitlessly (as it turned out) expended by them in an

[2] [1926] A.C. 205; 42 T.L.R. 187; 10 T.C. 155.

[3] [1932] 1 K.B. 124; 47 T.L.R. 487; 16 T.C. 253.

[4] 1915 S.C. 91; 6 T.C. 572.

[5] [1948] A.C. 508; 64 T.L.R. 430; [1948] 2 All E.R. 367.

[6] [1948] 2 All E.R. 378; 30 T.C. 298.

[7] [1941] 1 K.B. 111; [1940] 4 All E.R. 412; 23 T.C. 597.

attempt to get a variation of what is called an "A" road licence in the year 1952 so as to enable them, under that licence, to operate three additional articulated vehicles.

The case stated, which Sir Reginald Hills described as being to some extent a labour-saving operation, expressed in the following lines only the contention of the company: "It was "contended on behalf of the company that the legal expenses "were incurred in attempts to obtain replacement of the said "'A' licence held before the war and as such were admissible "expenses." The reference to "replacement" arises from the fact that originally in 1939 the "A" licence which this company had covered seven vehicles; they were, in fact, what are called rigid tipper vehicles. In 1952, when the abortive application was made, their "A" licence, which, in the meantime, had been renewed with other variations, allowed but four articulated vehicles and the company proposed to increase the figure of four to the figure of seven which originally had been the number allowed in the year 1939.

The answer to the contention so stated which the Crown put forward was that the "A" licence was in the nature of a capital asset and that, accordingly, the legal expenses which had been incurred were capital expenditure not admissible in computing liability under Schedule D. The commissioners, again observing their terse form, stated their conclusion simply thus: "that in "view of the evidence produced before us the claim of the "company had been established."

The Crown appealed to the High Court and the matter came before Vaisey J. Before him it is not in doubt that the Crown put forward and made the foundation of their argument the point which they had put to the commissioners, namely, that this "A" licence is a fixed capital asset in the business; that the attempt which the company made in 1952 was in truth to enlarge the capital asset which they had and that, on those grounds, the claim of the company to deduct the £1,272 was quite untenable. And so Vaisey J. held.

Upon the matter of the licence the judge made use, in the course of his judgment, of expressions indicating that there was, to his mind, an analogy between the "A" licence which a haulage contractor necessarily requires in order to carry on his haulage contracting business at all, and the excise licence which a publican requires in order that he may carry on the business of a public-house; but he had not before him any evidence as to the precise nature of an excise licence, and he drew attention in one passage of his judgment to the fact that he felt some embarrassment because in the case stated there was no material relating to publicans' excise licences. There was produced to him the "A" licence under the Road and Rail Traffic Act, 1933, and the nature of that licence is, I think, broadly speaking at any rate, not in doubt.

The necessity to obtain such a licence arises under the Road

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and Rail Traffic Act, 1933, and, as Mr. Talbot explained to us in opening the case, there are, for persons carrying on trades or businesses which require the use of motor vehicles, three classes of licence called "A," "B" and "C." The "A" licence is the one peculiar to the requirements of a public carrier or a haulage contractor, such as are the present appellants; for such a licence is required and designed to permit the use of the road vehicles which it specifies or otherwise indicates for the use of the public haulier or carrier of other people's goods; without such a licence one cannot carry on lawfully such a business at all. Mr. Talbot pointed out that (as is apparent from the document) the practice is, certainly as regards the actual power-driven vehicles, to specify in the licence the precise vehicles which the haulage contractor desires to use. When it comes to the trailers which may be attached to the power-driven vehicles, then, more commonly, I understand (as in this case), without specifying or identifying the exact trailers which the haulage contractor desires to use, the licence will authorize the use of a certain number—four, five or whatever it may be—and the contractor may only carry on his trade as a haulage contractor on the roads by use of the power-driven vehicles specified and with the limited number of trailers allowed.

We have also been told that there is a certain strict control kept in this matter (as the experience of the present appellants makes indeed manifest): one cannot, so to speak, go and intrude into this business with any very high prospects of success. Apparently the licensing authority is concerned to see that no more persons than are really necessary for the economy of the trade carry on this business and that no more vehicles are used in the business than are really required. So in this case the appellants, who had carried on the business for some years, failed to get the authority to add to their fleet any one of the three additional articulated vehicles for which they sought authority.

One other matter of obvious fact may be mentioned in regard to licences: as must be commonly experienced, these articulated vehicles, like other vehicles, in course of time wear out or may come to grief in other ways. It is, therefore, obvious that occasions may arise from time to time when a carrier's licence which operates on the face of it for five years may require to be varied by substituting for one vehicle another.

All that material was before the judge and, having had his attention drawn to a number of cases, including cases relating to excise licences, the judge at the end of his judgment said [1]: "It seems to me that, quite apart from the cases, the matter "must turn on ordinary principles. If a man buys and sells "stocks and shares and it is his business to buy and sell stocks "and shares, then any losses which he incurs or profits which "he makes in the conduct of that business are brought in as

[1] [1956] 2 All E.R. 858, 862; [1956] 1 W.L.R. 974, 979.

"income profits or as part of his losses in the computation of "his income in carrying on that business. On the other hand, "if his purchasing of stocks and shares is not his business but is "something which cannot be treated as the carrying on of a "trade, the profit or loss which he makes in buying an invest-"ment is not part of his profit or loss in carrying on any "business." So far it is conceded that those observations are unimpeachable.

He continues: "Here the purpose for which this sum of "£1,272 was expended was an attempt to make the fleet of "lorries owned by the taxpayers more useful and more advan-"tageous as income-winning assets, which is not part of the "carrying on of the business at all. It was designed to improve "the taxpayers' capital position, and I think that this unsuccess-"ful attempt to better the capital position by obtaining the desired "variation of the A licence was properly attributable in the "accounts to capital and not to income."

Mr. Talbot drew attention to the words (which I somewhat emphasized in reading)—"which is not part of the carrying on "of the business at all." On a strict scrutiny that view is not perhaps expressed with complete accuracy: for the operation of improving your capital asset may well be in one sense, of course, part of the conduct of your business. But, apart from that slight criticism (which is, I think, simply a criticism of terminology), as a statement of principle that paragraph again seems to me to be unimpeachable.

Then come these final sentences [2]: "I have hesitated about "this case, because I have had to draw inferences and make "assumptions which may rest on rather insecure foundations, "but, having regard to all the circumstances of the case, I think "I am justified in dealing with the matter on the materials "before me and forming the conclusion that this A licence is "exactly comparable with and analogous to the licence granted "in respect of licensed premises under the Licensing Acts. I "think that the principle of the cases to which I have referred" —which were cases, inter alia, of licences for licensed premises— "really governs my decision in the present case. It is unfor-"tunate that I have not some better information about these "A licences, although one has been produced to me."

Mr. Talbot says—and he has really limited himself to this single point—that that judgment is based upon an assumption. The assumption is that the "A" licence is a capital asset, being (and Mr. Talbot quotes the words the judge used) "exactly "comparable with and analogous to" a publican's excise licence. "That assumption," says Mr. Talbot, "is not in truth well "founded; if it were, I should have to concede that the judgment "could not be challenged." But, Mr. Talbot argues, the analogy is not really justified and, in any case, the question (which he

[2] [1956] 2 All E.R. 858, 862; [1956] 1 W.L.R. 974, 978.

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says in part, at any rate, was one of fact) was never put before the commissioners and there is no finding upon it to the effect that an excise licence is a fixed capital asset. He has, therefore, confined his argument in this appeal to a request that we should direct this matter to go back to the commissioners for further hearing and a finding upon that matter.

The question whether an "A" licence in the hands of one carrying on the business of these appellants is a fixed capital asset or not would, in the end, I think, be a question of law rather than fact or, at least, of mixed law and fact. But Mr. Talbot said that there were matters of fact which would be relevant to the conclusion. I asked him to what matters, if the question were further debated, the evidence would be directed and he said, first, that it would be directed to the importance to a business of this sort of such a licence. Well, I daresay something might be said about that, though I cannot imagine that there would be much difficulty about it, bearing in mind that, without such a licence the haulage contracting business could not be carried on at all.

Secondly, he said that evidence would be directed to show how frequently these applications were made. I have said something about that already. But I can see that, if it could be shown that licences of this sort, though expressed to be for five years, really required annual renewal, it might be said that the licence had lost its quality of an enduring capital asset.

Thirdly, he said that it would be material to consider the likelihood of opposition when these applications are made. I do not say anything more about that except to point out that in this case the opposition with which the appellants found themselves faced unfortunately prevailed over all their attempts to get the further variation.

I am bound to say, speaking of my impression of the matter as it has been presented to us, that I should somewhat doubt, with all respect to Mr. Talbot, whether, when all such evidence had been given, it would be found to have any material effect upon the assumption which the judge made. But I do not want (and I do not think it would be right for me) to lay down as a rule to govern necessarily all such cases in the future that "A" licences in the hands of businesses of this kind must be capital assets. I think that is unnecessary for this decision and I therefore do not say it, though I must not be supposed to be encouraging the possibility of a different view.

However that may be, I am satisfied that the assumption which the judge made was an assumption which certainly could be sensibly justified on such material as there was before him and had been before the commissioners: in other words, I am quite satisfied that this is not a case where I feel that the assumption is likely to involve the possibility of real injustice. That is a matter which will be relevant when I consider the question whether we should send it back in any case to the commissioners.

I also add this: that, although the judge did use the language (which I have already read) indicating on the face of it an exact parallel between an "A" licence and an excise licence, I think it would be unfair to the judge to say that he founded his judgment upon that precise similarity. He founded it, as I think, correctly upon the matter of principle, though he made an assumption of fact which did undoubtedly and, in my opinion, justifiably depend upon a fair similarity between a licence of this kind for a haulage contractor and an excise licence for a publican. Nor do I think that the fact that one is transferable and the other is not is by any means necessarily a relevant distinction. However, I need not pursue that matter; it suffices for me to say that to my mind, on the material that was available, the assumption which the judge made was certainly one which could fairly be made on the evidence.

But, assuming in favour of Mr. Talbot that evidence might have been given which was not given, and assuming that such evidence might have turned out to be such that a conclusion could properly be reached in this particular case that the "A" licence was not a capital asset—assuming all that—is this a case in which we ought now to direct a remittance of the case to the commissioners? I must say I have clearly come to a negative conclusion on that point. I have already said that I think that on the material presented the assumption was certainly not one which makes me feel a doubt whether there may not have been some injustice done. But, further than that, this is a case in which the question whether this was a capital asset was clearly raised before the commissioners. I have read the two passages from the case stated which show that it was in the forefront of the Crown's case that it was a capital asset. The opportunity was there presented for the company, if they wished, to give all this evidence and to challenge on the facts which they could prove the premise of the Crown's contention. They did not do it.

The matter came before Vaisey J. and again no attempt was there made to introduce further evidence, nor did the appellants' counsel ask for the case to be sent back. When the judge expressed the slight embarrassment which the paucity of the evidence caused him and thought that he might have to send it back, not unnaturally Mr. Lindsay, as a competent counsel, seized upon that possible relief, as well he might, and said he would welcome it; but the suggestion was not formally put to the judge; nor, as we have been informed, was it really made a basis of the appeal to this court until shortly before the case came on. In all those circumstances, I do not think it would be right now to give to this company, after hearings before the commissioners, the judge and the Court of Appeal, an opportunity to start all over again and try to present on the facts an entirely different case.

The principles on which this court will remit to the commissioners in order that they may, in effect, allow the taxpayer to

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start again were stated in *Murphy* v. *Australian Machinery and Investment Co. Ltd.*[3] Mr. King referred to the language used by Tucker, Somervell and Cohen L.JJ., and I need not take time by referring to it again; it will suffice to say that the members of this court made it plain, I think, that in circumstances such as arise in this case it would not be in accordance with the proper practice of this court to exercise our discretion in the appellants' favour: something much more special would have to be presented than has been presented in this case to justify the court taking such a course. I have not forgotten what Lawrence J. said in *Burston* v. *Inland Revenue Commissioners*,[4] but I do not think that the judge in that case qualified by his language anything which emerges from the judgments in the Court of Appeal in the *Murphy* case.[5]

For those reasons, even if it could in the end be fruitful (which, I repeat, I very much doubt, though I forbear from deciding the matter), I do not think it would be right for us now to accede to Mr. Talbot's request and remit this case for further hearing to the commissioners and I would, accordingly, dismiss the appeal.

Birkett L.J. I am entirely of the same opinion and I would only add a very few words. It seems to be agreed that the real issue to be determined in this case is the question of whether the "A" licence was a fixed capital asset of the business or not.

Mr. Talbot, when he opened this case to us, put that matter in the very forefront and said, "The question is: is the 'A' "licence in this case a fixed capital asset? We say No." In due course Mr. King presented the argument for the Crown, and he said, in similar language: "Is the 'A' licence a fixed "capital asset? We say Yes." So it appears that that is the issue.

However, the question that we really have to determine is not quite that. The real question, as presented by Mr. Talbot, is: "Ought this case to be remitted, in all the circumstances, "in order that that matter might be the subject of further "evidence?"; and it is really based upon the contention that Vaisey J. in the court below made an unwarranted assumption that there was a perfect identity or, at least, an analogy between the "A" licence under the Act of 1933 and the excise licence commonly known as a public-house licence.

Although the language of the judge, no doubt, in an extempore judgment is not quite as exact as in a considered judgment, he does say[6]: "It seems to me that, quite apart from the cases, "the matter must turn on ordinary principles." Now, those cases were the cases which were introduced by Mr. King and Mr. King was saying, in support of the argument which he was presenting to the judge: "This is a fixed capital asset: witness "the position of the excise licence; this is what has been said

[3] (1947–1948) 30 T.C. 244.
[4] (1942) 24 T.C. 285, 291.
[5] 30 T.C. 244.
[6] [1956] 1 W.L.R. 974, 979.

"about that," and, no doubt, he argued, and with very great force, that there was really no distinction in principle to be made between the two.

That there were distinctions to be made permits of no doubt, and if this case were to be remitted, no doubt evidence could be called to show that in certain respects the "A" licence under the Road and Rail Traffic Act and the excise licence did differ in certain particulars.

The judge thereupon said [6]: "It seems to me that, quite "apart from the cases, the matter must turn on ordinary "principles." Then he discusses the ordinary principles. But then, a little later, he said [7]: "this 'A' licence in question is "exactly comparable with and analogous to the licence granted "in respect of licensed premises under the Licensing Act, and "I think that the principle of the cases to which I have referred "really governs my decision in the present case." That looks as though he was referring to the fact that he had discussed it on general principles, quite apart from the cases, and that they really governed his decision.

I daresay that, if he had had the opportunity of thinking longer about it, he might—as everybody might in the like circumstances—have phrased it rather differently, but I think it is perfectly plain that what he was saying was this: "I think "there is the closest analogy between the 'A' licence and the "excise licence; there is identity between the two and I think "that governs my decision; but I also think that, if those cases "were left out of consideration and we discussed the matter "upon general principles, I should arrive at exactly the same "conclusion."

Mr. Talbot thereupon says that the case ought to be remitted to the General Commissioners because they really did not give that matter any consideration and the judge was not entitled to make the assumption which he did make on the material before him. Indeed, we had passages from the judgment read to us which made it quite plain that Vaisey J. was in some little perplexity about the paucity of the material in certain parts of the case; but he did come to his conclusion, and I think that there was evidence upon which he could so do. He put his conclusion in these words [8]: "Here the purpose for which this "sum of £1,272 was expended, as I have already mentioned, is "an attempt to make the fleet of lorries owned by this company "more useful and more advantageous as income-winning assets, "is not part of the carrying on of the business at all. It was an "expenditure which was designed to improve the capital position "of the company, and I think that this unsuccessful attempt to "better the capital position by obtaining the desired variation of "the 'A' licence was a matter which was properly attributable "in the accounts to capital and not to income."

[6] [1956] 1 W.L.R. 974, 979.
[7] Ibid. 980.
[8] Ibid. 979.

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I am bound to say that, even were we to accede to Mr. Talbot's request that this case should be remitted to the General Commissioners and he was permitted to call evidence, I think that Mr. King put it plainly, in his usual moderate way, when he said: "I think that Mr. Talbot would find great difficulties"; I would be inclined to say that I should think he would find it impossible. But I must agree and do agree with what my Lord has already said upon that matter: that, in this case, I think there was evidence upon which Vaisey J. could so find, and I incline to the view that, even if we were to send it back and allow evidence to be given, no evidence could be given which would establish that this was not a fixed capital asset.

The other point, I think, is a point of substance too. When the matter come before the General Commissioners it is quite plain, from the case stated and the extracts that my Lord has read, that the case that was made for the company was that these legal expenses were incurred in an attempt to obtain replacement of the "A" licence which the company had formerly had and the Crown, in answer to that, contended that the "A" licence was in the nature of a capital asset.

I think that at this stage, having gone from the commissioners to Vaisey J. and now to this court, the words of Lord President Clyde in *R. A. Bird & Co.* v. *Inland Revenue Commissioners* [9] are peculiarly apposite. He said [9]: "It is quite plain from the "case, and from what parties say, that the appellant did not "put before the commissioners any material other than is repro-"duced in the case, bearing on the alleged inadequacy. It seems "to me that if we were to send this case back for further inquiry "about this, we might be exposed, as far as I see, in almost "any case, to an exactly similar application—whenever, in short, "the appellant has not presented his case to the commissioners "in a way which brings out the point he ultimately desires to "make before the Court of Appeal. That would never do. No "doubt, if there has been a misunderstanding, we would strain "a point to put that right; and if the commissioners had failed "to include or to allude sufficiently to some topic that was "brought before them by way of evidence we should remit to put "that right. But on the grounds I have indicated it is impos-"sible to grant the appellant the indulgence which he asks in "this case."

I agree with the decision which has already been announced by Lord Evershed M.R.

ROMER L.J. I also agree and I only want to say this: that, although it would, I think, perhaps be going too far to say—and it would certainly be going further than the decision of this case requires—that no evidence could possibly be adduced to support the view that an "A" licence is not a capital asset of a haulage contractor's trade, it appears to me that, prima facie, it bears

[9] 12 T.C. 785, 794; 1925 S.C. 186; 1925 S.L.T. 96.

every characteristic and feature of a fixed capital asset. It is an asset which is retained by the company and it is an asset which produces income.

It is quite impossible to suggest that it could form part of the company's circulating capital, because these companies do not trade in "A" licences, and, accordingly, as I say, I think that prima facie an "A" licence has a strong complexion of being an item of fixed capital; but, from that, I do not think it is necessary to proceed to a decided view that the contrary could not possibly be shown.

For the rest, I entirely agree with what my brethren have said.

Appeal dismissed.

Solicitors: *Stanley Wise & Co.; Solicitor of Inland Revenue.*

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[1956 L. 130.]

LETTS AND ANOTHER *v.* SAME.

[1956 L. 131.]

LETTS AND OTHERS *v.* SAME.

[1956 L. 132.]

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Revenue—Estate duty—Gift inter vivos—Shares—Covenant not during lifetime or by will to dispose of ordinary shares save to sons and nephews—Subsequent exchange with sons and nephews of ordinary shares for preference shares of less capital value—Death of owner of ordinary shares—Whether exchange a gift—Customs and Inland Revenue Act, 1881 (44 *&* 45 *Vict. c.* 12), *s.* 38—*Customs and Inland Revenue Act,* 1889 (51 *&* 52 *Vict. c.* 7), *s.* 11—*Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*c*)—*Finance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 47.[1]

Assignment—Equitable—Gift—Gift by letter of right to allotment of shares—Allotment within five years of donor's death—Whether gift completed by letter or by allotment.

[1] Customs and Inland Revenue Act, 1881, s. 38 (2): "The personal "or movable property to be included "in an account shall be . . . (*a*) Any "property taken as a donatio "mortis causa made by any person "dying on or after the first day of "June, 1881, or taken under a volun-"tary disposition, made by any "person so dying, purporting to "operate as an immediate gift inter "vivos whether by way of transfer, "delivery, declaration of trust or "otherwise, which shall not have "been bona fide made three months "before the death of the deceased. "(*b*) Any property which a person "dying on or after such day having

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In 1944 a company was formed to take over a business owned by five partners—the senior partner and his two sons and his two nephews (all four collectively hereinafter called "the active "partners"). The five partners agreed in April, 1944, to sell the business to the company, receiving for the goodwill and pending engagements 50,000 fully paid ordinary shares of £1 each to be divided among them in proportion to their interests in the profits of the business, and receiving for the remaining assets 5 per cent. fully paid preference shares of £1 each. The senior partner thus received 20,832 ordinary shares and, by an agreement executed in May, 1944, covenanted with the active partners that he would "not at "any time either by deed or will or otherwise give, settle, bequeath "or otherwise dispose of the ordinary shares in the capital of the "company to be received by him under the sale agreement . . . or "any of them to or in favour of any person or persons other than

"been absolutely entitled thereto, "has voluntarily caused or may "voluntarily cause to be transferred "to or vested in himself and any "other person jointly whether by "disposition or otherwise, so that "the beneficial interest therein or in "some part thereof passes or "accrues by survivorship on his "death to such other person. (c) Any "property passing under any past "or future voluntary settlement "made by any person dying on or "after such day by deed or any "other instrument not taking effect "as a will, whereby an interest in "such property for life or any other "period determinable by reference to "death is reserved either expressly "or by implication to the settlor, or "whereby the settlor may have "reserved to himself the right, by "the exercise of any power, to "restore to himself, or to reclaim "the absolute interest in such "property."

The period of three months in para. (a) was extended successively to twelve months, three years and five years.

Customs and Inland Revenue Act, 1889, s. 11 (1): "Sub-section 2 of "s. 38 of the Customs and Inland "Revenue Act, 1881, is hereby "amended, as follows:—The descrip-"tion of property marked (a) shall "be read as if the word 'twelve' "were substituted for the word "'three' therein, and the said "description of property shall include "property taken under any gift, when-"ever made, of which property bona "fide possession and enjoyment shall "not have been assumed by the donee "immediately upon the gift and "thenceforward retained, to the "entire exclusion of the donor, or of "any benefit to him by contract or "otherwise."

Finance Act, 1894, s. 2 (1): "Pro-"perty passing on the death of the "deceased shall be deemed to in-"clude the property following, that "is to say:—. . . (c) Property which "would be required on the death of "the deceased to be included in an "account under section 38 of the "Customs and Inland Revenue Act, "1881, as amended by section 11 of "the Customs and Inland Revenue "Act, 1889, if those sections were "herein enacted and extended to "real property as well as personal "property, and the words 'volun-"'tary' and 'voluntarily' and a "reference to a 'volunteer' were "omitted therefrom. . . ."

Finance Act, 1946, s. 47: "The "enactments mentioned in Part I of "the Eleventh Schedule to this Act "(which relate to the effect for "estate duty purposes of gifts inter "vivos and of certain other trans-"actions effected and circumstances "prevailing in the life time of the "deceased) shall, in the case of "persons dying on or after April 10, "1946, have effect subject to the "amendments specified in that Part "of that Schedule, being amend-"ments extending to five years "before the death the period of "three years before the death which "is material for the purposes of "those enactments and amendments "consequential on that extension: "Provided that the amendments "specified in the said Part I shall "have effect subject to the tran-"sitional provisions set out in "Part II of the said Schedule, being "provisions which—(a) exempt gifts "made before April 10, 1943 from "the operation of the said amend-"ments so far as they relate to gifts "inter vivos; and (b) make analo-"gous provision in relation to others "of the said amendments."

"the active partners or some or one of them." The agreement also provided that all the senior partner's ordinary shares which the active partners or any of them might acquire from him during his life or his personal representatives after his death should be divided between and belong to the active partners or their personal representatives in equal shares.

Under the agreement the senior partner was entitled to 7,342 preference shares. On July 29, 1944, he gave a written direction to the directors of the company to divide his preference shares between his two sons and his daughter. In February, 1945, the shares were allotted. In 1948 the senior partner wrote to the active partners (who, with him, were the directors of the company), suggesting that he should transfer 20,000 ordinary shares to them and receive in exchange 20,000 preference shares (which were of considerably less value) from them. They agreed and the exchange took place. After it, the senior partner still kept 832 ordinary shares which, under the agreement of May, 1944, were to go to the active partners in equal shares. On October 10, 1949, the senior partner died. In 1950 the sons transferred to the nephews without payment one-quarter of those shares:—

Held, in deciding that by the combined effect of section 38 of the Customs and Inland Revenue Act, 1881, section 11 of the Customs and Inland Revenue Act, 1889, section 2 (1) (*c*) of the Finance Act, 1894, and section 47 of the Finance Act, 1946, estate duty was payable on the 20,000 ordinary shares and the 832 ordinary shares, but not on the 7,342 preference shares:

(1) That by the agreement of 1944 the senior partner neither transferred nor covenanted to transfer any right or title in the 20,000 ordinary shares to the active partners, with whom he covenanted merely not to dispose of the shares or bequeath them to others, thus leaving himself free to die intestate as to them.

(2) That what was transferred by the exchange transaction of 1948 was not, as the active partners contended, a life interest in the ordinary shares, but, as the Crown contended, the whole beneficial interest therein, so that there was a substantial gift (viz., the ordinary shares) for a partial consideration (viz., the preference shares).

Attorney-General v. *Kitchin* [1941] 2 All E.R. 735 distinguished.

(3) That the direction of July, 1944 (more than five years before the senior partner died), to allot the 7,342 preference shares constituted an unambiguous and effective equitable assignment of rights of the senior partner arising out of the contract of sale of the partnership assets to the company, and operated as a perfect gift.

Brandt's (William) Sons & Co. v. *Dunlop Rubber Co.* [1905] A.C. 454; 21 T.L.R. 710 applied.

ADJOURNED SUMMONSES.

Three summonses were issued for the determination of questions whether, on the death on October 10, 1949, of Harry Vaughan Letts (hereinafter mostly called "the senior partner"), estate duty became payable on certain ordinary and preference shares in Charles Letts & Co. Ltd.

The facts are stated in the headnote and in the judgments of Upjohn J.

John Pennycuick Q.C. and *W. A. Bagnall* for the plaintiffs.

E. Milner Holland Q.C. and *J. W. Brunyate* for the Crown.

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The cases cited in argument are referred to in the judgment.

UPJOHN J. I will now deliver judgment on the first summons. This summons, under the Administration of Justice (Miscellaneous Provisions) Act, 1933, asks for the determination of the question whether, on the death on October 10, 1949, of Harry Vaughan Letts, estate duty became payable under and by virtue of section 38 of the Customs and Inland Revenue Act, 1881, as amended by a number of subsequent Acts mentioned in paragraph 1 of the summons, on 5,000 ordinary shares in Charles Letts & Co. Ltd., transferred to each of the plaintiffs on April 12, 1948.

In order to understand that transaction of transfer, some account of the earlier history is necessary, though having regard to the course that the argument ultimately took before me, only brief reference to many of the facts proved before me is required.

For many years Harry Vaughan Letts, who has been referred to throughout the argument as, and whom I will call, the senior partner, carried on in partnership with his brother, Norman Letts, the business of manufacturers and publishers, including the well-known Letts diaries. In 1925 they entered into a formal partnership deed for a period of seven years, renewable as therein provided. Amongst many other provisions clause 17 of the deed entitled each partner during his life to introduce up to two sons as partners on certain terms, and clause 18 to nominate the same number of sons to his share in the partnership on his death. The net profits were divisible as to seven-twelfths to the senior partner and five-twelfths to the junior partner, Norman.

From time to time thereafter the senior partner's two sons, the plaintiffs, Kenneth and Leslie Letts, were admitted as partners, and the elder son of Norman Letts, the third plaintiff, Donald Letts, was also admitted. Norman Letts was about to admit his second son, the fourth plaintiff, Reginald, when he died in 1935. All the parties considered bona fide, though probably erroneously, that the fourth plaintiff was still entitled to be nominated under clause 17, and it is not disputed that clause 18, coupled with Norman Letts' will, also operated. The result, on the footing that clause 17 still operated, was that the senior partner, his two sons and his two nephews, were entitled to share in the profits of the partnership in the following proportions, namely, the senior partner to eight twenty-fourths, his two sons, Kenneth and Leslie to three twenty-fourths each, and his two nephews, Donald and Reginald, to five twenty-fourths each.

This displeased Kenneth and Leslie, for the senior partner was then exercising, as he was entitled to under arrangements made in 1932, remote though autocratic supervision of affairs. They, being the senior active partners both in point of time as partners and in age, were bearing a greater responsibility and greater burden of the work than their cousins and yet were receiving less remuneration. The simple palliative of increasing

their salaries before ascertaining the divisible profits does not seem to have occurred to anyone, but the following arrangement was made and incorporated into a partnership deed of July 25, 1935, namely, that the senior partner's share of income should in future be increased to ten twenty-fourths, that the other four should share the remaining fourteen twenty-fourths of the profits equally, and that on the death of the senior partner his future share of profits should be divisible equally between his two sons and two nephews, so that they would in all respects be equal partners.

This was plainly a bargain reached at arms' length and for full consideration. It was not entered into without a certain reluctance on the part of the senior partner, who understandably enough regarded his sons as giving up their ultimate birthright of becoming entitled on his death to a major share of the profits for an immediate mess of pottage in the sense of equality with their cousins during his life.

In 1943, commercial considerations made it desirable to convert the partnership into a limited company, which was done in 1944. The company was incorporated on April 14, 1944, and by an agreement dated April 24, 1944, the partners agreed to sell the business to the company as a going concern. For the goodwill and pending engagements the partners were to receive 50,000 ordinary shares in the company of £1 each, credited as fully paid up. For the remaining assets the partners were to receive five per cent. preference shares of £1 each, also credited as fully paid up.

At one stage, some argument was addressed to the question as to whether goodwill was represented in the capital accounts of the partners in the partnership books, but in the end nothing turned thereon.

It was agreed that the 50,000 ordinary shares should be divided among the partners in proportion to their interests in the profits of the business, so that the senior partner became entitled to 20,832 shares in the company.

It was all part of the bargain that these shares of the senior partner should, so far as practicable, be made subject to the arrangements made in 1935, and this was carried out by a later agreement dated May 5, 1944, the accident of the later date, however, being fully explained in the evidence. The agreement was under seal, and was made between the five former partners. The fifth recital and the operative part was: " . . . As the result " of the sale of the said business the provision of the deed of " 1935 (as continued in force) relating to the devolution of the " said Harry Vaughan Letts' ten twenty-fourth parts or shares " in the profits of the business on his death has become " ineffectual for the purposes for which it was devised and the " partners accordingly desire to make a substantially similar " arrangement in relation to the ordinary shares in the capital " of the company to be received by the said Harry Vaughan

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"Letts under the sale agreement: Now this Deed witnesseth "as follows: 1. The said Harry Vaughan Letts hereby cove- "nants with the other four parties hereto (hereinafter called "'the active partners') jointly and with each of them severally "that he will not at any time either by deed or will or otherwise "give settle bequeath or otherwise dispose of the ordinary shares "in the capital of the company to be received by him under the "sale agreement (hereinafter called 'senior partner's ordinary "'shares') or any of them to or in favour of any person or "persons other than the active partners or some or one of them. "2. It is hereby agreed and declared by and between the active "partners that all senior partner's ordinary shares which may "be received by the active partners or any of them from the "said Harry Vaughan Letts or his personal representatives "whether during his lifetime or after his death shall be divided "between and belong to the active partners or their personal "representatives in equal shares and each of the active partners "or his personal representatives will accordingly execute and "do all such transfers and things as shall be necessary to effect "such division and vest in the other active partners or their "personal representatives their respective due proportions of "any senior partner's ordinary shares so received by him or "them."

In 1948 came the transaction forming the subject-matter of the Crown's claim in this case. It is contained in two letters, the first addressed to his sons by the senior partner, but, as appeared from intrinsic evidence, it was intended to be read as well by the nephews, and it was read by them, as appeared from the reply. The letter, dated February 23, 1948, was in these terms: "My dear Boys, I have been giving a good deal of "thought to my holding of shares in C. L. & Co. Ltd. and it "seems to me at my age I would rather play safe than take "risks—provided of course I have an adequate income. For "this reason preference shares are more attractive to me than "ordinary shares, especially as the risks on ordinary shares are "not only greater in themselves, but more exposed—at any rate "in the short view, and that is all I can take—to increases in "taxation. I have in mind an exchange of preference shares "for ordinary shares, upon a basis of share for share, the effect "on my net income at present taxation and profit levels is "comparatively small reducing it from just over £4,000 per "annum to about £3,650. You on the other hand may be "fearful of the future of equity shares. On the other hand, "taking as you can a longer view than I, you—Kenneth, Leslie, "Donald and Reginald—may be as ready to make the exchange "as I am. I want however to limit this to 20,000 ordinary "shares, so that I still retain voting rights. When you have "had time to consider the suggestion perhaps you will let me "have your decision."

The reply, dated March 2, 1948, was in these terms: "My

"dear Dad, all four of us have now had an opportunity of "considering the offer contained in your letter of February 23 "and I am writing to signify our joint acceptance (to which all "four of us have put our signatures below). We quite under-"stand your point of view, and as far as we are concerned, in "spite of the present depressing outlook for equities generally, "we hope that the future may bring greater prosperity to the "business. Yours affectionately," and it is signed by all four of the active partners.

The transaction was duly carried out, though I have not been referred to any actual documents of transfer. At this time the ordinary shares were paying about 37½ per cent. of their nominal amount by way of dividend. A possible construction of these letters is that the preference shares to be exchanged for ordinary shares should be substituted for them and be subject to the terms of the 1944 agreement which I have read. But that construction, though mentioned, has not been argued before me, and I approach this problem on the footing that, as a result of the transaction, the senior partner was entitled to the preference shares transferred to him absolutely.

For the taxpayer, Mr. Pennycuick, opening the case, advanced as his main though not only point that in effect the senior partner had a life interest only in the ordinary shares, and so the exchange of a life interest in ordinary shares, although paying 37½ per cent., in the case of a man of 80, as the senior partner was at this time, involved no element of bounty, as he received an absolute interest in 20,000 five per cent. preference shares. Assuming the senior partner had only a life interest, the Crown does not dissent from that proposition, but they submit that the circumstances do not warrant that assumption. In my judgment, the agreement of 1944 bears but a superficial relationship to the creation of a life interest. By that document the senior partner transferred no right or title and did not covenant to transfer any right or title in the shares to his sons or nephews. He merely covenanted with them not to dispose of the shares nor to bequeath them to others. But he could have died intestate as to the shares without committing any breach of covenant, in which case his sons, if then living, would have succeeded to part of the shares (for they had a sister) not by virtue of the 1944 deed, but as next-of-kin.

It may be that the active partners could at all events during the senior partner's lifetime have prevented by injunction any disposition by the senior partner in breach of his covenant, but they never could have compelled him by disposition, either inter vivos or testamentary, to confer on them or any of them any interest in the shares.

In principle, it seems to me that if A merely enters into a negative covenant with B not to dispose of or bequeath property otherwise than to B, B still only has a spes successionis to that property under some subsequent disposition by A, and his

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beneficial title to the property depends on that subsequent disposition, if made, and not under the earlier covenant, notwithstanding that by virtue of that covenant A could not lawfully dispose of the property except to B. The fact that B may also be a likely next-of-kin if A chooses to make no disposition is, in my view, irrelevant. B merely has another spes successionis.

Consequently, I accept the submission of the Crown that if the senior partner had by a transfer by way of gift in his lifetime given his shares to one or more of the active partners, that would have been a transfer by way of gift to the donee of the whole beneficial interest in the shares transferred, notwithstanding the senior partner's covenant not to dispose of the shares otherwise than to or among the active partners.

Mr. Pennycuick's second point was this, that, notwithstanding the amendments which section 38 of the Customs and Inland Revenue Act, 1881, has suffered, it still applies only to gifts, including in that word gifts made for partial consideration, and that has, I think, been clearly established by the recent case of *In re Fitzwilliam's Agreement.*[1]

Mr. Pennycuick submits that the transaction of 1948 was not in the nature of a gift at all, but a transaction for value. He referred to the case of *Attorney-General* v. *Kitchin.*[2] That was a case where a settlor challenged the validity of a settlement he had entered into on grounds which appeared very slender, but the parties concerned, after negotiation, entered into a deed of family arrangement which appeared generous to the settlor, but Clauson L.J., delivering the judgment of the court, said[3]: "The claim was a genuine claim, though it may have been ill-"founded. Its cash value might well be regarded as a very "small sum, but the facts show that the relatives, as bargainers, "formed the view that it was better for them to secure the "abandonment of the claim than to fight William Henry Benn "and risk the complete loss of their rights under the original "settlement. Their bona fides is not questioned. They received "what they bona fide considered, not unreasonably, to be full "value for the concessions they made to William Henry Benn. "In my view, as in that of the judge, it is impossible to say that "full consideration did not pass. The result of the judgment "which I have given, taking precisely the same view of the "matter as Lawrence J., took, must be that the appeal is "dismissed."

Mr. Pennycuick submits with force that the matter must be regarded from a practical point of view. What, he poses, were the active partners entitled to before the transaction, and what did they get as a result of it? The evidence is clear, that the active partners thought, to quote Mr. Kenneth Letts' affidavit, "that all the senior partner's ordinary shares were bound on "his death to go to the other partners in equal shares." On

[1] [1950] Ch. 448; 66 T.L.R. (Pt. 1) 174; [1950] 1 All E.R. 191.

[2] [1941] 2 All E.R. 735.

[3] Ibid. 739.

that footing, of course, the transaction whereby any gentleman aged 80 received an absolute interest in 20,000 preference shares for a virtual life interest in the same number of ordinary shares was beneficial only to the senior partner.

On the other hand, it is clear that, unlike the case of the *Attorney-General* v. *Kitchin*,[4] there was no element of compromise. No doubts arose on the rights or obligations of the parties under the document of 1944. There were no disputed rights; no disputed claims. The senior partner expressed a desire for great security, even at the sacrifice of some income, and the active partners agreed with his suggestion. The documents constituting the transaction are quite silent as to whether the parties regarded the transaction as one for valuable consideration or not, for the good reason that the matter was never discussed as one of the quid pro quo, though I have little doubt that the active partners thought, rightly or wrongly, that they were being most generous to the senior partner. There was no compromise; there was no sale and purchase. There was, de facto, an exchange of shares, and the surrounding evidence provides no real clue as to the intentions of the parties—whether a gift was intended, or whether it was a transaction for valuable consideration.

In these circumstances, it is possible to reach a solution of the problem only by an analysis of the transaction. The senior partner received 20,000 preference shares, assumed for the purposes of argument to be of a value of about 18s. 6d. each. The active partners received, equally between them, 20,000 ordinary shares, assumed to be of the value of £4 8s. each. For the reasons I have given earlier, this must be treated as a transfer of the whole beneficial interest in the shares by the senior partner, and not of a transfer of something equivalent to a life interest. I should add that it has not been argued before me that the value of the ordinary shares, £4 8s., is affected by the circumstance that they were subject to the agreement of 1944. Thus, this transaction was a substantial gift for partial consideration by the senior partner to the active partners and, as such, is exigible to duty under section 38 of the Act, and I must declare, accordingly, that duty became payable on the 20,000 shares transferred as a gift for partial consideration. On the second summons, I will declare that duty became payable on the 832 shares.

I will now deliver judgment in the last summons, which raises the question whether, on the death of the senior partner, duty became payable under section 38 of the Customs and Inland Revenue Act, 1881, on 7,342 5 per cent. first preference shares of £1 each on the capital of Charles Letts & Co. Ltd. allotted to the plaintiffs by the company on February 9, 1945.

This judgment may be regarded as supplemental to the judgment which I have just delivered, and I do not propose, therefore, to have any elaborate rehearsal of the facts. I can go

[4] [1941] 2 All E.R. 735.

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straight, therefore, to the first relevant agreement, which was the agreement of sale whereby the senior partner and the active partners sold their interest in the partnership to the company then recently incorporated. It is dated April 24, 1944, and the sale was broken down in this way.

For goodwill and pending contracts, the partners were to receive between them 50,000 ordinary shares. I am not concerned with that in this summons. For all the remaining assets, which were set out very fully in clause 1 of the agreement, the partners were to receive 5 per cent. preference shares credited as fully paid up, and I think I can go straight to clause 3 (ii) which deals with the consideration for that part and provides: "3. The . . . consideration shall be satisfied as follows, namely, " . . . (ii) As to the sum specified in item (ii) in clause 2 hereof " by the allotment to the vendors or their nominees in such pro- " portions as the vendors may in writing direct of such number " of five per cent. first preference shares of one pound each in " the capital of the company as shall be equal to the amount of " such sum when ascertained such shares to be credited as " fully paid up. Unless and save in so far as the vendors shall " in writing otherwise direct such shares shall be issued to the " vendors in the same proportions as the amounts of the credit " balances of their personal accounts in the books of the business " as existing after the undrawn net profits of the business for the " year ending April 30, 1944, have been carried to such accounts " in accordance with the provisions of clause 4 hereof bear to one " another but so that in the event of such proportionate division " giving rise to any fractions of a share no such fractions shall be " issued but the shares representing the aggregate of such frac- " tions shall be allotted to the said Kenneth Petrie Letts."

At the time that that transaction was going through, the partners thought that some of the assets in the balance sheet of the partnership were under-valued, and it was decided, quite properly, to write some of those assets up from the figure at which they then stood in the books of £18,304 odd, to a figure of £25,000. Of that write-up, each partner was to be entitled in proportion to his shares in the divisible profits of the company. That, in the case of the senior partner, was a ten twenty-fourth share, so that his share of the write-up amounted to £7,342, whence it followed that he would be entitled to have issued and allotted to him or his nominees that additional number of preference shares.

It was suggested to the senior partner by his son Leslie that he might like to make a gift to his children—that is to say, Leslie, his brother Kenneth and his sister Mrs. Seton, known as Phyl in the family, and, as appears from the correspondence which I shall have to read in a moment, the senior partner fell in with that suggestion. The evidence that he intended to make a gift so far as the sons were concerned is from the correspondence perfectly clear. With regard to Mrs. Seton it is not so clear. She has

filed evidence explaining that after this long lapse of time her memory is somewhat clouded on the matter, and no letters have survived; but I am quite satisfied, and the Crown do not seriously dispute the proposition, that the shares allotted ultimately to Mrs. Seton must stand or fall on the fate of the shares issued to her brothers, because I am quite satisfied that the inference I ought to draw is that the father was intending to treat his three children on exactly the same basis in this respect.

There was some correspondence about this matter, and I think I can go straight to a letter written by Leslie to his father on July 24, 1944, in these terms: "My dear Dad, very many "thanks for your note and very handsome gift, it is in a way a "double one—once in itself and again in that it will reduce the "estate duty eventually—I sincerely trust a long way off—to be "met. About that you know I had anxiety and this gift and "your arrangement about buying the farm for Phyl will ease the "duties very considerably and save us, I hope, from having to "realize C. L. & Co. Ltd. shares."

The father's letter has not survived, but it is not in dispute that Leslie was there referring to a gift which his father was proposing to make of 7,300 odd preference shares when issued.

Three days later, on July 27, the other brother, Kenneth, wrote a letter to his father in these terms: "My dear Dad, I "have just heard from Leslie that you have agreed to our "suggestion that your share of the firm's assets write-up should "be divided between Phyl, Les and myself. I can assure you "that I very highly appreciate this generous gesture on your "part, which will make my holding of preference shares in the "business look very much more respectable."

Then Leslie wrote on July 28 in these terms: "My dear Dad, "it would appear that there is a much simpler method of "effecting your gift of your share of the write-up to us three "children, and that is that you sign the draft letter to the "company two copies of which are enclosed. I have filled in the "number of shares in pencil; please ink these in if you agree "the slight discrepancy in share, date, and return one copy "to us."

Apparently the senior partner replied to that, and he did sign a direction on July 29, 1944, which is the principal document in this case. It was in these terms: "To the Directors, Charles "Letts & Co. Ltd. I, Harry Vaughan Letts, of 'Southdowns,' "Park View Road, Woldingham, Surrey, hereby request and "authorise you to allot to the undermentioned persons as my "nominees the numbers of 5 per cent. first preference shares "of £1 each in the capital of Charles Letts & Co. Ltd. set "opposite their respective names credited as fully paid up, which "shares form part of the total number of similar shares which "I am entitled to have allotted to me, or my nominees, credited "as fully paid up under the provisions of clause 3 of the agree-"ment for sale dated April 24, 1944, and made between myself

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"Kenneth Petrie Letts Leslie Charles Letts Donald Norman "Letts and Reginald Hume Letts of the one part and Charles "Letts & Co. Ltd. of the other part, namely," and then he sets out the names of his three children and he splits the shares equally between them, that is to say, 2,447 to Kenneth and Leslie, the odd additional share going to Mrs. Seton.

Just to complete the history, for some reason which no one quite now understands, a similar direction—indeed, I think it was in identical terms—was again signed by the senior partner on January 23, 1945. On February 9, 1945, the shares were allotted.

The real point of this case is this. Of course, it is not disputed that the whole beneficial interest in these shares vested at latest in the three children on February 9, 1945, by way of gift, but that is within five years of the senior partner's death, and so duty would be attracted under section 38 of the Customs and Inland Revenue Act, 1881; and the real question is whether the direction of July 29, 1944, which was outside the five-year period, did in effect vest the shares beneficially in the three children.

There are two further matters which I should mention. I have pointed out that a subsequent direction was made on January 23. The Crown, however, do not contend that the subsequent direction in any way superseded or rendered nugatory the earlier direction—if, indeed, that earlier direction has the effect which the children contend that it has. The other matter is that the ascertainment of the property to be sold which was to be satisfied by the issue and the allotment of preference shares was a matter of some difficulty. There were questions of tax and so forth outstanding, and it was not until February, 1945, that those matters were settled. At the time of the direction of July 29, 1944, no preference shares had been issued, and it was not known how many shares the senior partner, among others, would be entitled to, although, of course, it was no doubt appreciated at that time that he would be entitled to a number of preference shares far in excess of the 7,342 shares mentioned in the direction. In the result, he did become entitled, I believe, to something in the neighbourhood of 88,000 preference shares.

Two points arise. The first is this: did the senior partner intend to make a gift by that document of July 29, 1944, which I have called "the direction"? Secondly, was the direction a complete and effective instrument of gift? On the first point, it seems clear that the senior partner was intending to make a gift in this sense, that he was directing the company to put his children on the share register with the intention that they should become the beneficial owners of those shares. Whether he thought that by the direction he was perfecting the gift or that some further act of bounty on his part was necessary does not, I think, matter; it is a question of the interpretation of the document. In fact, I do not suppose that the senior partner gave one moment's thought to this interesting legal problem.

The second point is the really vital one. Was the document a complete and effective instrument of gift? On that point the taxpayer must, of course, prove, in the famous words of Turner L.J. in *Milroy* v. *Lord*,[5] "that . . . the settlor must have done "everything which, according to the nature of the property "comprised in the settlement, was necessary to be done in "order to transfer the property and render the settlement "binding upon him."

Mr. Pennycuick submits that the direction constitutes a valid equitable assignment of the senior partner's rights under the sale contract. I should make it clear at this stage that Mr. Pennycuick, for good reason, does not submit that this direction is an equitable assignment of shares to be issued or allotted, or anything of that sort; for he recognises that on that basis he would be met with a series of grave difficulties. What he submits is that under the sale agreement the senior partner has a contractual right to have issued, to him or to his nominees, certain preference shares. That, he says, truly is an equitable chose in action, enforceable by specific performance if necessary, which can be disposed of by the senior partner. He can transfer those rights under that contract by way of gift or for consideration. Being an equitable chose in action, no particular language need be used, no particular form need be employed. The assignment may take the form of an assignment in express terms, or it may consist of a notice to the other contracting party—that is, the company—to perform its obligations in favour of the third party. He referred me to two cases to illustrate the principle. The first was *In re Griffin*,[6] a decision of Byrne J. I will read the headnote: "The indorsement and delivery of a banker's "deposit receipt, with the intention to make a gift, operate as "a good equitable assignment of the amount on deposit at the "bank; but, if anything be required to complete the gift, the "appointment of the donee as executor of the donor perfects "the gift."

Byrne J. said[7]: "To operate as an equitable assignment no "particular form of words is required in the document. An "engagement or direction to pay out of a debt or fund a sum "of money constitutes an equitable assignment, though it does "not operate as an assignment of the whole debt: *per* Chitty "L.J. in *Durham Brothers* v. *Robertson*[8]; and a direction to pay "the whole debt constitutes an equitable assignment of the "whole debt. I think, therefore, that the defendant is entitled "to succeed upon this ground. . . ."

Mr. Pennycuick then referred me to the well-known passage in *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*[9] of Lord

[5] (1862) 4 De G.F. & J. 264, 274.

[6] [1899] 1 Ch. 408; 15 T.L.R. 78, 79.

[7] [1899] 1 Ch. 408, 412; 15 T.L.R. 78, 79.

[8] [1898] 1 Q.B. 765, 769.

[9] [1905] A.C. 454, 462; 21 T.L.R. 710.

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Macnaghten: "But, says the Lord Chief Justice, 'the document "'does not, on the face of it, purport to be an assignment nor use "'the language of an assignment.' An equitable assignment does "not always take that form. It may be addressed to the debtor. "It may be couched in the language of command. It may be a "courteous request. It may assume the form of mere permis-"sion. The language is immaterial if the meaning is plain. All "that is necessary is that the debtor should be given to under-"stand that the debt has been made over by the creditor to "some third person. If the debtor ignores such a notice, he "does so at his peril. If the assignment be for valuable con-"sideration and communicated to the third person, it cannot be "revoked by the creditor or safely disregarded by the debtor." I have recently held that that passage is equally applicable to an assignment by way of gift.

He submits that here is a direction to the company to carry out their obligations under the contract of sale by allotting certain shares to the persons mentioned in the direction. That is a valid assignment, he submits, by way of direction to the company to carry out its obligations in that manner, being made with the intention of vesting the shares beneficially in the children. That is perfecting the gift, for he has done all that he can do at that time, on that date, to transfer all that he has, which is a chose in action—that is, the right to enforce the contract, to issue and allot preference shares against the company.

On the other hand, counsel for the Crown submitted that that is not the correct way to look at this matter. In the first place, it is submitted that the notice to the debtor must be plain and unambiguous, and in support of that proposition I was referred to *James Talcott Ltd.* v. *Lewis*.[10] That was a very different case, but there is no doubt that it supports the view that a notice must be plain and unambiguous.

Then it is said that it is far from plain and unambiguous, for it is a direction to the company to allot to the "undermentioned "persons as my nominees" certain shares. It is pointed out that the word "nominees" there is capable of bearing a number of meanings. It may be that they are to be nominees in the sense in which that word is frequently used—that is, merely trustees or names for the senior partner. It may be they were allotted pursuant to some contract of sale, or it may be that they were allotted, intended to be by way of gift. It is said, for those reasons, that the document is not plain or unambiguous.

I do not accept that proposition. It does not matter in the least to the company what are the arrangements made between the senior partner and his nominees. All that the company is concerned with is this, that they are told to allot certain shares to certain persons. It matters not to them how those persons have become entitled to have those shares allotted to them.

[10] [1940] 3 All E.R. 592.

The next point, I think, raises a very difficult question, and it is this. It is said that when you look at the direction the senior partner was not, on a proper interpretation, assigning his contractual rights under the agreement of sale at all. What he was doing was not to assign any rights under that contract, but merely to exercise the power given to him by the contract to nominate others to be registered as shareholders. Of course, a power to nominate others to be put on the register may in some cases be a most valuable right, although I do not suppose in the case of this particular company it was considered to be of much importance. But it is said with force by the Crown that here is no purported transfer of any chose in action, but a mere nomination pursuant to a power contained in the contract. It is pointed out that it would be very extraordinary if the situation really was this, that by this nomination the senior partner had thereafter put it out of his power to change his mind and direct the company to allot the shares to some other person. But it was said rightly that if the claim of the taxpayer is right, that must be the effect of it, because if this did operate as an assignment, then the very day after it was executed, the three children could apply to this court to restrain their father by injunction from afterwards revoking the direction. It was put, I think, with much force that one would not expect a document couched in these terms to have that effect. It is merely a nomination under the powers contained in the agreement and, as such, would be revocable until the shares were actually allotted. It was compared to the case of a father who might write to the bank asking the bank to transfer a sum of money from his account to his son's account, but before the letter arrived or before those instructions were carried out they were countermanded by the father. It was suggested that in such a case the son could have no possible rights to restrain his father from altering his mind.

Those are powerful arguments, and I think the question is a difficult one. But, bearing in mind that the father was undoubtedly intending that these children should have, beneficially, the shares representing this write-up of the assets of the partnership, I think he was intending by this direction to the company to make an assignment of his rights. The language, as Lord Macnaghten pointed out, is immaterial, but it is important to remember that this document was sent to him by Leslie to sign "as a much simpler method of effecting your gift of your "share of the write-up . . ." In my judgment he was entering into this document, in my opinion, as a direction to the company as a way of implementing his intention of making a gift, and so it operated as an equitable assignment. That being so, and he having done all that was then in his power in relation to his rights under the agreement of sale, it operated as a perfect gift

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on that day, and accordingly the contention of the Crown fails. Accordingly, I must declare that on the death of the senior partner no duty became payable on these shares.

Orders accordingly.

Solicitors: *Loxley & Preston; Solicitor of Inland Revenue.*

K. R. A. H.

[PROBATE, ETC., DIVISION.]

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May 9;
Nov. 20.

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* PURTON *v.* PURTON AND GEORGE.

Husband and Wife — Divorce — Delay, unreasonable — Adultery — No action until petitioner desired to re-marry—Exercise of discretion —Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4 (2) (*i*).

A husband whose wife had been living in adultery for some ten years did not take action to divorce her until he wished to marry another woman with whom he committed adultery after filing his petition. Although he had had some hopes for the first five years that his wife might return, it was not disputed that his subsequent acceptance of the position until he met the other woman amounted to unreasonable delay. The wife and co-respondent also wished to marry:—

Held, that the mere fact that the husband had been stung into action at last by his desire to marry another woman was not by itself a reason for refusing to exercise discretion in regard to his unreasonable delay in his favour. He had not in any way been guilty of acquiescence in his wife's adultery, nor encouraged the association, but had at first hoped that she might return. Applying the principles laid down by Viscount Simon L.C. upon which the court's discretion is exercised to all the circumstances of the case, it was proper to grant a decree notwithstanding the husband's culpable delay and his own adultery.

Blunt v. *Blunt* [1943] A.C. 517; 59 T.L.R. 315; [1943] 2 All E.R. 76 applied.

Lowe v. *Lowe* [1952] P. 376; [1952] 2 T.L.R. 505; [1952] 2 All E.R. 671 distinguished.

UNDEFENDED PETITION by husband for divorce on the ground of adultery.

The parties were married in June, 1927. In 1946 the wife went to live with the co-respondent taking with her the two younger children of the marriage. After some five years the husband gave up hope that his wife would return, but he took no steps to have the marriage dissolved. In 1955 he formed an attachment for another woman whom he wished to marry, and who also wished to marry him; and on November 25, 1955, he filed a petition for divorce. In December, 1955, the woman in question went to live in his house as housekeeper, and shortly afterwards they began to live together as man and wife.

The case was adjourned for argument by the Queen's Proctor upon the issue of unreasonable delay, and at the adjourned hearing the wife gave evidence that she still wished to marry the co-respondent.

A. F. Waley for the husband.
Colin Duncan for the Queen's Proctor.

The following cases were cited in argument: *Mortimer* v. *Mortimer* [1]; *Newman* v. *Newman* [2]; *Beauclerk* v. *Beauclerk* [3]; *Johnson* v. *Johnson* [4]; *Rickard* v. *Rickard and Bond* [5]; *Binney* v. *Binney and Hill* [6]; *Greenwood* v. *Greenwood* [7]; *Blunt* v. *Blunt* [8]; *Stevenson* v. *Stevenson and Lane* [9]; *Lowe* v. *Lowe* [10]; *Llewellyn* v. *Llewellyn.* [11]

KARMINSKI J. The parties in this case were married in June, 1927; four children were born of the marriage which was at least reasonably happy until the early part of 1946, when the wife first fell in love with, and then went to live with, the co-respondent. The wife took with her the two youngest children of the marriage; the two eldest children, who were nearly grown-up, remained with their father. The children saw each other and their parents quite regularly, and that state of affairs continued for a very long time.

For the first five years of this separation the husband says that he had hopes that his wife would return to him. I saw him on the previous hearing and today, and I say at once that I regard him as an honest man and that I think that he is telling me the truth both in that regard and in other matters. I find that he entertained a hope, firm at first but later less strong, that his wife would give up the co-respondent and return to him at the matrimonial home. In fact she did not; and she has remained with the co-respondent up till the present time. She has voluntarily given evidence today, and she tells me—and I accept her evidence—that she and the co-respondent very earnestly desire to be married.

By 1951 the husband had quite given up hope that his wife would return to him, and for the next five years he did nothing until the petition in this case was in fact presented on November 25, 1955. By that time he had met, and had formed an attachment for, the woman named in his discretion statement. He had formed the view, and this woman had accepted it, that

[1] (1820) 2 Hagg.Con. 310.
[2] (1870) L.R. 2 P. & D. 57.
[3] [1891] P. 189; 7 T.L.R. 203.
[4] [1901] P. 193.
[5] (1921) 37 T.L.R. 511.
[6] [1936] P. 178; 52 T.L.R. 481; [1936] 2 All E.R. 409.
[7] [1937] P. 157; 53 T.L.R. 716; [1937] 3 All E.R. 63.
[8] [1943] A.C. 517; 59 T.L.R. 315; [1943] 2 All E.R. 76.
[9] [1947] W.N. 83.
[10] [1952] P. 376; [1952] 2 T.L.R. 505; [1952] 2 All E.R. 671.
[11] [1955] 1 W.L.R. 480; [1955] 2 All E.R. 110.

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marriage between them would, if possible, be desirable. At the end of 1955 the woman went to live in the husband's house as his housekeeper; but after a very short interval the relationship between them developed and she in fact lived with him as man and wife after about Christmas, 1955. They are still desirous of marrying each other.

I have not the slightest doubt that unless the husband had formed an affection for another woman this particular petition would never have been presented. He was not unsatisfied with the state of affairs which had gone on for very nearly 10 years; and although he had not, as I find, acquiesced in it in any way, and certainly had not encouraged this association or the adultery, I have no doubt that nothing at all would have happened in this case but for the fact, perhaps the chance fact, that he met the other woman and they formed an affection for each other.

Under those circumstances I thought it right to adjourn this case, together with another case with somewhat similar difficulties,[1] so that the mattter could be argued by the Queen's Proctor, and I have had again the advantage of Mr. Colin Duncan's argument in this case.

On the facts as they stand, I regard this case as one of grave difficulty, but not so hopeless as it originally appeared when it was first brought to my notice. Mr. Waley (who has argued the case for the husband petitioner admirably) frankly, and I think rightly, conceded that there was in this case unreasonable delay, which he agreed amounted to culpable delay. But he said that this case is one of the comparatively small body of cases where, in spite of culpable delay being found, the court can, and here should, exercise its discretion in favour of the husband nowithstanding.

Mr. Waley rightly emphasized that the delay became culpable only during the last five of the 10 years and then only because the husband had given up all hope of reconciliation. Mr. Duncan, for the Queen's Proctor, accepted that the mere fact that the husband had been stung into action at least by his desire to marry another woman was not by itself a reason for refusing to exercise discretion.

In matters of discretion it is essential to try and form a general view of the whole case. Here was a man who was left by his wife through no fault of his own, with two children of 17½ and 16 to look after. They were in fact both at work, but he provided a home for them; not only, I am sure, in the sense of providing a roof and food, but looking after them as well as he could. At that stage, therefore, his mind was not at all on divorce; further, he hoped that his wife would come back to him.

Subsequently, of course, the children grew up and one of them, indeed, is now married; but he had formed a way of life where the question of marriage or divorce was of small interest

[1] *Key* v. *Key & Staples*, post, 220.

to him. The husband is a perfectly intelligent man, but he is not perhaps the kind of man who seeks legal advice unless he is driven to it. Undoubtedly the difficulties in this case might well have been solved if, within a few years of his wife leaving him, he had consulted a solicitor or at any rate taken advice from one of the many voluntary bodies who give legal advice; but, unfortunately, he did nothing of the kind and continued to exist as he was.

But in this case, unlike the husband petitioner in *Lowe* v. *Lowe*,[2] he was not guilty in any way of any kind of acquiescence in the position. In *Lowe* v. *Lowe* [2] the husband went on being quite friendly with his wife and meeting her from time to time, and indeed took no proceedings until after the death of the man with whom she had been living. In *Lowe* v. *Lowe* [3] the husband had also consoled himself for a period of five years with another woman. Those disquieting aspects are happily absent from this particular case. I agree with both Mr. Waley and Mr. Colin Duncan that there was culpable delay here; but I have to consider, in the light of all the circumstances, and dealing with a man of the husband's particular background, whether or not I exercise the court's discretion.

The basis on which the court's discretion is exercised I believe to be that laid down by Viscount Simon L.C. in *Blunt* v. *Blunt*,[4] and it seems to me that all, except perhaps one, of the five categories enumerated by the Lord Chancellor [5] fall to be considered here. The first one is the children, and that is the one least applicable to the present case. I think the youngest child, who is a little over 12, has to be considered because she has been living with her mother and under the same roof as her mother's lover for most of her life. I cannot help thinking that it would certainly be of some advantage to her if her mother and the co-respondent, whom she probably regards as her step-father, could be married.

The second category is more important. I have to pay regard to the woman named in the discretion statement; she is free to marry and her position would be regularized by being allowed to marry the husband. So far as reconciliation is concerned, it is quite obvious here that after all these years there is no real prospect of reconciliation. The husband has admittedly formed an association with another woman, and the wife appears to have been living perfectly happily with the co-respondent, whom she desires to marry.

The interests of the husband are identical with those of the woman named in his discretion statement. He wants to be able to marry her and to live respectably. Lastly, I have to regard the interests of the community as a whole and maintain the delicate balance between the need for the binding sanctity of

[2] [1952] P. 376; [1952] 2 T.L.R. 505; [1952] 2 All E.R. 671.

[3] Ibid.

[4] [1943] A.C. 517; 59 T.L.R. 315; [1943] 2 All E.R. 76.

[5] [1943] A.C. 517, 525.

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PURTON v. PURTON AND GEORGE.

Karminski J.

marriage and those considerations which make it contrary to public policy to insist on the maintenance of a marriage which has in fact, though not in law, ceased to exist.

I have considered all these matters, and I have considered, too, those matters in the light of the admitted long delay by this husband. On the whole, and with some hesitation, I have come to the conclusion that this is a case where I ought to exercise the judicial discretion of the court, notwithstanding his culpable delay, in favour of the husband. I also exercise my discretion in his favour notwithstanding his adultery as disclosed.

Decree nisi.

Solicitors: *Maurice Hudgell; The Queen's Proctor.*

J. B. G.

[PROBATE, ETC., DIVISION.]

1956
May 9;
Nov. 20.

Karminski J.

* KEY *v.* KEY AND STAPLES.

Husband and Wife — Divorce — Delay, unreasonable — Adultery — Unsuccessful inquiries for respondent—Saving money for divorce—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4 (2) (*i*).

A wife left her husband in 1946 to live in adultery with another man. The husband unsuccessfully tried to find her for some three or four years: in 1950 he went to live as man and wife with another woman whom he wished to marry, and started to save up money to enable him to take proceedings for divorce:—

Held, (1) that, although there had been a delay of ten years, that delay was not culpable, but had been sufficiently explained.

(2) That in regard to the husband's adultery it was a proper case to exercise discretion in his favour.

Hooper v. *Hooper,* The Times, October 15, 1953, applied.

Lowe v. *Lowe* [1952] P. 376; [1952] 2 T.L.R. 505; [1952] 2 All E.R. 671 distinguished.

UNDEFENDED PETITION by husband for divorce on the ground of adultery.

The case was adjourned for argument by the Queen's Proctor upon the issue of delay. The facts are set out in the judgment.

R. J. A. Batt for the husband at the adjourned hearing.

Colin Duncan for the Queen's Proctor.

KARMINSKI J. This is a petition by a husband in which he asks for dissolution of his marriage with the respondent on the ground of her desertion and of her adultery with the co-respondent. The husband has to ask for the exercise of the discretion of the

court by reason of the fact that he himself has committed adultery.

The case came before me first in May, 1956, when it appeared that there were certain considerable difficulties on the question of delay, and for this reason. It was in 1946 that the wife left her husband and went off to live with the co-respondent; and it was not until February, 1956, some ten years later, that the husband started the present proceedings.

An additional matter which put me on inquiry was this, that in his discretion statement—the truth of which I wholly accept—it is said that the husband here has been living in effect as man and wife with the woman named in that statement from January, 1950. On those facts I was a good deal troubled as to the nature of the delay which had emerged; and I have to decide whether that very long delay is culpable and, if it is culpable, whether under all the circumstances the court's discretion ought to be exercised in the husband's favour.

I therefore thought it right to ask for the assistance of the Queen's Proctor, and once more I am indebted to Mr. Colin Duncan, who has appeared for the Queen's Proctor, for his help on the matter. After I had heard some general submissions by Mr. Duncan for the Queen's Proctor I thought it right to give an opportunity for the husband to be recalled, and he was duly recalled and further examined by Mr. Batt who now appears for him.

The evidence of the husband as given today has, to my mind, made my task a very great deal easier. He has explained to me that after his wife left he took steps the very next day to try to find out where she was. All he knew was that she had gone off with the co-respondent. He had hopes at that time that she might return, because the co-respondent was quite a young man and he thought that that association might not endure. In fact it seems that he was wrong, because the wife and co-respondent have been living together since 1946. He went to her sister, who refused to say where they had gone. The wife kept her mother in the dark, at any rate at that time, as to her own whereabouts. She, also, was asked by the husband where the wife was. In 1946 and subsequent years the husband was a motor-coach driver, and in the summer months he had to drive to Portsmouth, where he made certain inquiries which were tentative and unsuccessful. He did not ask the police because he thought that they would not be able to help him. I am satisfied that he tried from 1946 right up until 1949 or 1950 to find his wife.

In 1950 he went to live with the woman named in his discretion statement, and there is no doubt that they desire to marry, and the woman is a widow. The husband, at that stage, seems to have come to the conclusion that his wife was not coming back to him and he made up his mind to try and get a dissolution of his marriage to her. For that purpose he started to save up enough money to enable him to put himself in funds

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to start proceedings. It is to be observed that when he started saving the Legal Aid Scheme had not yet come into operation—it commenced in October, 1950—but the fact remains that this man, who never in fact applied for or received legal aid, had by February, 1956, when he started these proceedings, managed to save out of wages which were not very large, and on which he had to live, a sum of £100. As the Court of Appeal pointed out in *Hooper* v. *Hooper*,[1] the saving by a man in this kind of position to obtain a decree is something not to be criticized but to be commended.

I have recited the facts of this case at some length as I now understand them because I have been referred to *Lowe* v. *Lowe*,[2] in which the earlier decisions were reviewed. In that case I refused a decree to a husband who had been guilty of very long delay on the ground that he had acquiesced in his wife's adultery and had been guilty of unreasonable delay, so that in the circumstances of that case it would not be a proper exercise of the court's discretion to grant the husband a decree.

I will say at once that the facts in *Lowe* v. *Lowe*[2] were different, in some respects widely different, from the present case. The delay was somewhat longer, but that is not very material. What is material is this: in *Lowe* v. *Lowe*[2] the petitioner, the husband, knew very well where the wife was living with the co-respondent, and indeed met her from time to time on perfectly friendly terms, but he took no steps whatsoever until the man with whom she was living had died and until he himself had decided that he would like to marry some other woman. That was a case where there was, as I found, no honest explanation of the man's delay.

I think the present case, as it now emerges, is quite different. The husband, who is not, perhaps, a man with very much educational advantage, did his best according to his own lights to remedy the wrong which had been done to him. He tried his best to find his wife for some years, and then he tried with great trouble and inconvenience to save up enough money to get a start. I have come to the conclusion that, although there is undoubtedly a ten-years' delay here, there is no culpable delay as envisaged by the statute and, that being so, I think this is a proper case where the delay is sufficiently explained.

I think also that it is a proper case on the facts where I can exercise my discretion in this man's favour on the grounds of his adultery, and I pronounce a decree nisi accordingly.

I would further add this, that in this sort of case it may be of very great assistance to the court if the attention of the court is called to the salient facts and dates and some explanation given

[1] The Times, October 15, 1953.

[2] [1952] P. 376; [1952] 2 T.L.R. 505; [1952] 2 All E.R. 671.

to the court before the evidence is called. That course at least has the merit of directing the attention of the court to the inherent difficulties of a case of this kind; but I am now satisfied that this is a case where the delay is not culpable.

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KEY v. KEY AND STAPLES.

Solicitors: *Elliot & Macvie; The Queen's Proctor.*

J. B. G.

[CHANCERY DIVISION.]

* *In re* 10 THE TERRACE, HAMPTON WICK, MIDDLESEX.

BROUGHTON *v.* THORNE.

1956 *Dec.* 12.

Vaisey J.

[1953 B. 5253.]

Solicitors — Costs — Registered land — Transfer — Scale fee — Whether applicable if work not wholly done — Solicitors' Remuneration (Registered Land) Order, 1925 (*S.R. & O.,* 1926, *No.* 2 (*L.* 2)), *para.* 1 (*d*) (i).

On the sale of certain registered freehold property in Middlesex under an order of the court one of the charges (amounting to £25) in the bill of costs of the solicitor (for mortgagees) to whom the conduct of the sale was given and who had previously prepared particulars and conditions of sale and had, after the sale had taken place, prepared a transfer, was, on taxation, disallowed by the taxing master who required detailed charges to be submitted. The solicitor objected, claiming that this was the proper scale fee in accordance with paragraph 1 (*d*) (i) of the Solicitors' Remuneration (Registered Land) Order, 1925. The taxing master, in answer to the objection, referred to *In re Lacey & Son* (1883) 25 Ch.D. 301 (which was concerned with a sale of unregistered land to which the Remuneration Order of 1882 applied) and stated that having regard to the circumstances and to the fact that a substantial part of the work, which the scale fee provided by the Order was intended to cover, was not done, the scale fee did not apply.

A summons to review taxation was taken out by the solicitor, in which he sought that his objection might be allowed and that it be referred back to the taxing master to vary his certificate accordingly:—

Held, that the provisions of paragraph 1 (*d*) (i) of the Order of 1925 applied, so that the solicitor was entitled to the scale fee provided in the Schedule, the case not being analogous to a sale of unregistered land.

In re Lacey & Son (1883) 25 Ch.D. 301 distinguished.

SUMMONS TO REVIEW TAXATION.

In 1955, certain registered freehold property in Middlesex was sold, under an order of the court, and, in the bill of costs of the solicitor (Mr. Alfred Ernest Shrimpton, the respondent to the taxation), who was a solicitor acting for mortgagees and who was appointed by the court to conduct the sale, one of the charges

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was stated to be: "Scale fee for investigating title to property "in question and preparing and completing instruments of "transfer: £25." This was disallowed by the taxing master. The respondent objected, his reasons being as follows: "By the "order dated October 14, 1954, the property was directed to be "sold and by the order dated May 24, 1955, it was sold to the "plaintiff [Mr. Weldon James Broughton]. The subject of the "sale was the whole legal estate in the property vested in the "plaintiff and the defendant [Miss Lily Thorne] as joint tenants, "not merely the equitable interest of the defendant, and the "purchase price was fixed on this basis. The title deduced "was to the whole legal estate and was liable to requisitions "accordingly, and the instrument required to carry out the "transaction was a transfer on sale of the absolute title in the "property vested jointly in the plaintiff and defendant. It is "submitted, therefore, that the solicitor having the conduct of "the sale must be entitled to remuneration on the scale provided "by the Solicitors' Remuneration (Registered Land) Order, 1925. "No other paragraph of the former order would appear to govern "the remuneration in the circumstances of this case."

The master, in his answer to the objections, after stating certain facts relating to the negotiations for the sale of the property and that the defendant, having been ordered to execute the transfer of the property, did so in his (the master's) presence on November 17, 1955, proceeded as follows: "Notwithstanding "these facts the respondent included in his bill of costs in "addition to the detailed items a sum of £25 representing the "scale fee under paragraph 1 (D) (i) of the Solicitors Remunera-"tion (Registered Land) Order, 1925, as amended by the Order "of 1953.[1] I disallowed this item on the ground that the scale

[1] By the Remuneration Order, 1882, a scale of charges on sale is set out in Schedule I (inter alia) for the "Vendor's solicitor for deducing title "to freehold, copyhold, or leasehold "property, and perusing and com-"pleting conveyance (including pre-"paration of contract or conditions of "sale, if any)."

Solicitors' Remuneration (Registered Land) Order, 1925, para. 1: "The remuneration of solicitors "in conveyancing and other non-"contentious business under the Land "Registration Act, 1925, shall be "regulated as follows:—(*d*) For every "completed transfer on sale . . . "(i) Where the land is registered with "Absolute or Good Leasehold title, "the remuneration shall be that pre-"scribed in the Schedule hereto. . . . "(*h*) The remuneration prescribed "by the Schedule hereto covers (in "addition to all searches in, attend-"ances at, correspondence with the "Registry, and other matters in-"volved in, incidental to or arising "out of the registration) the prepara-"tion or perusal (as the case may be) "of the contract, or conditions of sale, "if any, the perusal of any lease, or "other deed mentioned on the regis-"ter, and all other work incidental to "or consequential on the transaction, "including all matters which in the "case of sales, purchases, charges, "mortgages, sub-charges, and sub-"mortgages, and transfer of charges "or sub-charges, or mortgages of un-"registered land are covered by the "remuneration prescribed by the "Remuneration Order, 1882, Schedule "I, Part 1."

[Without further qualification the Schedule, as amended by the Solicitors' Remuneration (Registered Land) Order, 1953, indicates in one column the value of the land and, in the only other column, the scale of remuneration.]

"fee was not applicable to the particular circumstances of this "case, whilst at the same time inviting the respondent to "substitute detailed charges for any work he may have done "over and above the work already charged in his bill. The "respondent declined to avail himself of this offer but brought "in objections to the taxation on the ground that he was entitled "to the scale fee of £25. On the hearing of the objections on "August 16, 1956, I again invited the respondent's representative "to furnish me with particulars of the work which the fee "charged was intended to cover and having been informed that "he was unable to do so I disallowed the objections on the "following grounds: Paragraph 1 (H) of the Solicitors Remunera-"tion (Registered Land) Order, 1925, as amended by the Order "of 1953, sets out the work which the scale fee is intended to "cover, including all matters which in the case of sales, pur-"chases . . . of unregistered land are covered by the remunera-"tion prescribed by the Remuneration Order, 1882, Schedule I, "Part 1. Schedule I mentions four things: deducing title, "perusing conveyance, completing conveyance, and preparing "contract or conditions. It was not necessary that a contract "or conditions should be prepared, the Schedule saying that the "charge included them 'if any,' but in the case of *In re "Lacey & Son*[2] the Court of Appeal held that the scale fee "could not be charged unless the other three things were done. "In the present case a substantial part of the work which the "scale fee is intended to cover was not done and therefore the "scale fee does not apply. Any work done by the respondent "not already charged for and allowed in his bills of costs should "be charged according to Schedule II. Dated September 21, "1956."

The respondent took out a summons in which he sought that his objection to the taxation of costs might be allowed and that it might be referred back to the Taxing Master to vary his certificate accordingly.

The substantial question before the court was whether the solicitor's claim in respect of registered land in this case came within the scale fee or ought to be a claim for specified items.

Quentin Edwards for the applicant solicitor.

R. B. Holroyd Pearce (*Roger Gray* with him) for the parties to the action.

The only case cited in argument is referred to in the judgment.

VAISEY J. This is a summons to review taxation. The item of taxation which is in dispute is the scale fee, £25, on a transaction of transfer on the sale of registered land.

Registered land is dealt with, not under the old Solicitors'

[2] (1883) 25 Ch.D. 301.

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Remuneration Order of 1882, but under the new Order, the Solicitors' Remuneration (Registered Land) Order of 1925. It seems to me that when one looks at that Order of 1925 it is quite straightforward when it says this in paragraph 1 (*d*): "For every "completed transfer on sale . . . (i) Where the land is regis- "tered with absolute . . . title"—which is the case here—"the "remuneration shall be that prescribed in the Schedule hereto." That is in the Schedule to the Order of 1925. The figure which has been ascertained by referring to that Schedule is £25, and the taxing master has disallowed that, on the ground, as I understand it, that, having regard to the case of *In re Lacey & Son*,[1] the scale fee can only be charged if the majority, so to put it, of the various items of work which were covered by the charge had in fact been done. I do not think that that is so, because the decision in *In re Lacey & Son*[1] was a decision under the old Schedule in which the operative words were that the vendor's solicitor should receive a fee "for deducing title to freehold, "copyhold, or leasehold property, and perusing and completing "conveyance (including preparation of contract or conditions of "sale, if any)." I can quite understand that, on a taxation which was regulated by the old Order of 1882, having regard to *In re Lacey & Son*,[1] the scale fee under the Schedule could not be charged unless the work indicated was done.

But when one looks at paragraph 1 (D) of the Order of 1925, which I have read, there is a plain direction that the figures in the Schedule are to operate. Then we find this statement in (*h*): "Remuneration prescribed by the Schedule hereto covers (in "addition to all searches . . .)," and so on, "the preparation or "perusal (as the case may be) of the contract or conditions of "sale," and so forth. The taxing master points out that, taking the various items under (*h*), some of those items of work have not been done by the solicitor, and treating *In re Lacey & Son* as analogous, he said that, if they had not been done, it does not come within the scale fee and the solicitor's claim ought to be a claim for "itemized" amounts. I do not think that that is so. I think that the position of registered land stands on a very different footing from the conveyance of land under the old régime, where there had to be abstracts and various steps taken, which are not now necessary in the case of an absolute title. It seems to me, on the particular facts of this case, that this scale fee of £25 ought to have been allowed, and I will vary the certificate, if necessary, by allowing the £25.

Order accordingly.

Solicitors: *A. E. Shrimpton; Sherrard & Sons, Kingston-on-Thames.*

J. L. D.

[1] 25 Ch.D. 301.

[QUEEN'S BENCH DIVISION.]

* ADLER v. UPPER GROSVENOR STREET INVESTMENT LTD.

1956
Dec. 20

Hilbery J.

[1956 A. No. 1671.]

Landlord and Tenant—Assignment or underletting of lease—Consent—Residential flat—Covenant not to assign or underlet without consent, such consent not to be unreasonably withheld—Proviso to covenant that tenant offer to landlord surrender of lease before asking for consent to assign—Effect of proviso—Separate covenant—Whether void—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 19 (1) (*a*).

A lease demising a residential flat to a tenant for seven years from January, 1954, contained a covenant against assignment by the tenant "without the previous consent in writing of the landlords' such consent (subject as hereinafter provided) not to be "unreasonably withheld" to an assignment of the whole flat to a respectable and responsible person. There followed a proviso to the covenant "provided that should the tenant desire to assign or "underlet the flat he shall before doing so offer in writing to the "landlords to surrender the lease . . . without any consideration "and the landlords may accept such offer at any time within "21 days from the receipt thereof . . . but shall otherwise be "deemed to have rejected it." The landlords refused the tenant permission to assign to a designated assignee on the grounds inter alia that the tenant had not offered to surrender the lease. The tenant sought a declaration that the proviso requiring him to offer the landlord the surrender of the lease when asking permission to assign was void and of no effect by virtue of section 19 (1) (*a*) of the Landlord and Tenant Act, 1927[1]:—

Held, that the proviso to the covenant against assignment to offer a surrender of the lease did not prevent the operation of the proviso brought into the lease by section 19 (1) (*a*) of the Act of 1927 since it did not purport to restrict the ambit of section 19 in any way, such as by stipulating that a failure to offer that surrender should be deemed to be a reasonable reason for the landlords' refusal. This particular proviso should be construed as a covenant in the lease imposing a condition precedent to the coming into operation of the covenant against assigning or underletting without consent of the landlord: if it was put into operation and the landlord refused the surrender the tenant lost nothing of his right under the covenant against assigning or underletting without the landlord's previous consent; if the landlord accepted the surrender the whole lease went and the provision regarding assignment never came into operation. Accordingly, the declaration was refused.

In re Smith's Lease, Smith v. *Richards* [1951] 1 T.L.R. 254; [1951] 1 All E.R. 346 distinguished.

[1] Landlord and Tenant Act, 1927, s. 19 (1): "In all leases whether "made before or after the commencement of this Act containing a covenant condition or agreement against "assigning, underletting, charging or "parting with the possession of "demised premises or any part thereof without licence or consent, such "covenant or agreement shall, notwithstanding any express condition "to the contrary, be deemed to be "subject—(*a*) to a proviso to the effect "that such licence or consent is not to "be unreasonably withheld. . . ."

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Action.

The following statement of facts is taken substantially from the judgment. By a lease dated January 17, 1955, made between the defendants, Upper Grosvenor Street Investment Ltd., and the plaintiff, Louis Reginald Adler, a residential flat known as flat no. 4 on the first floor of the building situate at no. 46, Grosvenor Street, and 46 and 46a, Reeves Mews, Westminster, was demised to the plaintiff for a term of seven years from December 25, 1954, at the yearly rent of £850 which included rates, except for any increase in the rates which might occur after the date of the lease and the coming into effect of the terms of the lease, and the letting was "otherwise subject to the terms "and conditions in the lease." Among other terms and conditions, the lease contained the usual covenant by the lessee "not to assign underlet or part with possession of the said flat "or any part thereof without the previous consent in writing of "the landlords such consent (subject as hereinafter provided) "not to be unreasonably withheld to an assignment or under-"letting of the said flat as a whole to a respectable and respon-"sible person . . ." There followed: "Provided that should "the tenant desire to assign or underlet the flat he shall before "doing so offer in writing to the landlords to surrender the lease "on any subsequent quarter day without any consideration and "the landlords may accept such offer at any time within 21 days "from the receipt thereof (such acceptance to be without "prejudice to the rights and remedies of the landlords in respect "of any rent in arrear or any breach of the covenants herein "contained) but shall otherwise be deemed to have rejected it."

In March, 1956, some 15 months after the lease had come into existence, the plaintiff expressed a wish to assign and asked for leave. The defendants refused leave to assign to the designated and proposed assignee, giving various grounds for refusal, and adding that the plaintiff (the tenant) had failed to comply with the proviso to the covenant in the lease in that he had not offered in writing to the landlord to surrender the lease when he desired to assign or underlet the flat.

In this action the plaintiff claimed that he was desirous of assigning or underletting the flat as a whole and sought (1) a declaration that the proviso to the covenant against assigning, underletting or parting with possession requiring the tenant to offer in writing to the landlord to surrender the lease was void and of no effect by virtue of section 19 (1) of the Landlord and Tenant Act, 1927 [1]; (2) a declaration that in the event of his applying to the defendants for a licence to assign or underlet the flat to a responsible and respectable person the defendants were not entitled to refuse such licence by reason only that he had not offered to surrender the lease to the defendants as required by the proviso.

[1] See note 1 on p. 227.

The defendants denied that the plaintiff's contention was correct and denied that the plaintiff was entitled to the declarations claimed or to either of them.

George Avgherinos for the plaintiff.
David Kemp for the defendants.

The following case (other than those referred to in the judgment) was cited in argument: *Bates* v. *Donaldson*.[2]

HILBERY J. stated the facts, read section 19 (1) (*a*) of the Landlord and Tenant Act, 1927, and continued: The argument which has been put before me on behalf of the plaintiff is that the proviso and covenant in this lease " . . . that should the tenant " desire to assign or underlet the flat he shall before doing so " offer in writing to the landlords to surrender the lease . . . " is bad and void because it offends against the words in section 19 [1] of the Landlord and Tenant Act, 1927, " . . . notwithstanding " any express provision to the contrary. . . ." The first thing to observe is that all that section 19 purports to do is to add something to all leases where such leases contain " a covenant " condition or agreement against assigning, underletting, charging " or parting with the possession of demised premises or any part " thereof without licence or consent. . . ." There is a covenant in this lease limited in that way, that is to say, it is a covenant " not to assign underlet or part with possession of the said flat " or any part thereof without the previous consent in writing of " the landlords," but the covenant in this lease already contains the proviso which section 19 says must be added and read into such a covenant against assigning, letting or subletting without the previous consent of the landlord. The question that arises, therefore, is whether, through the inclusion of the further covenant or proviso, something has been added which offends against section 19. It is said that it does offend because it is an express provision stultifying the effect of that which is required by section 19.

In my view, that argument fails. I think that section 19, properly construed, only does that which, in express terms, it sets out to do: it forces into any lease, where there is a covenant against assigning or subletting without the previous consent of the landlord, a further proviso, and expressly prevents any inclusion in the lease of anything which would prevent the inclusion of that proviso. That is the real meaning of the words in the section " notwithstanding any express provision to the contrary."

I therefore approach this matter asking myself whether the proviso in this lease prevents the operation of that proviso, that " consent is not to be unreasonably withheld " ? I cannot see

[2] [1896] 2 Q.B. 241; 12 T.L.R. 485.

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that it does. It appears to me properly to be read as an express provision in the lease imposing a condition precedent to the coming into operation of the covenant against assigning or letting without the previous consent of the landlord, and in express terms the tenant agrees with the landlord that, if he wishes to assign, before so doing, and therefore before he asks for the permission of the landlord, he shall offer the landlord a surrender of the term. The first thing to be observed is that there is no particular hardship in the tenant making such a bargain; it is not particularly hard on him, if he wishes to get rid of the term, that he should afford the landlord an opportunity of accepting a surrender of what remains of the term.

It is said that the effect of the proviso when operated must be one of two things, and I agree that it must: the landlord will either accept or refuse the surrender. If the landlord accepts the surrender, it appears to me that the provision that the tenant may assign never comes into operation. It is clear and has been decided that section 19 is not applicable and is not to be read into a clause which is absolute against assignment altogether. It seems to me that if, in the first place, the landlord refuses the surrender offered, the right of a tenant to offer an assignee who cannot be reasonably objected to by the landlord remains unimpaired; if, on the other hand, the landlord accepts the surrender, it does not and cannot amount in law to saying that the effect of the clause in such circumstances is that it is one which is absolute against assignment.

It has been urged on behalf of the plaintiff that the decision of Roxburgh J. in *In re Smith's Lease, Smith* v. *Richards*,[1] shows that this proviso must be bad because in that case the lease in terms contained this proviso attached to the covenant against underletting or parting with possession without the previous consent of the lessor: "Provided always that any "refusal by the lessor to consent to any particular assignment or "unfurnished underletting of the said premises or a furnished "letting thereof for a period exceeding six calendar months shall "not be deemed to be an unreasonable withholding of consent by "reason only that the lessor at the time of intimating any such "refusal may offer to accept from the lessee a surrender of the "tenancy hereby created and in the event of any such offer being "made by the lessor the lessee within three calendar months "after receiving such offer shall either withdraw her application "for the lessor's consent to assign or (as the case may be) "underlet the said premises or shall surrender to the lessor the "tenancy hereby created without prejudice to the liability up "to the date of such surrender of either party against the other "under any of the covenants on their respective parts herein "contained." The ratio decidendi, however, in that case was, as Roxburgh J. said[2]: "Can the parties curtail the operation

[1] [1951] 1 T.L.R. 254; [1951] 1 All E.R. 346.

[2] [1951] 1 All E.R. 346, 348.

"of that statutory provision"—referring to section 19—"by "postulating in the lease that certain things shall not be deemed "unreasonable? In my judgment, the answer is in the nega- "tive." He then considered a decision of Macnaghten J. in *Balfour* v. *Kensington Gardens Mansions Ltd.*[3] and a decision of Harman J. in *Creery* v. *Summersell and Flowerdew & Co. Ltd.*,[4] and finally said this[5]: "Therefore, in my judgment, both on "principle and on authority, the parties cannot restrict the ambit "of section 19 by stipulating expressly that this or that shall be "deemed to be reasonable. The question is objective: Is it "reasonable? That question has to be decided without regard "to the interpretation which the parties have put on that "expression."

In the present case the parties have not, by this proviso and covenant to offer a surrender of the lease, purported to restrict the ambit of section 19 by any stipulation that a failure to offer that surrender shall be deemed to be a reasonable reason for refusal; they have not in terms put any further restriction on the covenant as it stands which embodies all that section 19 requires to be included in any lease. It may well be, as it was pointed out in argument, that if there were no such express covenant and undertaking to offer a surrender by the tenant, if the landlord was to make such a thing a condition of giving his consent to an assignment, that would be an unreasonable withholding of the consent; he would then be seeking to impose upon the tenant, though there was no provision by the tenant that he should afford such a thing, a term that the tenant should afford something, namely, an offer of surrender as a condition for his getting a consent. Here, I have to remember that there is a clear contract—true, attached in the form of a proviso, but none the less really a separate undertaking, a covenant attached in one way as a proviso to the covenant against underletting or assigning without the consent of the landlord, but in express terms dealing with something which is to be regarded as a step to be taken anterior to the question whether or not consent should be given or should be reasonably withheld by a landlord to a proposal to assign or underlet.

Lastly, section 19 is a section which by statute imposes on the parties to a particular type of contract, namely, "all leases," a term for which they have not themselves contracted. I see no reason to construe it as intended to effect any more than it expressly says it shall effect.

It is argued here that impliedly it results in this proviso and covenant in this lease being contrary to the section. I see no reason to read the section so as to bring about that implication. I think it is worth while noticing that Lord Greene in *F. W. Woolworth & Co. Ltd.* v. *Lambert*[6] said about this section:

[3] (1932) 49 T.L.R. 29.
[4] [1949] Ch. 751.
[5] [1951] 1 All E.R. 346, 349.
[6] [1937] Ch. 37, 60; 52 T.L.R. 732; [1936] 2 All E.R. 1523.

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"... I only wish to make two observations. The first one is "this: that it is, in my judgment, a misconception to treat "the relevant subsection here as though it were a subsection "conferring upon the court some remedial jurisdiction to relieve "the lessee from a covenant or to modify it. It is in truth "nothing of the kind. It is a statutory addition to the terms "of a particular type of covenant, and the proviso which the "subsection mentions is to be read into the covenant. What the "legal consequences of that may be in relation to any particular "set of facts is a matter which will fall to be determined in the "usual way. It is quite wrong to look upon this as something "which enables the court to say that a particular set of terms "or some particular conditions would be the reasonable thing for "the lessor to impose in the circumstances. The practical "question which falls to be decided in matters of dispute under "this is simply the question, Aye or No, has the covenant been "broken; Aye or No, does the covenant, or does it not, apply "in the particular circumstances of the case?"

I see no reason myself why this particular proviso should not be construed as a covenant, as indeed it is a covenant, and, if so, it is a covenant which the parties have contracted shall be a covenant by way of a condition precedent, and it operates on matter which is anterior to the coming into operation of the covenant against underletting or assigning without the previous consent of the landlord. I so construe it. If it is put into operation and the landlord refuses the surrender, the tenant has not lost anything of his right under the covenant against assigning or underletting without the landlord's previous consent; if the landlord accepts the surrender, then the whole lease goes and the situation of the tenant is no worse and no different from what it would be if he had a covenant against assigning which was absolute.

In the circumstances, I refuse either of the declarations. As that is my view, I need not in those circumstances deal with the further point argued as to whether the second declaration asked for is not one which is too hypothetical for the court in any event to grant. Sufficient unto the day, I think, is the decision which I have given, which therefore results in judgment for the defendants.

Judgment for defendants.

Solicitors: *Malcolm Slowe & Co.; Digby & Co.*

E. M. W.

[COURT OF APPEAL.]

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1956 *July* 11, 12, 17.

Vaisey J.

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1956 *Dec.* 11, 12, 13, 14.

Lord Evershed M.R., Birkett and Romer L.JJ.

Revenue—Surtax—Company—Apportionment of undistributed income pursuant to surtax direction—"In accordance with . . . interests "of members"—Meaning—Part of income to be carried to fund for redemption of preference shares—Whether preference shareholders' "interests" included such sums—Investment company—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *Sch. I, paras.* 8, 10.

An investment company issued to an assurance society six per cent. first preference shares, non-voting and redeemable on the terms that the company would maintain a redemption fund out of funds otherwise available for dividend. A surtax direction was made on the company under section 21 of the Finance Act, 1922, and the commissioners apportioned the income of the company among the members in accordance with their dividend rights. The company contended that in addition to those rights the assurance society (which was not liable to surtax) ought to be treated as entitled to sums which had been carried to the redemption fund as well as to the dividend rights:—

Held, that the interest of the preference shareholders for the purposes of section 21 of the Act of 1922 and Schedule I paragraphs 8 and 10 was limited to the dividend rights.

F. P. H. Finance Trust Ltd. (*No.* 2) v. *Inland Revenue Commissioners* [1946] A.C. 38; 61 T.L.R. 320; [1945] 1 All E.R. 492; 28 T.C. 209 applied.

Decision of Vaisey J. affirmed.

APPEAL from the Special Commissioners for the purposes of the Income Tax Acts.

At a meeting of the Special Commissioners for the purposes of the Income Tax Acts, Wigram Family Settled Estates Ltd. (in liquidation) (hereinafter called "the company") appealed against directions made upon it by the Special Commissioners under the provisions of section 21 [1] of the Finance Act, 1922, and section 14

[1] Finance Act, 1922, s. 21: "With "a view to preventing the avoidance of "the payment of super-tax [now sur-"tax] through the withholding from "distribution of income of a company "which would otherwise be distri-"buted, it is hereby enacted as "follows: (1) Where it appears to the "special commissioners that any com-"pany to which this section applies "has not, within a reasonable time "after the end of any year or other "period . . . for which accounts "have been made up, distributed to "its members in such manner as to "render the amount distributed liable "to be included in the statements to "be made by the members of the "company of their total income for "the purposes of super-tax, a "reasonable part of its actual income "from all sources for the said year "or other period, the commissioners "may, by notice in writing to the "company, direct that for the purposes "of assessment to super-tax, the said "income of the company shall, for "the year or other period specified in "the notice, be deemed to be the "income of the members, and the "amount thereof shall be apportioned "among the members. . . ."

Schedule I, para. 8: "The appor-"tionment of the actual income from "all sources of the company shall be "made by the Special Commissioners "in accordance with the respective "interests of the members. . . ."

Para. 10: "Notice of any appor-"tionment . . . shall be given by

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of the Finance Act, 1939,[2] in respect of the years of assessment 1949–1950, 1950–1951 and 1951–1952; and against the consequential apportionment among the members of the actual income of the company for those years. The commissioners confirmed the directions and the company did not appeal against that part of the decision but objected to the apportionments on the ground that they had not been made on the correct basis.

The following facts were, so far as relevant, those proved to the satisfaction of the commissioners and set out in the case stated.

The company was incorporated on December 12, 1932, to acquire and deal in real estate. At the time of its incorporation the authorized capital of the company was £5,000, divided into 3,500 preference shares of £1 each and 1,500 ordinary shares of £1 each, all of which were issued for cash. By a special resolution dated April 6, 1933, the authorized capital was increased to £7,500 by the creation of 2,500 participating cumulative preference shares of £1 each, of which 2,000 shares were issued for cash. By a special resolution dated December 12, 1934, the capital was further increased to £57,500 by the creation of 50,000 6 per cent. redeemable preference shares of £1 each, all of which were issued for cash; and by a further special resolution dated April 14, 1936, it was again increased to £107,500 by the creation of an additional 50,000 6 per cent. redeemable preference shares of £1 each, all of which were issued for cash on April 22, 1936, to the holders of the original issue of redeemable preference shares. The terms of issue of the first issue of redeemable preference shares were, inter alia, that they were to be repaid within five years from March 31, 1935, and that the company was to set aside out of profits available for dividend in each year, beginning with the year ended March 31, 1936, a sum of £9,050, such sum to be credited to a redeemable preference shares redemption fund until that fund amounted to £50,000.

By amendments effected by the special resolution of April 14, 1936, providing for the second issue of redeemable preference shares the following provisions for the redemption of the 100,000 redeemable preference shares were made and were incorporated in the company's articles of association (article 14a). The

"serving on the company a statement "showing the amount of the actual "income from all sources adopted by "them for the purposes of section 21 "of this Act, and either the amount "apportioned to each member or the "amount apportioned to each class of "shares, as they think fit."

[2] Finance Act, 1939, s. 14: "(1) "Subject to the provisions of this "section with respect to companies "with estate or trading income, the "whole of the actual income from "all sources, for every year of assess-"ment, of every investment company "to which section 21 of the Finance "Act, 1922, applies shall, however "much or however little thereof has "been distributed to its members, be "deemed for the purposes of assess-"ment to surtax to be the income of "the members of the company, and "accordingly the special commis-"sioners shall give a direction under "subsection (1) of the said section "21 in respect of each year of assess-"ment in relation to every such com-"pany without considering whether "or not the company has distributed "a reasonable part of its said "income."

preference shares were to be redeemed on the expiration of 10 years from March 31, 1935, and for the purpose of such redemption the company was to carry to the credit of a redeemable preference shares redemption fund out of the profits of the company which would otherwise have been available for dividend, for the year ended March 31, 1936, the sum of £9,050, and for every subsequent year the sum of £7,797, the profits for the purpose of that article being calculated without deduction of the sums payable to the principal shareholders or to their firms for professional services. Both the first and second issues of redeemable preference shares were made to the Equity and Law Life Assurance Society (hereinafter called "the society"), and the said provisions as regards the redemption of the preference shares were imposed by the society as a condition precedent to subscribing for the shares in cash. At all material times the company paid dividends on the preference shares but it did not declare any dividends on the ordinary shares.

By March 31, 1949, that was the beginning of the first material accounting period of the company, a sum of £77,000 derived from the profits of the company stood, in accordance with the company's articles, to the credit of the redeemable preference shares redemption fund. During the material years transfers to this fund out of the taxed profits of the company were made as follows: year ended March 31, 1950—£4,000; year ended March 31, 1951—£10,000, and year ended March 31, 1952—£4,000. The larger transfer in the year ended March 31, 1951, was made because the company had previously fallen in arrears with the transfers required by the articles. On August 30, 1950, 80,000 redeemable preference shares were redeemed by applying £80,000 standing to the credit of the redemption fund, and, thereafter, and until the company was liquidated in May, 1952, the society's holding of redeemable preference shares in the company was only 20,000.

The company's income for the years for which directions were made was: for the year ended March 31, 1950—£13,154; for the year ended March 31, 1951—£21,885; and for the year ended March 31, 1952—£13,527. In apportioning the income for these years the Special Commissioners apportioned to the society as a member of the company such proportion only of the said income as was represented by the society's right to a 6 per cent. dividend on the amount of redeemable preference shares held by it at the relevant time, namely, 100,000 up to August, 1950, and 20,000 thereafter.

The company contended (i) that the apportionments of the actual income of the company to its members did not fully take into account the interest of the society, because the society in addition to its entitlement to a 6 per cent. dividend on its shareholding in the company had also an interest in the credit to the redemption fund made in each of the relevant years out of the profits otherwise available for dividend; (ii) that the sums

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transferred to the credit of the redemption fund were transferred as a matter of contract with the society constituting an interest of the society as a member within paragraph 8 of Schedule I to the Finance Act, 1922, and (iii) that the Special Commissioners ought to have apportioned to the society as representing its interest in the material years the following sums, namely: for the first relevant year £4,000, for the second £10,000, and for the third £4,000, grossed up in each case at the appropriate standard rate, or alternatively not grossed up, in addition to the dividend for each of the said three years at 6 per cent. on the amount of the society's shareholding.

It was contended on behalf of the Crown (i) that the method of measuring the respective interests of the members by reference to dividend rights was in the circumstances the most equitable and fair, having regard not only to income rights and to voting rights but also, and in particular, to the interest of the ordinary shareholders on a winding-up, and in view of the redemption of the majority of the preference shares in August, 1950, and (ii) that the apportionment should be affirmed in principle.

The commissioners rejected the contention that in the apportionment insufficient account had been taken by the assessing commissioners of the interest of the society as a member, and held that the society's interest was adequately measured by taking 6 per cent. on the amount of its preference shareholding in the material years. They further held that the guarantee on which the society had insisted as a condition of subscribing for the shares was no more than a security for the eventual repayment of its capital, and that it would have been wrong to have imputed a double interest to the society, one measured by the income yield on its shares, the other by the amount credited in any relevant year to the preference shares redemption fund out of the profits otherwise available for dividend. The commissioners, therefore, affirmed the principle on which the apportionments had been made.

The company appealed.

On July 17 VAISEY J. read a judgment, in which he referred to the facts, to the relevant statutory provisions, and to the contentions of the parties. His Lordship continued: The Special Commissioners rejected the company's contentions and held in favour of the Crown that it would have been wrong to take into account the redemption rights afforded to the society's shares, and with that view I agree.

It seems to me that the contractual guarantee providing for the creation of the redemption fund was, as the Special Commissioners put it, in essence merely a security for the eventual repayment of the capital and in no way and in no sense a double interest attached to the shares—double, that is, as consisting of the 6 per cent. dividend and also of the benefit of the credits to the redemption fund. It seems to me that the fallacy in the

company's argument consists in treating the redemption fund as providing something in the nature of a bonus or premium to the holders of the society's shares, whereas in truth all that it did was to provide for their payment off or redemption, which may or may not have been welcome or beneficial to such holders. When the credits were made to the redemption fund, the society's shares remained 6 per cent. first preference shares, exactly as they were before. The holders of the junior classes of shares were all pro tanto benefited and, as it would appear that all the prior classes of shares were very well secured or covered, the only people who really gained by the application of the appropriate amounts of profits to the redemption fund were the holders of the ordinary shares.

I was at first puzzled by this problem and it may be that my conclusions are unduly simple. However, it seems to me that the sums carried to the redemption fund, though they originated in income, were in fact converted into, and applied as, capital. The holders of the society's shares could never have been liable either to income tax or to surtax except in regard to their 6 per cent. dividends.

I was referred to *F. P. H. Finance Trust Ltd.* v. *Inland Revenue Commissioners (No. 2)*.[3] Lord Russell of Killowen, after pointing out that everyone who falls within the extended definition of "member" is not necessarily to be included in an apportionment, said[4]: "In my opinion the commissioners, in apportioning "the income among the members, should determine who are the "persons of whom it can be said (1) that they fall within the "definition and (2) that they are the persons who, in view of all "their interests in the company, are the persons really interested "in the income in question and in what proportions."

Applying that principle, it seems to me that the holders of the society's shares are perhaps less, and certainly not more, interested in the income carried to the redemption fund than any of the other classes of shares, and particularly the holders of the ordinary shares. I think the Special Commissioners applied the appropriate test and came to the right conclusion.

The result of this is apparently that there is now no disagreement as to the right figures, and nothing remains for me to do except to dismiss this appeal with, I suppose, the usual consequences as to costs.

Appeal dismissed.

The company appealed.

Cyril King Q.C. and *P. J. Sykes* for the company.

John Pennycuick Q.C., *Sir Reginald Hills* and *Montagu Temple* for the Crown.

In addition to the case referred to in the judgments, the

[3] [1946] A.C. 38; 61 T.L.R. 320; [1945] 1 All E.R. 492; 28 T.C. 209.

[4] 28 T.C. 246.

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following were cited in argument: *Fattorini (Thomas) (Lancashire) Ltd.* v. *Inland Revenue Commissioners* [5]; *Inland Revenue Commissioners* v. *Freds Securities Co.*[6]; *Ammonia Soda Co. Ltd.* v. *Chamberlain.*[7]

LORD EVERSHED M.R. Section 21 of the Finance Act, 1922, was enacted, as appears from what has been called its preamble, for the purpose of preventing the avoidance of the payment of super-tax (now surtax) through the withholding from distribution of income of certain companies which would otherwise be distributed. The scheme of that section, as later amended, was that the income of such companies, notwithstanding that it had not been, or had not been entirely, distributed, was liable to be deemed to be treated as the members' income.

The point, of course, was this: that whereas individuals are liable to super-tax, or surtax, limited companies are not. So Parliament provided that in the cases to which the legislation applied the income in question, namely, the income of the company, should be made to bear, or be liable to be assessed for, surtax although it remained the income of the company; and by way of further discouragement, the income is to be assessed for surtax or is to be treated as though it were the highest part of the income of the company's members respectively.

In order to give effect to that scheme it was provided by the Act of 1922, and the later Acts of 1936, 1937 and 1939, that it should be made applicable to certain classes of companies, one of which is described as an investment company. The company with which we are concerned in this present case, Wigram Family Settled Estates Ltd., is a company of that category, so that this legislation is undoubtedly applicable to it.

The mechanics of the legislation were such that two stages operated towards the obtaining of the taxation: (1) a direction is given by the commissioners, and (2) as a result of that direction the income is deemed to be the income of the members. The second stage itself may be regarded as sub-divided; for having deemed it to be the income of the members it is then necessary for the commissioners to divide it "in accordance with the "respective interests of the members." Those last words are taken from paragraph 8 of the First Schedule to the Finance Act, 1922; and the problem in this case really turns upon the effect of those words—the income "shall be apportioned in "accordance with the respective interests of the members."

This being an investment company, the question whether there should be a direction was, as a result of the amending legislation, no longer made to depend upon whether in fact there had been reasonable distribution of the income. In other words, in a case of the kind with which we are concerned, the first stage, direction,

[5] [1942] A.C. 643; 24 T.C. 328.
[6] [1939] 2 K.B. 734; [1939] 3 All E.R. 241; 22 T.C. 445.
[7] [1918] 1 Ch. 266; 34 T.L.R. 60.

was mandatory, given that the company was one, as was this company, to which the legislation applied.

[His Lordship referred to the facts and went on:] For the purposes of the present case, or at any rate for explaining it at this stage, I propose to leave out of account (while not forgetting what Mr. King said in his reply) the two so-called junior classes of preference shares, cumulative preference participating shares and the non-participating preference shares, and to confine my attention accordingly to the redeemable preference shares on the one hand and the ordinary shares on the other.

At the time when the redeemable preference shares were issued the articles of association were altered so as to give specific effect to the rights of the holders and to the terms upon which the issue was made. Those rights and terms are found in article 14A of the company's articles of association. That article provides in the first place that the redeemable preference shares should be redeemed at the expiration of the period of ten years there mentioned, and should be redeemed out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for purposes of the redemption; and then provision is made for the payment of the cumulative preferential dividend up to the date of redemption. So far, the article followed in regard to redeemable preference shares the statutory requirements which were introduced into company law recently, and now find their place in section 58 of the Companies Act, 1948. Briefly, that section requires that redeemable preference shares if not redeemed out of the proceeds of a fresh issue of shares, should be redeemed out of the profits otherwise available for dividend.

Returning to article 14A, paragraph (b) provides that for the purposes of such redemption the company should create and thereafter maintain what was called a redeemable preference share redemption fund out of the profits of the company otherwise available for dividend; and provision is made for putting aside out of such profits, if available, for each year certain sums of money. In fact the actual provisions of the article so far as they specified the sums to be set aside were not exactly followed; but nothing in the present case turns upon that variation or upon the fact that the dates which were mentioned in the article were not strictly adhered to. So far as is relevant it is sufficient to say that for the years with which we are concerned, the tax years 1950–1951, 1951–1952 and 1952–1953, the following sums were put to the credit of the specially created redemption fund, namely, in the first and the third of those years £4,000 and in the second £10,000, in each case being sums taken from the income of the company which would otherwise be available for distribution by way of dividend to the shareholders.

I will, for simplicity, confine myself in this judgment to the first of the three years, when the sum of £4,000 was, as I have said, taken from the profits available for distribution and put to

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the credit of the specially created redeemable preference share redemption fund.

It is I think right to say at once that there is in this case no question whatever of the company having withheld from distribution, unreasonably or otherwise, unduly large sums. There is here, indeed, no question whatever of this company having been used, at any relevant date or at all, for the purpose against which the legislation was designed, namely, the avoidance of the payment of surtax by individuals by keeping the funds in question in a limited company not liable for surtax. In the result, if the Crown's view is right, it must I think be conceded that this might fairly be regarded as something of a hard case. All the company did by way of retention of income, otherwise liable to be distributed, was to apply it in accordance with its contractual obligations so to do. But the point has arisen (and taken the sharp features which it has) because the sole holder of the redeemable preference shares was a company, the Equity and Law Life Assurance Society, not itself liable to pay surtax at all. On the other hand the ordinary shareholders, and it will be remembered that I am leaving deliberately out of account the other preference shareholders although the same would in effect apply to them, were individuals themselves liable to pay surtax. The company being within the scope of the legislation, the necessary direction for the years I am discussing was given.

When the matter was first before the Special Commissioners the company, as I understand it, took, among other points, the point that the company, although being an investment company, was within certain exceptions in the statute so that the direction was wrongly given. That point has now disappeared from the case. There is no doubt now that the direction was properly given, and the consequences of the direction therefore must flow, whatever they may be.

The direction having been given, it thereupon fell to the commissioners to apportion the income of the company among the members, on the footing that it was deemed to be or to have been the members' income in accordance with their respective interests. The way in which it has been apportioned is set out in figures attached to the case stated. [His Lordship referred to a table in the case stated which he said showed, speaking generally, that the interest of the redeemable preference shareholders was taken to be confined to their right to a 6 per cent. cumulative preferential dividend. His Lordship continued:] The dividend not I understand being in arrear, their interest in the company's income for that year was therefore taken as having been and as being £6,000, 6 per cent. of £100,000. Similarly, the junior preference shareholders had attributed to their interests sums arrived at by reference to the preferential dividend to which they in turn were entitled; and that left the rest of the income to be apportioned and attributed to the ordinary shareholders. It so works out that the ordinary shareholders in the end of all are, so to say,

saddled with a very large portion of the total sum of the company's income; and since they are surtax payers they therefore have to be assessed to a large sum for surtax. Under the scheme of the Act (unless they happen to be willing to pay the surtax which I will assume they are not) the surtax falls to be paid in fact by the company. The net result for practical purposes is this, that a part (and the part with which we are concerned here) of the accumulated profits of the company, carried in fact to this redemption fund, brings down upon the company a claim, and a large claim, for surtax.

What is said, again putting it quite briefly, on behalf of the company is that that method of apportionment wholly neglects what is in truth an important and certainly a relevant interest of the redeemable preference shareholders, the Equity and Law Society, namely, their right by contract and under the articles to have the £4,000 set aside and put to this redemption fund for their benefit, as creating and building up the fund out of which the shares ultimately would be and were in fact redeemed. Treating the case as one of figures, what the company says is that of the company's total income the £4,000 which has been apportioned to the ordinary shareholders should be transferred from their account (so to speak) and attributed to or apportioned to the Equity and Law Society; the practical effect being that since the society is not a surtax payer, therefore the company's liability for surtax will be correspondingly reduced.

I said earlier in this judgment that this is admittedly not a case in which the structure and the transactions of the company can be regarded as directed to the avoidance of surtax. The hardship of the case seems therefore to be this: the ordinary shareholders have been treated as having had this income and therefore rendered themselves or this company liable to assessment, though they could not have had a penny piece of it, having regard to the obligations of this company to the society. So the company is made to pay a sum of surtax in respect of part of its income which it could not deal with in any other way than it did in fact.

The question (and I am repeating what I said a little earlier) depends upon those few simple words in paragraph 8 of the First Schedule to the Act—the apportionment "shall be made in "accordance with the respective interests of the members."

It was the view of the Special Commissioners that the right of the society under this contract and under the articles was in truth, in substance, in reality (whichever phrase one likes to use), no more than a right to have the obligations of the company for redemption of the preference shares secured, or better secured.

[His Lordship referred to the conclusion reached by the commissioners, set out above, and went on:] That view of the Special Commissioners found favour with Vaisey J. when the

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case came before him. "It seems to me," he said,[1] "that the "contractual guarantee providing for the creation of the redemp- "tion fund was, as the Special Commissioners put it, in essence "merely a security for the eventual repayment of the capital "and in no way and in no sense a double interest attached to "the shares. . . . It seems to me that the fallacy in the "company's argument consists in treating the redemption fund "as providing something in the nature of a bonus or premium "to the holders of Equity's shares, whereas in truth all that it "did was to provide for their payment off or redemption, which "may or may not have been welcome or beneficial to such "holders."

The judge then referred to the case to which our attention was also drawn, that of *F. P. H. Finance Trust Ltd. (No. 2)* v. *Inland Revenue Commissioners.*[2] That was a case, of a surety, in which the company's formation and transactions had been directed to the avoidance of surtax; and I think it right to say that the language of Lord Russell of Killowen, who delivered the only speech in the House of Lords, was primarily at any rate directed to that feature of the case. But his language is also of general application, certainly in some respects, and any opinion of that noble Lord naturally receives the greatest possible attention. There was one passage in it to which Vaisey J. was referred, and to which we also have had much argument directed. It was[3]: "In my opinion the commissioners, in "apportioning the income among the members, should deter- "mine who are the persons of whom it can be said (1) that they "fall within the definition . . ."—that is of being members— ". . . and (2) that they are the persons who, in view of all their "interests in the company, are the persons really interested in "the income in question and in what proportions." Some of the argument turned upon the adverb "really." I think again it is fair to say that the word was no doubt used with particular reference to the circumstances in the *F. P. H.* case,[4] that the real interest of the shareholders had been somwhat disguised by the regulations of the company with a view to avoiding the tax liability which would otherwise have fallen upon them. But still the speech does, I think, lay down the general rule that one should not merely confine one's self to looking at what at first sight may appear to be the income rights in any given case of the classes of shareholders in the company with which one is concerned; one must see what really is the interest in the fund of those shareholders.

Although I have said more than once that this is not a tax avoidance case, as that phrase is commonly understood, yet it is relevant to bear in mind, as Mr. Pennycuick made clear to us in his very cogent argument (if he will allow me so to describe it),

[1] p. 236, ante.
[2] [1946] A.C. 38; 61 T.L.R. 320; [1945] 1 All E.R. 492; 28 T.C. 209.
[3] 28 T.C. 209, 246.
[4] [1946] A.C. 38.

how in such a case as this the matter would work, if the company is right. It is never to be forgotten that this is an investment company, and that therefore a direction perforce must be given with the inevitable consequence that the income of the company, that is the income available for distribution, is to be deemed to be the income of the members. Let me apply that phrase to the income with which we are concerned for the year here in question. If the income in question is so to be deemed, then prima facie it would be deemed to be their income in accordance with their rights to receive it. The structure of the company here is in perfectly normal and ordinary form. The preference shareholders are entitled to preferential dividends and no more (subject again to the limited right of participation by one of the junior classes of preference shareholders). Subject to those rights, everything which is distributed goes to the ordinary shareholders; and they, as one would expect, are the persons eventually entitled in a winding up to the company's distributable assets after the prior classes of shareholders have been repaid the equivalent of their capital. The ordinary shareholders, therefore, if they received, let us say, this sum of £4,000, would have paid in respect of it a large sum, a very high proportion, in the way of surtax. By not distributing this sum, by keeping it in the company (albeit pursuant to a contractual obligation and for the purpose of providing for the redemption of the redeemable preference shares), no surtax would, apart from this legislation, be paid upon it. If, therefore, the objective of this legislation is that, quoad companies of this kind, surtax should be exigible on the footing that one deems all the income distributable to be the income of the members, then the result would be, if the company is right, that so much surtax has been lost to the revenue. Put the other way round, and from the point of view of the ordinary shareholders, it may fairly be said that instead of having received this sum by way of dividend it has been kept in the company, and upon the liquidation of the company (which has now in fact occurred) they will be able to get those sums which were kept in reserve and get them free of tax. I mention those facts in order to show that there is in truth force and cogency in the point made by Mr. Pennycuick, that if one does look at the real interest, that is the eventual proprietary interest (however one describes it), of the ordinary shareholders, they have indeed that interest in the case and in the sum with which we are concerned. Against that view can undoubtedly be set the fact that by contract, by the articles, the company here could not distribute this sum of £4,000. It was conceded by Mr. Pennycuick that, if it had threatened to do so, the court would almost certainly have granted an injunction to prevent the distribution. Therefore, the question must be posed and answered: has the Equity and Law Society, by virtue of that contractual right, which it can call upon a Court of Chancery to enforce, not got a

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real interest in the £4,000 such as should have been taken into account by the apportioning commissioners? That is the problem.

The Special Commissioners and Vaisey J. answered negatively, and I have already referred to the reasons stated by the judge. For my part I think that conclusion was correct. I agree with Vaisey J., shutting our eyes as we will to the hardship perhaps in this case, that nevertheless the interest of the Equity and Law Society in this sum was in truth no more than a concern to see that the profits of this company, so far from being dissipated by distribution among the shareholders, should be retained so that there would be available, and available at the end of the limited period stated, a sufficient fund of undistributed profits, out of which (and out of which alone in the absence of a re-issue of shares) these preference shares could be redeemed.

That I venture to think is the whole sum of the matter: and I do not think I should greatly improve it, or improve it at all, by much elaboration.

But two points at this stage I think it right to mention. Mr. Pennycuick also invoked the provisions of section 14 (3) of the Finance Act, 1937, which provides that in making the apportionment, in cases of companies of the kind of which this is one, the apportioning commissioners may, if they think it proper so to do, attribute to the members an interest corresponding to their interest in the assets of the company available for distribution in the event of a winding up. What Mr. Pennycuick said was that in a winding up the sensible way of computing the interest of the preference shareholders, during the period when the company was in fact a going concern, was to award them their preferential dividend and give the rest to the ordinary shareholders. With all respect I do not myself think that the argument and the reference to that section materially advance the Crown's case. It seems to me that it is merely stating in another form, and I am not quite sure that it is in as accurate a form, what are the true rights inter se of these classes of shareholders to dividend while the company is a going concern.

It was said by Mr. King in reference to this section—and this is the second point—that if one is going to pay regard to interests in a winding up, then what about the interests of the junior classes of preference shareholders—because they are, after all, entitled in a distribution to redemption before the ordinary shareholders get anything. What I have already said about the invocation of this subsection inferentially answers Mr. King's point. We have to look at this sum as being, as it is, the distributable income of the company in the year in question, and as such the question arises, and must be answered: what are the respective rights of the members to or in that sum of undistributed income? It therefore always comes back, I think, to the single point: is the contractual right of the Equity and Law Society to have the £4,000 set aside a relevant interest for the purposes of this apportionment? I have said that in my judgment, with

all respect to the force of the arguments on the other side, it is not.

I add by way of conclusion a reference to an illustration which I ventured myself to put during the course of the argument, and which I think lends some emphasis to the view which Vaisey J. took, and, as I think, rightly took. If it be supposed that for the better securing of the Equity and Law Society's shares the company was under covenant to apply some portion of its income available in any year for distribution towards the discharge of some debts (properly so called), for example, some debenture debt or some other debt of the company, could the income so applied or the right to have the income so applied be regarded as an "interest" of the Equity and Law Society in that income for present purposes? In that case it is, in my judgment, more plainly seen, to my mind, that the answer should be in the negative. It makes to my mind more plain that the real object of article 14A is not to provide something for the Equity and Law Society, what Vaisey J. called something in the nature of a bonus or premium, but merely to make proper provision by way of security for the final obligation for redemption.

For those reasons I conclude that Vaisey J. rightly answered this problem; and I would dismiss the appeal.

BIRKETT L.J. I am of the same opinion, and I only desire to add a very few words. I think that the issue to be determined in this appeal can be stated now quite shortly and, indeed, quite simply; and I think that after the arguments to which we have listened the answer also can be given equally shortly and equally simply. It has been necessary to listen to a somewhat elaborate argument from both sides before that simplicity could be achieved, but as a result of the argument I find myself in the position of saying that I entertain no doubt that the Special Commissioners in this case and Vaisey J. came to a right conclusion, and that this appeal ought to be dismissed.

The essential problem I think turns upon the word "interest" or "interests." There was never any doubt that the Equity and Law Life Assurance Society did have an "interest," in the ordinary use of language, in the particular sums with which we are dealing. In the case stated all the history of the company, all the structure of the capital of the company, and all the resolutions dealing with the capital of the company are most carefully set out in detail, and the situation of this fund out of income for the purpose of paying off the redeemable preference shares is made quite plain. What was really said here was this: when one comes to the wording of section 21 of the Act of 1922 and the words of paragraph 8 of the First Schedule incorporated therein, there was such an interest that the Special Commissioners when dealing with this matter ought to have taken it into account when making the apportionments; and as they did not do so complaint is made that they went wrong.

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The argument which was put before the Special Commissioners was simply this, based of course upon the history set out in this rather elaborate case stated. It was said that the apportionment of the actual income did not take into account fully the interest of the Equity and Law Society, because whilst it is common ground that it was entitled to the 6 per cent. dividend upon the preference shares, this further interest ought to have been taken into account, namely, the credit to the redemption fund which was set up, as the case shows, out of the profits of the company in the relevant years, which profits would otherwise have been available for dividend. That was the cardinal mistake. Further, it was said in support of it that the taking of those sums out of dividend and the placing of them to the credit of this account to redeem the preference shares was a matter of contract between the Equity and Law Society and the company. That was the contention, and the only contention. Indeed, Vaisey J., when considering this, said: "The only point is as to the apportionment "among the members, that is to say, whether it has been done "upon a correct basis." All the argument turned upon what really was the interest.

Reference was made to the speech of Lord Russell of Killowen in the *F. P. H. Finance Trust Ltd.* case,[5] and his use of the words "really interested in the income in question." I think there Lord Russell was using the word "really" because of the peculiar and special facts of the case; and "really" became of some point in the context in which he was using it. The complete sentence reads: "In my opinion the commissioners, in apportioning the income among the members, should determine who "are the persons of whom it can be said (1) that they fall within "the definition, and (2) that they are the persons who, in view "of all their interests in the company, are the persons really "interested in the income in question and in what proportions." When he reaches the end of that paragraph he says: "If the "same individuals figure in each answer, those are obviously the "persons who, according to their interests in the company, own "the real and paramount beneficial interest in the fund in "question." That is the sense in which he was using it there.

In the case before us, as I think, something of the same nature has got to be determined. There is no question that the 6 per cent. dividend ranks under the meaning of the word "interests" within the section. The question is whether the beneficial interest of the Equity and Law Society in that income of the company set aside for the purpose of redeeming the redeemable preference shares is in the same category. The Special Commissioners said "No"; Vaisey J. said "No." For my own part I was much impressed by the argument this morning of Mr. Pennycuick, particularly when he put into a few words what he submitted was the real distinction between the interests of the Equity and Law

[5] 28 T.C. 209, 246.

Society in this fund and the interests of the ordinary shareholders. Mr. Pennycuick contended that the real interest (or the paramount interest, to use the same word as Lord Russell) really lies in the holders of the ordinary shares and not in the Equity and Law Society. The distinction that he made, as I understood it, was this: "The interest of the holders of the ordinary shares "is in the accretion of the assets whilst the company is a going "concern. But when one sets aside out of profits so much to "this fund, by so doing there is an accretion of assets of the "company, and if one considers it from the point of view of "winding up, why then it is available for distribution and belongs "to the ordinary shareholders." That is the real interest; that is the paramount beneficial interest.

So far as the Equity and Law Society are concerned Mr. Pennycuick said that their interest was to have an additional security for the repayment of their money, and although it is true that they could have restrained by an injunction any attempt on the part of the company to distribute the money instead of fulfilling its contractual obligation, none the less it was not to be considered as a real interest in the sense in which the words are used in the statutes and in the schedule.

I have come to the clear conclusion that the decision of the Special Commissioners and the judgment of Vaisey J. were correct, and that this appeal ought to be dismissed.

ROMER L.J. I agree. I think this is a very hard case. I feel it is not at all the sort of case at which this legislation was aiming. The object of the legislation sufficiently appears from the beginning of section 21 of the Act of 1922, where it states: "With a view to preventing the avoidance of the payment of "super-tax through the withholding from distribution of income "of a company which would otherwise be distributed . . ." That was the mischief at which the legislation was directed. Here there is no question of withholding the distribution of income which would otherwise be distributed in order to avoid the payment of surtax, as it now is; it was withheld from distribution because the company was under a contractual obligation so to withhold it. Nevertheless the legislation, so far as an investment company is concerned, applies automatically whatever the company does with its income. The relevant provisions automatically apply, and so applying them I cannot avoid the conclusion that the Special Commissioners and the judge arrived at a right decision in this case, for the reasons which Lord Evershed M.R. has given and to which I cannot usefully add anything.

Appeal dismissed.

Solicitors: *Wigram & Co.; Solicitor of Inland Revenue.*

E. D.

[QUEEN'S BENCH DIVISION.]

1956
Oct. 24.

Lord Goddard C.J., Hallett and Ashworth JJ.

* REGINA *v.* PATENT APPEAL TRIBUNAL. *Ex parte* CHAMPION PAPER AND FIBRE CO.

Crown Practice—Certiorari—Inferior tribunal—Patent appeal tribunal—Whether certiorari will lie to the tribunal—Patents Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 87), *s.* 24 (1).

Crown—Prerogative—Patents—Law now governed by statute. Patent.

Where a decision of the appeal tribunal set up under the provisions of the Patents Act, 1949, involves an excess of jurisdiction or contains a defect of law on the face of it, certiorari will lie to the tribunal, since the tribunal, although given statutory duties to perform, is bound to act in a judicial manner and is an inferior judicial tribunal.

APPLICATION for order of certiorari.

The applicants, Champion Paper and Fibre Co., the patentees of a process for the manufacture of machine coated paper, suffered a loss due to the war in that production and sales were hampered during the period of hostilities so that they were not able to exploit their patent as fully as they might otherwise have done. They applied to the Comptroller-General of Patents under section 24 (1) of the Patents Act, 1949, for an extension of the patent. The comptroller granted an extension of five years. On appeal to the appeal tribunal set up under the provisions of the Act of 1949, the period of the extension was reduced from five years to two years. The applicants moved for an order of certiorari to bring up and quash the decision of the appeal tribunal.

Charles Russell Q.C., *J. P. Graham Q.C.* and *Stephen Gratwick* for the applicants.

Rodger Winn for the Attorney-General.

Guy T. Aldous Q.C. and *Douglas Falconer* for the Westfield Paper Co. Ltd. and the Donside Paper Co. Ltd.

P. J. Stuart Bevan for the Comptroller-General of Patents.

The following cases were cited in argument: *Steers* v. *Rogers* [1]; *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health* [2]; *Reg.* v. *Manchester Legal Aid Committee.* [3]

LORD GODDARD C.J. stated the facts and continued: The appeal tribunal is very much sui generis. It is a very remarkable tribunal, because it consists of one person only, it being provided by subsection (2) of section 85 of the Act of 1949 that he

[Reported by D. TRAFFORD OWEN, Esq., Barrister-at-Law.]

[1] [1892] 2 Ch. 13; 10 R.P.C. 245.
[2] [1947] 2 All E.R. 395.
[3] [1952] 2 Q.B. 413; [1952] 1 T.L.R. 476; [1952] 1 All E.R. 480.

shall be a judge of the High Court, whilst subsection (10) provides: "An appeal to the appeal tribunal under this Act shall "not be deemed to be a proceeding in the High Court."

The first point taken by Mr. Aldous was that certiorari cannot lie in respect of a decision of the appeal tribunal, but in the opinion of this court it is quite clear that certiorari will lie to the tribunal if the tribunal exceeds its jurisdiction or if the tribunal gives a decision which the court conceives to be bad on its face. The tribunal is an inferior tribunal. It deals with a variety of matters under the Patents Act, 1949. In regard to two of these matters there is provision for an appeal direct to the Court of Appeal. It would certainly be a strange tribunal if on some occasions it is exercising a judicial function so that an appeal lies to the Court of Appeal, and on other occasions it is not exercising a judicial function, although it may be that no appeal is given. An appeal is always a matter of statute. There is no appeal given by statute in this case, but it is said that it is still open to apply for an order of certiorari.

With regard to the question whether or not certiorari would, in this case, constitute an infringement of royal prerogative; it seems to me that no question of infringement of the Queen's prerogative arises, because the law relating to patents is now governed by statute and both the comptroller and the appeal tribunal are given certain statutory duties to perform, which they must perform in a judicial manner. If they exceed their jurisdiction or give decisions which are bad on their face, it follows that certiorari must lie. Therefore, the court has no hesitation in saying that an order of certiorari can be issued to this tribunal.

[His Lordship considered whether such an order ought to be issued in the present case and continued:] I can see no ground on which we can say that the decision of the comptroller displays an error of law on the face of it. Therefore, I think this motion fails and should be dismissed.

HALLETT J. I agree.

ASHWORTH J. I agree.

Application dismissed.

Solicitors: *Bristows, Cooke & Carpmael; Slaughter & May; Treasury Solicitor; Solicitor, Board of Trade.*

[QUEEN'S BENCH DIVISION.]

1957
Jan. 16.

Lord Goddard C.J., Cassels and Lynskey JJ.

* RIGBY *v.* WOODWARD.

Justices—Case stated—Procedural error in—Departure from ordinary principles of justice—Evidence given by co-defendant incriminating defendant—Refusal by justices to allow cross-examination of co-defendant—Defendant convicted and co-defendant acquitted—Decision given after departure from ordinary principles of justice and procedure wrong in law—Decision of justices quashed—Question of law to be answered in favour of defendant—Court no power to order retrial—Summary Jurisdiction Act, 1857 (20 *&* 21 *Vict. c.* 43), *s.* 6—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 87.

The defendant was charged, together with another man, with unlawful and malicious wounding. At the hearing before the justices the co-defendant gave evidence that the defendant had hit the complainant but the justices, thinking it their duty to exclude from their minds evidence of one co-defendant tending to incriminate another, refused to allow the defendant's solicitor to cross-examine the co-defendant, and, considering the evidence of the complainant conclusive against the defendant, convicted him. The co-defendant was acquitted. The justices, on the application of the defendant, stated a case for the opinion of the High Court under section 87 of the Magistrates' Courts Act, 1952,[1] the question of law for the opinion of the court being whether, upon the facts stated by the justices, they had come to a correct determination and decision in point of law:—

Held, that the justices' refusal to allow cross-examination of the co-defendant was a departure from the ordinary principles of justice for which the proper remedy was an application for an order of certiorari (when the court would have had to consider whether the irregularity was such that the conviction ought to be quashed) but that nevertheless the matter came within section 87 of the Magistrates' Courts Act, 1952,[1] for a radical departure from the well-known principles of justice and procedure made a decision given after that departure wrong in law so that the defendant was questioning the justices' decision on the ground that it was wrong in law. The court, therefore, had

[1] Magistrates' Courts Act, 1952, s. 87 (1): "Any person who was a "party to any proceeding before a "magistrates' court or is aggrieved "by the conviction, order, determination or other proceeding of the "court may question the proceeding "on the ground that it is wrong in "law or is in excess of jurisdiction by "applying to the justices composing "the court to state a case for the "opinion of the High Court on the "question of law or jurisdiction "involved: . . ."

S. 131: "The enactments mentioned in the Fifth Schedule to this "Act shall have effect subject to the "amendments specified. . . ."

Sched. 5: "The Summary Jurisdiction Act, 1857. For the words "'this Act' wherever they occur in "sections six, eight and ten, there "shall be substituted the words 'The "'Magistrates' Courts Act, 1952.'"

Summary Jurisdiction Act, 1857, s. 6: "The court to which a case is "transmitted under the Magistrates' "Courts Act, 1952, shall hear and "determine the question or questions "of law arising thereon, and shall "thereupon reverse, affirm, or amend "the determination in respect of "which the case has been stated, or "remit the matter to the . . . justices, "with the opinion of the court thereon, or may make such other order in "relation to the matter . . . as to the "court may seem fit. . . ."

no alternative but to answer the question of law in the defendant's favour, and, as it would not be right to remit the case to the justices for them to resume the hearing, since there was no means of ensuring that the evidence of which the appellant had been deprived would be available, the conviction must be quashed.

CASE STATED by Reading justices.

On April 29, 1956, an information was preferred by Charles Woodward, a chief inspector of police, against the appellant, David Stanley Rigby, that he, together with Ivor George Mervyne Quelch, on April 28, 1956, in Reading unlawfully and maliciously wounded Raymond Lanning Waters contrary to section 20 of the Offences against the Person Act, 1861.

The following facts were found by the justices. On the evening of Saturday, April 28, 1956, at about 11.20 p.m. Raymond Lanning Waters, an American airman, was, together with other persons, in the men's lavatory at the Majestic Ballroom in Reading, two of those other persons being the appellant and Quelch who was charged together with the appellant with the offence. An argument arose in the lavatory between Waters and Quelch and during the course of the argument Waters was struck from behind by the appellant. Waters turned to grapple with the appellant by whom he was punched twice, and turned back to Quelch and was again struck from behind by a very hard blow. Waters turned again immediately and saw the appellant with his right arm drawn back; in the appellant's right hand was a long thin metal weapon with a number of joints. Soon after that police officers arrived at the lavatory and the fight stopped. During the course of the fight Waters was struck four times, once by Quelch and three times by the appellant. Upon the arrest of the appellant and Quelch after complaint by Waters no weapon was found upon either of them but on Monday, April 30, a length of chain with a leather handle was found in the outlet trap of the urine channel in the lavatory. Certain marks inflicted on the cheek and forehead of Waters in the fight were consistent with the use of the chain. The appellant was 18 years old.

It was contended by the solicitor appearing on behalf of the appellant that Quelch having given evidence on oath that the appellant hit Waters from behind, he, the solicitor, should be allowed to cross-examine Quelch. The justices were not referred to any cases except that after they had retired to consider their verdict a copy of The Law Society's Gazette (May 1956) containing a reference to the point at issue and to *Rex* v. *Hadwen and Ingham* [2] was sent to them. They were of the opinion that in any event they ought to exclude from their minds evidence of one co-defendant tending to incriminate another co-defendant and accordingly they refused to allow the appellant's solicitor to cross-examine Quelch.

[2] [1902] 1 K.B. 882; 18 T.L.R. 555.

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The justices were of the opinion that the evidence of Waters was conclusive against the appellant and they convicted him and sentenced him to six months' imprisonment, because he had a previous conviction. Quelch was acquitted.

The appellant appealed to the Divisional Court by case stated under section 87 of the Magistrates' Courts Act, 1952,[1] the question for the opinion of the High Court being whether, upon the above statement of facts, the justices came to a correct determination and decision in point of law.

On behalf of the appellant it was conceded that an application for an order of certiorari would have been a more suitable remedy, but it was submitted that, the justices having gone wrong in law in refusing to allow the cross-examination, an appeal lay by case stated, and the court had power under section 6 of the Summary Jurisdiction Act, 1857, to quash the conviction.

H. B. Grant for the appellant.
Paul Wrightson for the prosecutor.

The following cases were referred to in argument: *Rex* v. *Hadwen and Ingham*[3]; *Rex* v. *Wandsworth Justices, ex parte Read.*[4]

LORD GODDARD C.J. This is a case stated by justices for the County Borough of Reading and the point which comes before this court does so in a very unusual way and can be very shortly stated. The charge against the appellant was of unlawful and malicious wounding, and apparently the prosecution put forward a very serious case. The appellant and another man named Quelch who was charged with him were alleged to have attacked a young American airman in a public convenience, and attacked him by hitting him with a bicycle chain, one of the worst forms of coshes known, and if they did, it was a cowardly and brutal assault. My only surprise, in the first instance, is, especially as the appellant had been convicted before and this was a very serious attack, that the justices thought it proper to adjudicate upon the case instead of sending for trial as they should have done. However, the justices decided to try the case themselves —I dare say the appellant elected to be tried—and they did. The co-defendant, Quelch, went into the witness box, I suppose on his own behalf, and gave evidence during the course of which he said that it was not he who had hit the complainant, but that it was the appellant, Rigby. He gave evidence against the appellant. Naturally enough, the appellant's solicitor desired to cross-examine him, and for some reason which this court finds it very difficult to understand, the justices decided that they would not allow the witness to be cross-examined. They say that they retired to consider the point, though I should have thought that

[3] [1902] 1 K.B. 882; 18 T.L.R. 555.

[4] [1942] 1 K.B. 281; 58 T.L.R. 88; [1942] 1 All E.R. 56.

their clerk would have told them at once that they must allow Quelch to be cross-examined. Perhaps he did, and perhaps the justices refused, I do not know, but they retired to consider the matter. Their attention seems to have been called to *Rex* v. *Hadwen and Ingham* [1] which was heard in the Court for Crown Cases Reserved soon after the Criminal Evidence Act came into force. That case decided in terms that if one prisoner gives evidence against the other he is liable to be cross-examined by the other prisoner's counsel, and the justices' attention was apparently also called to a note in the Law Society's Gazette to the same effect. They still persisted, however, in their refusal to allow the cross-examination, and they say that the reason why they did so was because they thought that it was their duty to put out of their minds the evidence which the co-defendant had given. We may talk about putting evidence out of our minds but in fact we cannot do it. The evidence of the co-defendant was evidence which had been given, and properly given, and was evidence which Quelch was perfectly entitled to give. The justices were bound to consider that evidence, and did so because they acquitted Quelch; but they say that they put out of their minds anything that Quelch said against the appellant, and that that was the reason why they persisted in their determination that the cross-examination should not be allowed. But they seem to have entirely overlooked the fact that if cross-examination had been allowed it might have happened that the solicitor would have managed to get such admissions out of Quelch or shown him to be such an unreliable witness as to have thrown doubt on whether the appellant was the assailant. One cannot stop a witness who has given evidence against a defendant from being cross-examined, and resolve to pay attention to the evidence he has given for one purpose but not for another purpose. I am always very loth to blame justices for making mistakes, and I am not blaming the justices in this case except to say that I cannot understand why they refused to allowed the cross-examination, because I am quite certain that no experienced justices' clerk would ever have allowed justices to take up this line.

There follows the much more difficult question as to what course this court can take. Ordinarily speaking this matter would have been brought before the court by certiorari and on certiorari it would have been said that not to allow cross-examination of a witness who had given evidence against the appellant was a departure from the common principles of justice. We should then have had to consider whether the irregularity was such that we ought to quash the conviction. It has been brought before us by case stated which, as I have said, is an unusual procedure and it would have been far more regular to have applied for an order of certiorari.

[1] [1902] 1 K.B. 882; 18 T.L.R. 555.

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Lord
Goddard C.J.

Section 87 (1) of the Magistrates' Courts Act, 1952, provides: "Any person who was a party to any proceeding before a magis-"trates' court or is aggrieved by the conviction, order, deter-"mination or other proceeding of the court may question the "proceeding on the ground that it is wrong in law or is in excess "of jurisdiction by applying to the justices composing the court "to state a case for the opinion of the High Court on the question "of law or jurisdiction involved." It seems to me that the present appellant does question the justices' decision on the ground that it is wrong in law, because if justices proceed in this way it cannot be said that the conviction is one which has been obtained in the due and proper course of law. A radical departure from the well-known principles of justice and procedure seems to me to make a decision given after that departure wrong in law.

The Summary Jurisdiction Act, 1857, was the first Act which enabled courts of summary jurisdiction to state a case. [His Lordship read section 6 of that Act and continued:] Sometimes justices who before they have decided a case have some question of law arising before them state a case for the opinion of the court and ask their opinion on it. There are other cases in which justices dismiss the information and the prosecutor brings the case up saying that there has been a mistake of law, or that on the facts proved the only proper decision could have been a conviction; or again the defendant may bring up the case claiming that on the facts found by the justices he was entitled to be acquitted. But there is no power to order a re-trial in the ordinary sense of that expression. If this court holds that on a submission of no case to answer justices were wrong in stopping it they can be ordered to resume the hearing of the case because they very likely have not heard the defence. If we sent this case back, I do not see how it could be dealt with. The co-defendant who gave evidence and was acquitted and was not cross-examined might possibly not be found. We do not know where he is or whether he can be called. We cannot make the prosecution call him. It seems to me that there has been an unfortunate departure from the ordinary principles of justice. It has resulted in a conviction, and although it may be that the appellant is guilty and that the justices were right in the opinion they formed, we cannot allow a proceeding of this sort to stand. We must decide the question of law that is raised here in favour of the appellant and, having done so, as it seems to me that it is impossible for us to order a re-trial, which I do not think we have power to do, it follows that the conviction must be quashed. I regret it, but that is the only decision we can give.

CASSELS J. I agree.

LYNSKEY J. I agree with great reluctance, but it seems to me here that the justices have clearly gone wrong. They have

deprived the appellant of the right of obtaining certain evidence from the co-defendant. That co-defendant has now been acquitted, and we cannot remit the case to the justices with the opinion of the court thereon as the justices could not act on this opinion because the co-defendant cannot be brought back. The result is that the justices made an error which we cannot put right, and that being so there is no course open to us except to quash the conviction.

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RIGBY v. WOODWARD.

Lynskey J.

Appeal allowed.

Solicitors: *Martin & Nicholson for M. Owen Wellbelove, Reading; Sharpe, Pritchard & Co. for G. F. Darlow, Town Clerk, Reading.*

J. F. L.

[CHANCERY DIVISION.]

* *In re* CAMKIN'S QUESTIONS.

[1952 S. 4825.]

1956 *Nov.* 20, 21, 22, 23, 26, 27, 28, 29, 30.

Wynn-Parry J.

Husband and Wife — Property — Proceedings under Married Women's Property Act, 1882, *s.* 17 — *Proceedings involving inquiries as to existence of property and unascertained debts not maintainable —Jurisdiction—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

In a summons relating to questions as between a husband and the executors of his wife as to the title or possession of property and taken out under section 17 of the Married Women's Property Act, 1882, questions were asked which entailed complicated inquiries as to the exact amounts of debts alleged to be owed by the parties to one another and whether property existed on which a decision of the court could operate; a further question was asked involving the identification of unspecified debts between the parties:—

Held, that the court had no jurisdiction, under the section, to conduct inquiries as to whether property existed, but that its jurisdiction was confined to deciding questions relating to property which, on the evidence, was shown to exist.

Held, also, that the court had no jurisdiction to entertain questions which, if resolved in favour of the party raising them, would only result in showing that a debt was owed to that party by the other party to the summons.

Tunstall v. *Tunstall* [1953] 1 W.L.R. 770; [1953] 2 All E.R. 310 applied.

Need for change in procedure considered.

ADJOURNED SUMMONS.

The executors of the will, dated April 17, 1946, of Florence Alethea Seager, who died on June 8, 1951, took out a summons

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under section 17 of the Married Women's Property Act, 1882,[1] in which her husband Edwin Alan Seager was the respondent, to determine (inter alia) various questions between them and the respondent as to the ownership or possession of the chattels specified in certain schedules to the summons.

Questions 7, 8 and 9 of the summons in its original form were as follows:—"7. For the determination of the question whether "the respondent is entitled to be paid out of the estate of the "said Florence Alethea Seager the sum of £5,000 in respect of "moneys which he alleges the said Florence Alethea Seager took "from the said two boxes referred to in para. 6 hereof or any "other sum in respect thereof and if so what sum. 8. For "the determination of all questions between the applicants and "the respondent as to whether the respondent is indebted to the "estate of the said Florence Alethea Seager in respect of any "and if so what sum in repayment of moneys loaned by her to "the respondent for his business known as The Enterprise "Garage, Sherborne, aforesaid. 9. For the determination of the "question whether the respondent is entitled to be paid out of "the estate of the said Florence Alethea Seager (a) the sum of "£260 5s. 9d. or any and if so what part of the said sum in "respect of accounts which he alleges he paid on her behalf; "(b) the sum of £4,200 in respect of moneys which he alleges "the said Florence Alethea Seager received in her capacity "as bookkeeper of his business of Garage Proprietor carried on "at Coldharbour Sherborne aforesaid but wrongfully paid into "her account at the Sherborne branches of Barclays Bank "Limited and of Westminster Bank Limited or otherwise wrongly "applied by her or any other sum in respect thereof."

Wynn-Parry J., having decided that he was not prepared to make any order on questions 7, 8 and 9, as they stood, for reasons which would presently appear, allowed an amendment to the summons by the substitution for those three questions of a new question 9, which was as follows: "For the determination "of all questions between the applicants and the respondent as "to the title to or possession of the net moneys standing to the "credit of the said Florence Alethea Seager at the Sherborne "branches of Barclays Bank Ltd. and the Westminster Bank "Ltd."

R. E. Megarry Q.C. and *L. H. L. Cohen* for the applicants.
F. D. L. McIntyre Q.C. and *Maurice Price* for the respondent.

[WYNN-PARRY J., at the conclusion of the argument, said: I propose to hold that section 17 of the Married Women's Property

[1] Married Women's Property Act, 1882, s. 17: "In any question "between husband and wife as to the "title to or possession of property, "either party . . . may apply by "summons or otherwise in a "summary way to any judge of the "High Court . . . and the judge ". . . may make such order with "respect to the property in dispute ". . . as he thinks fit . . ."

Act, 1882, has no application to a case in which it would be necessary to decide whether there is any property and only applies to cases where it can be postulated at the beginning of the consideration of the summons that there is property. Where there is nothing but an alleged debt owing by the husband to the wife, then there is no property upon which section 17 can operate. I will give my reasons in detail when I give judgment, but I shall not answer questions 7, 8 and 9 of the originating summons as they stand.]

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

November 30. WYNN-PARRY J. This is an originating summons taken out under section 17 of the Married Women's Property Act, 1882. Under the section, on any question between husband and wife as to the title to, or possession of, property, either party, the husband or the wife, or, under section 23, the personal representatives of the married woman, may apply to the court by summons or otherwise in a summary way for the decision of the question. This case illustrates beyond the peradventure the inconvenience, almost amounting to frustration, which is caused when this procedure is invoked in a case such as this, involving as it does a series of questions, some extremely complicated, in which a mass of evidence, including four banking accounts, has had to be considered and analysed. As the evidence was necessarily by summons, the evidence had to be adduced in the first instance in affidavit form. Twenty-three affidavits were filed in five batches: the first two were filed by the applicants, the executors of Mrs. Florence Alethea Seager (the deceased wife of the husband); in answer the respondent filed seven affidavits; the applicants replied with eleven further affidavits; the respondent filed a further affidavit, and the spate ended with two further affidavits by the applicants. The exhibits were 34 in number.

In its original form the summons raised nine questions, all necessarily framed in general terms, and these afforded the only indication of the several issues to be debated; they did not, nor could they, circumscribe with precision the scope of such debate. The difficulty thus presented to counsel in presentation and dealing with this case, and to the court in endeavouring to pronounce upon it, becomes so obvious as to need no underlining. The difficulties to which I have adverted would be very considerably mitigated, if not entirely removed, if power were given to the master similar to the power given to the registrar under the Companies Act of 1948 which allows him, in the case of a misfeasance summons involving substantial or complicated questions, to direct points of claim and defence, and to make a full order for discovery. When such a procedure is adopted, the matter

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follows the course of a witness action and, apart from any preliminary affidavits, the evidence is given orally and thus (a) the issues are defined, and (b) evidence emerges in a form which makes it far easier to follow and assess. Speaking for myself, after the experience of trying this summons for eight days under the existing and highly inconvenient procedure, I cannot help feeling that it would be in the interests of justice if such a power in the master were introduced.

During the course of the trial, and after hearing argument, I ruled that I was not prepared to make any order on questions 7, 8 or 9 as they stood, because in each case the claim, whether by the applicants or the respondent, was a mere money claim and involved, not merely a decision as to who was entitled to possession of property such as a fund shown to be in existence, but, as a preliminary, a search in the nature of an inquiry as to whether property existed on which the decision could operate. If a fund be shown to exist, no doubt the court will pronounce on the rights of the parties, as in *Rimmer* v. *Rimmer* [1]; but where there is no property or identifiable fund on which the order under section 17 could operate, proceedings under that section are inappropriate: see *Tunstall* v. *Tunstall.*[2] In my judgment, on an application under section 17, the court has no jurisdiction to conduct an inquiry with a view to finding out whether or not property exists. Its jurisdiction is confined to deciding questions relating to property which, on the evidence before it, is shown to exist. Further, in my view, the court has no jurisdiction to entertain questions which, if resolved in favour of the party raising them, will only result in showing that a debt is owed to that party by the other party to the summons.

I did, however, allow an amendment at the insistence of counsel for the respondent, which was not opposed and which now constitutes question 9, which reads as follows: "For the "determination of all questions between the applicants and the "respondent as to the title to or possession of the net moneys "standing to the credit of the said Florence Alethea Seager "at the Sherborne Branch of Barclays Bank Limited and the "Westminster Bank Limited."

[His Lordship then determined the questions raised by the summons, which are not material for the purpose of this report.]

Solicitors: *Smiles & Co.; John F. Chadwick.*

J. L. D.

[1] [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863.

[2] [1953] 1 W.L.R. 770; [1953] 2 All E.R. 310.

[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION (ORIGINATING SUMMONS).

1957
Jan. 21.

Husband and Wife — Practice (in matrimonial causes) — Divorce — Originating summons—Marriage certificate—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 2.

A certificate of marriage should be lodged in the Registry on application to issue an originating summons for leave to present a petition for divorce within three years of the marriage.

If leave is given on the originating summons the registry will transfer the certificate to the petition. If the application is refused the certificate will be returned to the applicant or his solicitor.

B. LONG,
Senior Registrar.

January 21, 1957.

[QUEEN'S BENCH DIVISION.]

* *In re* SHIPTON.

1956
Dec. 17.

Lord Goddard C.J., Hilbery and Ormerod JJ.

Criminal Law—Practice—Plea—Autrefois acquit—Indictment—Motor manslaughter — Jury acquit of manslaughter, disagree as to dangerous driving — Issue of lesser charge transferred to quarter sessions—Jurisdiction of quarter sessions—Road Traffic Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 34.
Road Traffic—Dangerous driving.

The defendant was indicted at assizes on a charge of manslaughter connected with the driving of a motor-car. The jury, having acquitted him of manslaughter, were unable to agree on a verdict on the issue of dangerous driving. Thereupon the judge ordered the issue of dangerous driving to be tried at quarter sessions on the same indictment. The recorder refused to try the defendant on the ground that he had no jurisdiction to try an issue of dangerous driving on an indictment containing only one count for manslaughter. On an application for leave to move for mandamus against the recorder:—

Held, the recorder had no jurisdiction to try the indictment for manslaughter and leave to move for mandamus must be refused.

Quaere whether, if a voluntary bill had been preferred, the defendant could have successfully pleaded autrefois acquit.

APPLICATION for leave to move for an order of mandamus.

The Crown applied for leave to move for mandamus directed to the recorder of Bournemouth ordering him to try the defendant, Eric Shipton, for dangerous driving.

The facts are set out in the judgment.

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Sir Harry Hylton-Foster Q.C., S.-G., and *Rodger Winn* for the Director of Public Prosecutions.

No cases were referred to in argument.

LORD GODDARD C.J. Mr. Solicitor-General applies for leave to move for mandamus directed to the recorder of Bournemouth, because he wants an expression of opinion from the court whether or not the recorder was right in holding that he had no jurisdiction to try an indictment before him.

The circumstances are that the proposed defendant in the case had been indicted for motor manslaughter, as it is generally called, before Havers J. at the Dorset Assizes. The jury, having acquitted him of manslaughter, were asked what their verdict was with regard to dangerous driving, and they said they were unable to agree. Thereupon, Havers J. ordered the issue of dangerous driving to be tried at the quarter sessions for the Borough of Bournemouth, dangerous driving being a matter within the jurisdiction of quarter sessions. When the case came on before the recorder he saw that it was an indictment for manslaughter, and said that he had no jurisdiction to try the case. The matter now comes before this court on an application for leave to move for mandamus against him to order him to try the issue of dangerous driving.

Section 34 of the Road Traffic Act, 1934, provides: "Upon "the trial of a person who is indicted for manslaughter in con- "nection with the driving of a motor vehicle by him, it shall be "lawful for the jury, if they are satisfied that he is guilty of an "offence under section 11 of the principal Act (which relates "to reckless or dangerous driving) to find him guilty of that "offence, whether or not the requirements of section 21 of the "principal Act (which relates to notice of prosecutions) have been "satisfied as respects that offence." That is an entirely permissive section. It says that when the jury have a man in charge on manslaughter, if they come to the conclusion that he is not guilty of manslaughter they may return a verdict of dangerous driving. In the present case they have found him not guilty of manslaughter and they have not agreed upon a verdict of guilty of dangerous driving. There was no separate count for dangerous driving. I think the recorder took a proper view. He had no jurisdiction to try an indictment which was an indictment for manslaughter.

It might be desirable if this matter were to be cleared up in some way by legislation. The judge more than once when an application was made to allow a voluntary bill for dangerous driving to be preferred, referred to the cause of wounding with intent. We all know that on the charge of wounding with intent it is open to a jury to return a verdict of malicious wounding. In the opinion of the court exactly the same position arises there as it does here. If a jury find a man not guilty of the

offence charged in the indictment and do not go on to say "but "we find him guilty of malicious wounding," there is an end of the matter. Perhaps it is a pity the judge did not give leave to prefer a voluntary bill. If a voluntary bill had been preferred, whether the man would have been able to plead autrefois acquit or not I do not know. At any rate the judge did not give leave to prefer a voluntary bill. There was no count in the indictment, and there have been expressions of opinion by this court that one should not join another count in an indictment for manslaughter: *Rex* v. *Large*.[1] If it were not for the Road Traffic Act, which is just coming into force, which makes a considerable difference by creating a new offence, I should have liked to consider the cases on the subject. However, as it is, I think it is perfectly clear, and the Solicitor-General has not been able to show us any authority to the contrary, that the present position is that as the jury acquitted of manslaughter and did not see fit to return a verdict of dangerous driving, we think the recorder was right; he had no jurisdiction to try the indictment, and therefore the court refuses leave to move for mandamus.

Application refused.

Solicitor: *Director of Public Prosecutions.*

P. P.

[1] 27 Cr.App.R. 65; 55 T.L.R. 470; [1939] 1 All E.R. 753.

[PROBATE, ETC., DIVISION.]

* HARBEN *v.* HARBEN.

1956
Dec. 19, 21.
Sachs J.

Infant—Custody—Divorce Court—Removal from jurisdiction—Issue as to jurisdiction of court—Injunction and order to return children sought—Power of court to make order as to children of British nationality outside the jurisdiction—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26.
Injunction.

A husband of English nationality and domicile of origin kidnapped the children of the marriage from the matrimonial home in Eire and took them to Jersey where he alleged that he had acquired a domicile of choice. He entered an appearance under protest to the wife's subsequent petition for divorce and resisted her application for an injunction to restrain him from removing the children from Jersey and for an order that they should be delivered up to her in England:—

Held, (1) that the raising of the issue as to jurisdiction did not oust the jurisdiction of the court to consider an application as to the custody of the children of the marriage.

Ronalds v. *Ronalds* (1875) L.R. 3 P. & D. 259 applied.

(2) The court had jurisdiction to deal with applications relating

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to children who were British subjects although they were outside its jurisdiction.

Hope v. *Hope* (1854) 4 De G.M. & G. 328 and *In re Willoughby* (1885) 30 Ch.D. 324; 1 T.L.R. 652 applied.

(3) Orders relating to children outside the jurisdiction would only be made in exceptional circumstances.

(4) In the unusual circumstances of the present case the decision on the application for an injunction neither did nor should turn to any substantial extent on what might be the result of the issue as to domicile. A wife whose children had been kidnapped should not necessarily be asked to follow the kidnapper to such part of the globe as he might state that he was selecting as his new domicile.

(5) Assuming that the Royal Court of Jersey had jurisdiction in the matter it was very doubtful, on facts such as those in the present case, whether that court would make an order on the application of the father contrary to the wishes of the mother; an English court would be more than chary of acceding to such an application by a father who had only recently brought the children into the country if proceedings had already been instituted in the country where the court would more aptly assume the function of parens patriae.

(6) The petitioner was, therefore, justified and entirely reasonable in making her application to the court to deal with the matter at the present stage and, in the exceptional circumstances, the court should exercise its jurisdiction and grant her applications.

(7) Although "it was not the habit of the court, in considering "whether or not it would make an order, to contemplate the "possibility that it would not be obeyed," the substantial assets of the husband in this country, in fact, made it possible to seek to secure compliance with the present order by sequestration proceedings.

Summons by a wife for an injunction restraining the husband from removing the children of the marriage from Jersey and an order to deliver them up to her in England.

The matter arose upon a wife's petition for divorce dated December 6, 1956.

The parties were married in Chester in August, 1947. According to the uncontradicted evidence before the court the husband was born and brought up in England, was educated there, was a director of an engineering company near London and member of a family which had been associated for generations with a well-known London insurance company. He had also, according to the evidence, on two occasions been divorced in the English courts and had apparently, on those occasions, not contested the issue of domicile. After the marriage, the parties lived in substance in Eire and continued to live together there until about the end of September, 1956, when they parted. The wife kept the children in her charge.

By mid-October the wife and the children were living with her mother and father in County Neath, and on November 2, 1956, it was arranged that the father should have access to the children at the Park Hotel, Virginia in that County. The arrangement was, according to the only evidence before the court,

made by the husband's brother-in-law, a General O'Gowan, and the wife was assured both by the brother-in-law and by the husband's solicitors, that she had nothing to fear from allowing this access. The children went to the hotel accompanied by their governess, but the husband promptly drove them to an airport some 44 miles away and, in a privately chartered aircraft, flew them to Jersey where he took up residence with them.

On December 6, 1956, the wife filed in the High Court a petition for divorce containing allegations of cruelty of a serious nature. In paragraph 7 the wife alleged that she became terrified for the safety of herself and the children, and, in her affidavit in support of the application, that the husband, in her view, was unfit to have the charge of children.

On December 12, 1956, the wife, having become aware that the husband was temporarily in England, appeared before the court and obtained an interim injunction restraining the husband from taking the children away from Jersey, it being alleged by the wife that there was a risk of them being taken further away to Rhodesia. The wife's petition was served in London on December 13, 1956, together with her application for an injunction restraining the husband from removing the three children from Jersey and an order to deliver them up to her in England and interim custody and the affidavit in support thereof. The husband entered an appearance under protest alleging that he was not domiciled in England. On December 14, 1956, he swore an affidavit in Jersey containing facts by reason of which the court was asked to come to the conclusion that his plea to the jurisdiction was well-founded.

The husband filed no further affidavits and, when the matter was heard on December 19, 1956, he stated, by his counsel, that he was not minded to contest the facts put before the court as to the kidnapping and that his petition for divorce had been filed in Jersey the previous day. It was conceded that the court had jurisdiction to hear the application, but it was contended that only in exceptional circumstances would the court exercise that jurisdiction, and that the present case was not of such an exceptional nature. It was submitted that the matter should be left to the Royal Court of Jersey.

The hearing was adjourned and in the course of the resumed proceedings a further affidavit on the merits was filed by the husband, by the leave of the court, together with an affidavit offering to bring the children within the jurisdiction on the terms that they were to remain with the father until the determination of the issue as to domicile.

Roger Ormrod for the wife.
Leonard Caplan Q.C. and *John Syms* for the husband.

The following cases were cited in argument in addition to those

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referred to in the judgment: *Johnstone* v. *Johnstone* *; *McKee* v. *McKee* †; *In re X's Settlement.* ‡

SACHS J. This is a wife's application concerning the three children of her marriage with the respondent, husband, two girls, one aged eight and one aged three, and a boy aged five. By the application the wife seeks, inter alia, an injunction restraining the husband from moving these three children from Jersey and also an order to deliver them up to herself in England, the three children having been removed from her care by a fraudulent ruse amounting to a kidnapping which took place in Ireland on November 2, 1956. The nature of the application was such that it was listed for hearing in open court, and, in any event, it raised issues of importance which would have necessitated adjourning the matter into court for the purpose of judgment.

[His Lordship referred to the facts, remarking that it was the husband's abduction of the children in the face of the assurances given which caused him to stigmatize the step as kidnapping which, in the circumstances, could properly be described as an outrageous procedure. He described the allegations in the wife's petition as of a really serious nature, stating that those contained in paragraphs 18 onwards as to July, August and September, 1956, would, if proved, support the allegation in paragraph 7 that the wife became terrified for the safety of herself and the children, adding that, if the allegations of cruelty were established, they would go a long way towards substantiating the wife's statement in her affidavit in the present proceedings that the husband was unfit to have charge of the children, and continued:]

In those circumstances I doubt if I need say more on the point of jurisdiction than to thank Mr. Ormrod for referring me to *Ronalds* v. *Ronalds*,[1] which to my mind, made it, by analogy, clear that jurisdiction exists to deal with the present issues by virtue of section 26 of the Matrimonial Causes Act, 1950,[2] and to *Hope* v. *Hope*,[3] the leading authority on the inherent jurisdiction of the High Court to deal with the custody of any child who is a British subject whether by parentage or even (as is exemplified by *In re Willoughby* [4]), by virtue of having a British grandfather. This inherent jurisdiction exists even if the child is born out of allegiance, and it exists irrespective of where the child may be physically located at the relevant times. It has been exercised irrespective of the fact that one parent was also resident out of

* [1929] P. 165.

† [1951] A.C. 352; [1951] 1 T.L.R. 755; [1951] 1 All E.R. 942.

‡ [1945] Ch. 44; 61 T.L.R. 93; [1945] 1 All E.R. 100.

[1] (1875) L.R. 3 P. & D. 259.

[2] Matrimonial Causes Act, 1950, s. 26 (1): "In any proceedings for "divorce . . . the court may from "time to time, either before or by or "after the final decree, make such "provision as appears just with "respect to the custody, maintenance "and education of the children the "marriage of whose parents is the "subject of the proceedings. . . ."

[3] (1854) 4 De G.McN. & G. 328.

[4] (1885) 33 Ch.D. 324; 1 T.L.R. 652.

the jurisdiction, and that there was no property of the child within the jurisdiction. It has been exercised even where the father was dead and the mother and child were both domiciled in a foreign country.

As is pointed out in the authorities, the court can act also irrespective of the fact that the courts of the country where the child is located may also have jurisdiction to make an order. It assumes that the other court will act in a reasonable manner both as to whether or not it chooses to make an order and as to what order it should make; and every effort is made on all sides to ensure that there should be no divergence between the line taken by this court and the line either taken or likely to be taken by the other court.

Whether or not this court makes an order in relation to a child outside the jurisdiction depends on the particular facts of the case, but, of course, those facts have to be really exceptional before an order is made. The very essence of a case being exceptional is that one is unlikely to find a precisely parallel set of facts in some other reported authority; and the absence of some specific element in previous cases which have found their way into the books does not much assist the court to decide whether the facts in the particular matter before it are or are not exceptional.

Much stress was laid by his counsel on the husband having put in issue his domicile. The facts before the court make it plain that the husband is a British subject whose domicile of origin is this country. It does not seem necessary to go into the question as to whether or not he at one stage acquired a domicile of choice in Eire because it is clear, not only from the wife's affidavit but from his own, that if he did acquire such a domicile he has abandoned it. On the evidence the date of abandonment is not as yet clear, but it is to be noted that by September, 1956, he states he had come to a decision not to reside further in Eire. Upon abandoning any domicile he may have had in Eire, his domicile of origin is revived unless or until he acquires a fresh domicile.

As domicile entails not merely an intention to reside permanently at a place but also de facto residence there, and there is no clear evidence of his having taken up his residence in Jersey before November, 1956, I doubt whether there is even a prima facie case before me of his having acquired a domicile there before the kidnapping. It is, of course, not impossible that before he filed his petition on December 18, 1956, he may have acquired such a domicile, but whether he did so in fact is something quite different, and indeed it is different from stating that he is, on the facts as put before this court, likely to have acquired such a domicile.

It is, accordingly, a matter of speculation as to whether he could convince the Royal Court of Jersey, in the exercise of its matrimonial jurisdiction acquired in 1949, that after a

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few weeks' residence in Jersey he—who only came to the island when his marriage was breaking up in a country where, in substance, there are no facilities for divorce—had established a domicile in the way that he alleges. His points that he has acquired there a house and is attracted by the taxation position in the island may, if the issue comes before the Royal Court have to be balanced against such knowledge as it may possess of the proportion of cases where men of wealth do acquire property there with those advantages in view and yet depart after a relatively short space. It is in any event a case in which a court would scrutinize with some care the evidence that might be adduced before it.

However, I do not think that the decision on the present application for injunction either does or should, in the unusual circumstances of this case, turn to any substantial extent on what may be the result of the domicile issue—a matter which has still to be litigated. The plain fact remains that as neither party is at present either resident in or domiciled in Eire, the courts of that republic can in practice be ruled out from consideration as to which is the proper place for the wife to bring her application. That leaves as alternatives the High Court of this country and the Royal Court of Jersey.

It is not my view that a wife whose children have been kidnapped in the way which I have described should necessarily be asked to follow the kidnapper to such part of the globe as he may state that he is selecting as his new domicile. I consider that in the very exceptional circumstances of this case the wife was justified and entirely reasonable in making her application to this court to deal with the matter at this particular stage; and further that this is one of those cases in which the court should then exercise its jurisdiction by reason of the circumstances in which she comes before it.

In coming to that conclusion I have rejected the argument of Mr. Caplan, that it was the Royal Court of Jersey which should now deal with questions concerning these children. Assuming, as I do, that it has a jurisdiction in the matter, I very much doubt, after taking into account the reasoning in the authorities cited to me, whether that court would in this particular case wish to exercise it at the instance of the father. In a parallel case here, if the High Court of Justice were asked, contrary to the desires of a mother, to make an order on the application of a father who had by false means or fraud brought but a short time previously into this country children, and it then appeared that neither they nor their parents nor grandparents had before that display of false means or fraud lived here, and that proceedings had already been recently instituted in the country where the court would more aptly assume the function of parens patriae, it is my view that this court would be more than chary of acceding to such an application.

I now propose to deal, in the exercise of the court's jurisdiction, with the first two paragraphs of the application—those which seek injunctions. As regards those paragraphs the evidence of the kidnapping is cogent and ample time has elapsed for it to be answered, if any answer there were. Further, Mr. Syms indicated that those facts were unlikely to be in dispute.

It has always been the practice of this court to ensure that a parent should not gain advantage by the use of fraud or force in relation to the kidnapping of children from the care of the other spouse, save perhaps where there is some quite overwhelming reason in the children's interest why the status quo should not be restored by the court before deciding further issues. In the present case I am concerned with three young children, two of whom are girls and the youngest is aged only three. It is a particularly wicked thing to snatch such children from the care of a mother, and, in saying that, I have in mind not merely the mother's position but the harm that can be done to the children. No affidavit of the husband tendering either his regrets or any vestige of excuse for his action has been proffered. Further, as I have already mentioned, when first I asked Mr. Syms what was the nature of the case which he might wish to make, if so minded, for depriving these children of a mother's care, he only spoke of her association with a certain man and never suggested that she had in any way whatsoever failed to look after the children properly.

Whilst such an improper association with another man is a factor which, if it were established, the court would take into account as being likely to affect the children, it is very far from being something which entitles a husband to take the law into his own hands in the way that this particular husband has done. In many cases, indeed it may be in the majority of cases, where the children are very young, the court, after ensuring that there shall be no contact between them and the man in question, does not disturb them from the care of the mother. In the present case there is already an undertaking by the wife not to bring the children into contact with that man, and there is no evidence that such association has in any way affected the children at any time.

Today, at the very last moment, an affidavit was filed suggesting that the upbringing of the children by the wife was at fault. There is no scintilla of evidence before me of such a complaint having ever been made by the husband before and he has, no doubt upon advice, refrained from venturing to go on oath on the subject. It seemed right, however, to admit the affidavit on the file and for the court to call the wife into the witness-box. In the particular circumstances of this case there was no opportunity for a full investigation of the matter complained of, but it is right also to say that on such material as was available and on such assessment as could be made in a brief space, the suggestion made in the affidavit was not one which appeared at

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all likely to be substantiated. I would add that over the relevant periods there was a nurse and a governess employed to look after the children and help with their upbringing.

I next turn to the fact that should further investigations by this court into the question of interim custody be required, account would have to be taken of the nature of the charges made by the wife against the husband. On the material so far before me, those charges, if proved, show the husband to be wholly unsuited to have the care of young children; in that respect they are far graver than anything which has been alleged against the wife. Further, the wife has also put on oath that in her view the husband is a person unfit to have the charge of children. Whatever then might, in due course, prove to be the appropriate order as regards the custody and care and control of these children, on the evidence before me there is nothing that should deflect the court from its normal practice of restoring, so far as it can, the position to what it was before the husband kidnapped these children. In that behalf it seems to me that when one is dealing with a person or persons of the large resources of this particular husband, it makes no difference whether the children happen to be in a different county to their mother, or, as in this case, in the Channel Islands.

As regards the prospects of the husband complying with the order, I have in mind that he has already said he was prepared to give an undertaking to bring the children to England but upon conditions which sought to take advantage of his own wrong. I have also in mind that part of the judgment of Romer L.J. in *In re Liddell's Settlement Trusts*,[5] where he stated: "It is not the habit of this court in considering whether "or not it will make an order to contemplate the possibility that "it will not be obeyed." Further, upon facts agreed between counsel, there are substantial assets of the husband in this country available should compliance with the present order have to be enforced through sequestration proceedings.

Accordingly, the order of the court will be that the husband do on December 31, 1956, deliver these children into the care and control of the wife and that the wife do have their care and control until further order of the court. The order will be made upon the wife's undertaking not to remove the children from the jurisdiction and upon her surrendering her passport to her solicitors, not to be returned to her except by leave of the court.

This order is neither intended to nor does prejudice the rights of the parties to raise, either before or after the determination of the issue of domicile, such points as they may desire in relation to interim custody. In that respect I do, however, hope that once the children have been so delivered to the wife, the parties by their legal advisers, will come to some reasonable arrangement as to what is to be done until, at any rate, the issue of domicile has been determined. After that the matter could properly come

[5] [1936] Ch. 365, 374; 52 T.L.R. 308; [1936] 1 All E.R. 289.

before the court again if the parties found it necessary. The present order is simply intended to ensure that the children be restored to the natural care of their mother and that they should continue there unless and until the husband, by due process of law, can establish that some other order is proper.

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Injunction granted.
Order for children to be delivered into the care and control of the wife.
No order on application for interim custody.

Solicitors: *Gregory, Rowcliffe & Co.; Gordon, Dadds & Co.*

E. J.

[QUEEN'S BENCH DIVISION.]

* BIRKETT v. McGLASSONS LTD. AND ANOTHER.

1957
Jan. 16.

Lord Goddard C.J., Cassels and Lynskey JJ.

Fishery—Salmon—Close season—Salmon deposited with fishmongers in January on terms that fish could be sold if not required by owners before February 1*—Fish consigned to London on January* 31 *for sale on February* 1*—Whether offence committed by fishmongers—"In possession for sale . . . between August* 31 *and February* 1*"—Salmon and Freshwater Fisheries Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 16), *s.* 30 (1).

Section 30 (1) of the Salmon and Freshwater Fisheries Act, 1923, which provides that "No person shall . . . have in his "possession for sale any salmon . . . between August 31 and "February 1 following" contemplates a sale which takes place or is intended to take place between the dates specified in the subsection and not a sale which takes place at any other time, and therefore possession of salmon within the period specified in the subsection for the purpose of sale outside that period is not an offence under section 30 (2) of the Act.

CASE STATED by Carlisle justices.

On May 15, 1956, informations were preferred by the appellant, Ralph Birkett, against the respondents, McGlassons Ltd., fishmongers, and Thomas Anthony Beattie, the managing director of that company, alleging that they, between August 31 and February 1 following, namely, on January 31, 1956, did have in their possession for sale 21 salmon, contrary to section 30 of the Salmon and Freshwater Fisheries Act, 1923.[1]

[1] Salmon and Freshwater Fisheries Act, 1923, s. 30: "(1) No person shall "buy, sell, or expose for sale, or have "in his possession for sale any "salmon . . . between August 31 "and February 1 following. (2) If "any person contravenes this section, "he shall be guilty of an offence "against this Act."

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The justices heard the informations on June 4, 1956, and found the following facts: Between January 16 and 26, 1956, 21 salmon caught in the River Eden by rod and line were deposited by various rod fishermen with the respondents and placed by them in the refrigerator of their premises at St. Albans Row, Carlisle. Each fish was deposited with the respondents on the terms that if the fishermen did not require the return of the fish before February 1, 1956, the respondents were at liberty to dispose of them by way of sale as agents for the fishermen. The justices were satisfied beyond all doubt that the fish were never in the respondents' possession to be sold between August 31, 1955, and February 1, 1956. At 8.30 p.m. on January 31, 1956, some hours after the respondents' premises closed for business, the fish were consigned to Bennett of London for sale on an agency basis. The respondents did not seek the authority of the rod fishermen before despatching the salmon. The carriage was by British Railways and having regard to the time of receipt of the fish it was impossible for them to be sold in London before the opening of the season, viz., February 1, 1956. It was part of the arrangement with the rod fishermen that when the salmon were sold the respondents should receive a profit of approximately 10 per cent. The Fishmongers Company, London, intercepted the fish before sale, but permitted their sale and held the net proceeds amounting to £189 1s. 7d. pending the decision of the court. The respondents had in fact paid some of the rod fishermen the amount for which their salmon were sold.

It was contended by the appellant that section 30 of the Salmon and Freshwater Fisheries Act, 1923, made it an offence for a person to have in his possession for sale any salmon between August 31 and February 1 following, whether such person intended to sell it between those dates on or after February 1, so that the respondents were offenders so soon as they began to pack and despatch the salmon even though they did not propose to effect a sale before February 1, 1956. It was contended by the respondents (a) that the mischief which section 30 of the Act of 1923 was designed to meet was the disposal of fish caught out of season, and that in the present case all the fish had lawfully been taken, because a byelaw allowed rod fishing as from January 15; (b) that the consequences of adopting the appellant's contention were (i) that fish lawfully taken would have to be consumed by the person taking the fish, disposed of by way of gift, or cast aside as refuse; (ii) that a private individual who had lawfully taken fish and who placed the same in a refrigerator in his own home intending to sell it after February 1 would be committing an offence under this section; (c) that the respondents acted perfectly openly in respect of the whole transaction. That eleven of the fish, the subject of the present charges, had been received from a member of the Cumberland River Board; (d) that the respondents did not intend to sell the

fish prior to February 1 and that prior to that date the purpose of their possession of the fish was safe keeping; (e) that to constitute an offence under the section it had to be shown that the respondents had the fish in their possession for sale between August 31 and February 1 following and that as it had been proved that all necessary steps were taken to prevent a sale before February 1 no offence had been committed.

The justices were of opinion that section 30 of the Salmon and Freshwater Fisheries Act, 1923, was ambiguous and that the benefit of the doubt should be given to the subject and, accordingly, they dismissed the informations: further, that, should their interpretation of section 30 be incorrect, they were satisfied that the respondents only had the fish in their possession for sale as from the closing of their premises on January 31, until midnight of that day and accordingly they might have dealt with the informations in accordance with the maxim "de "minimis non curat lex" and dismissed them.

The prosecutor appealed.

Gilbert Paull Q.C. and *J. G. Shorrock* for the appellant.
I. H. Morris Jones for the respondents.

No cases were cited in argument.

LYNSKEY J. Between January 16 and 26, 1956, 21 salmon were caught in the River Eden by rod and line. Although it is not right or possible to get salmon by commercial means during the season ending on February 1, apparently it is permissible to fish by rod and line as from January 15, and these 21 salmon which were caught between January 16 and 26, 1956, were lawfully caught by persons using rod and line. The fish were deposited with the respondents on the terms that if the fishermen did not require the respondents to return the fish before February 1, 1956, the respondents were at liberty to dispose of the fish by way of sale as agents of the fishermen. In other words, the effect of the finding is that the fish were left with the respondents on the terms that they were to hold them for the fishermen at call, that if there was no call for the return of the fish before February 1, 1956, then the respondents would be entitled to sell them. Of course, until that date arrived, there was no power of sale given to the respondents by the fishermen who caught the fish. The justices also find: "We were satisfied beyond all doubt that the "fish were never in the respondents' possession to be sold between "August 31, 1955, and February 1, 1956." That is a clear finding that there was no intention on the part of the respondents to sell these fish prior to February 1, 1956, that is to say, prior to the date upon which it would be lawful to sell these salmon. At 8.30 p.m. on January 31, 1956, some hours after the respondents' premises had closed for business, the fish were consigned to Bennett of London for sale on an agency basis. The respondents

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Lynskey J.

did not seek the authority of the rod fishermen before despatching the salmon. That apparently is a finding that the respondents did not in fact act in accordance with the terms of their bailment, but broke those terms by sending the fish for sale before the due time expired and the authority to sell arose. Eventually the fish were sent to London, arrived there on the morning of February 1, and would normally have gone on to Bennett's, but the Fishmongers' Company of London intervened and intercepted the fish. Thereafter they were sold, apparently, by the Fishmongers' Company or on their authority, and they hold the proceeds of sale pending the order of some court, not apparently this court.

The case for the appellant is that the respondents had the fish in their possession for sale and that they had it in their possession as from the date when the fish first passed into their possession. But my view is that up to the end of the period when the power of sale arose, they had the fish in their possession, not for the purpose of sale, but for the purpose of keeping it in refrigeration pending call by the owners of the fish if they desired to have it returned, and that the power of sale only arose if that power of recall was not exercised by the fishermen.

It is said by the appellant that, on its true construction, section 30 (1) of the Salmon and Freshwater Fisheries Act, 1923, means that if a person has in his possession at any time before February 1 salmon which he intends to sell after February 1, he is guilty of an offence under the section because, in effect, during the period between August 31 and February 1 following he has salmon in his possession which he has for the purpose of ultimate sale after that date. In my view, that is not the correct construction. It seems to me that section 30 (1) only concerns sales which take place or which are intended to take place prior to February 1 during the close season. Looking at the section and dissecting it: no person shall buy between August 31 and February 1 following; no person shall sell between those dates; no person shall expose for sale between those dates; and no person shall have in his possession for sale between those dates. I read that section to mean that a person must not have the fish in his possession during the close period for sale during the close period. It would have been easy to say, if the legislature had so desired: "You must not have salmon in "your possession for sale before that date [February 1] even "though sale took place after that date." It seems to me that section 30 (1) on its true construction means that the buying, the selling, the exposing for sale or the possession for sale which is contemplated is in each case a sale between August 31 and February 1 following. If that is the true construction of the section, on the facts found in the present case, no offence has been committed because if there was any possession, which I

doubt, there was no possession for sale during the close period. In those circumstances, in my view this appeal must be dismissed.

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LORD GODDARD C.J. I agree.

CASSELS J. I agree.

Appeal dismissed.

Solicitors: *Boxall & Boxall for Oglethorpe & Hough, Keswick; Charles Russell & Co. for Harston & Atkinson, Carlisle.*

E. M. W.

[QUEEN'S BENCH DIVISION.]

* PETER CASSIDY SEED CO. LTD. *v.* OSUUSTUKKUKAUPPA I.L.

1957 *Jan.* 21.

Devlin J.

Sale of Goods—F.o.b.—Export licence—Goods to be shipped from foreign port—"Delivery prompt, as soon as export licence "granted"—Implied warranty that sellers would obtain licence—Application for export licence made by sellers with due diligence—Export licence refused—Whether sellers in breach of absolute obligation to obtain licence.

Commercial court—Value of—Arbitration—Advantages of commercial court—Failure to make use of process of commercial court.

By a contract embodying four transactions dated September 16, 1953, sellers carrying on business in Finland sold to an English company a quantity of ants' eggs, f.o.b. Helsinki, "Delivery: "prompt, as soon as export licence granted." The first intimation that the buyers had had that an export licence would be required was contained in a letter from the sellers confirming the second transaction, and prior to the signing of the contract the sellers had assured the buyers that the obtaining of the licence would be a "pure formality." In fact the sellers' application for an export licence, which they had made with reasonable diligence, was refused by the Finnish authorities, so that they were unable to ship and deliver the contract goods. On a case stated by an umpire, it being admitted that it was the sellers' duty to apply for an export licence:—

Held, that, on the construction of the contract and in the circumstances of the case, there was to be implied into the clause "Delivery: prompt, as soon as export licence granted" an absolute warranty by the sellers that they obtain an export licence, and not merely a warranty that they would use all due diligence to do so. Accordingly, since they had failed to carry out that obligation, the sellers were liable in damages to the buyers.

Observations of Lord Reading C.J. in *In re Anglo-Russian Merchant Traders & John Batt & Co. (London) Ltd.* [1917] 2 K.B. 679, 686, and Denning L.J. in *Brauer & Co. (Great Britain) Ltd.* v. *James Clark (Brush Materials) Ltd.* [1952] 2 T.L.R. 349, 354; [1952] 2 All E.R. 497 applied.

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PETER CASSIDY SEED CO. LTD. v. OSUUSTUKKUKAUPPA I.L.

CASE STATED by an umpire.

By a contract dated Helsinki, September 16, 1953, buyers, Peter Cassidy Seed Co. Ltd., who carried on business in the City of London, agreed to buy from the sellers, Osuustukkukauppa I.L. [Co-operative Wholesale Society], of Helsinki, various quantities of "dry clean sound ant eggs, quality type OTK "packed in jute bags of 25 kg. net weight" at various prices per kilo net weight "f.o.b. Helsinki . . . Delivery: prompt, as "soon as export licence granted." Payment was to be net cash against shipping documents in Helsinki and "Other terms: All "disputes may be settled through London arbitration under "Friendly Rules." The sellers failed to ship and deliver any of the contract goods and the buyers claimed damages. The parties being unable to agree an amicable settlement of the dispute the matter was referred to two arbitrators. The arbitrators failed to agree upon an award and the dispute was referred to an umpire for determination.

The following is a summary of the facts found by the umpire relevant to this report.

On September 8, 1953, the buyers cabled to the sellers' agent in Helsinki a bid for 1,000 kilos ant eggs at a price of 17s. per kilo. f.o.b. September shipment and on September 9 the agent cabled "1,000 ant eggs 17s. f.o.b. booked." By a further exchange of cables on September 10 the buyers purchased another 1,000 kilos of ant eggs at 17s. per kilo, and on September 14 the agent offered the buyers 1,000 kilos at 18s. per kilo f.o.b., 500 kilos of which were accepted by the buyers on that day, and the balance of 500 kilos on the following day on the same terms. The first transaction for 1,000 kilos was accepted by the agent without reference to export licence although the agent, in a confirming letter dated September 9 stated: "The original "contract will follow soonest." In each of the subsequent transactions the cabled offers and acceptances made no reference to export licences but the agent confirmed the transactions by letter, "goods to be shipped as soon as export licence in order" or "after export licence is granted." On September 18 the buyers cabled to the agent that they expected that the export licence "only formality as bought without reserve" and the agent replied "Licence formality delays delivery usually fortnight." The purchasing contract dated on September 16, 1953, [set out above] confirming the four transactions, was signed by the buyers under date September 21, 1953, and returned by them to the agent on the following day. In returning the contract the buyers informed the agent that they noted that shipment was described as prompt as soon as export licence in order and, referring to the previous correspondence and cables, noted that "the export licence is a "pure formality."

On September 30 the agent, in reply to communications from the buyers, cabled "Awaiting delivery within ten days." In fact the sellers' application for an export licence was refused.

and on October 1 the agent cabled to the buyers that the sellers "informs their licence refused delivered total quantity to A. A. "Bergelin Turku which possess licence therefore contract "cancelled." Subsequently messages passed direct between the buyers and the sellers in which the sellers maintained that as the authorities had refused their application for a licence they considered the business as cancelled. The buyers, while refusing to accept cancellation, claimed arbitration and on October 7 the sellers cabled "Doing utmost fulfil contract reverting shortly." Meantime negotiations took place during which the time for shipment was extended to "during October" and the sellers endeavoured to obtain alternative supplies from Germany and Russia but without avail and the matter proceeded to arbitration.

Ordinance No. 1295 of 1945 issued by the Government of the Republic of Finland made the export of ant eggs from Finland unlawful except through or by permission of the Ant Egg Exporters' Association. By a further Ordinance, No. 286 of 1953, effective from September 1, 1953, the Government of the Republic of Finland introduced as a temporary Government Department the State Board of Licences for the regulation of the export and import trade, such board being subject to the Ministry of Commerce and Industry; this ordinance provided that no appeal lay from a decision made by the Government, the Ministry of Commerce and Industry and the State Board of Licences. After September 1, 1953, it became unlawful by Finnish law to export ant eggs unless a licence for their export had been granted by the State Board of Licences, and the board could not lawfully grant a licence for the export of ant eggs unless the Ant Egg Exporters' Association approved. The board could refuse a licence although approved by the association. There was no provision in either Ordinance which restricted licences to members of the Ant Egg Exporters' Association but it was the practice of the association not to concur in any application unless the exporter was a member of the association. The sellers were not at any material time members of the Ant Egg Exporters' Association. On September 15, 1953, the sellers applied to the State Board of Licences for a licence to export 3,000 kilos. of ant eggs to England for the buyers, stating that the goods were to be exported not later than October 3, 1953, but on September 30 the board issued an official notice that the application had been refused on September 25, the reason being given "applicant is not a member of the Ant Egg Exporters' Associa-"tion." Until they received a letter from the agent dated September 11 indicating that an export licence would be required the buyers were not aware that the export of ant eggs from Finland was subject to licensing regulations, and they knew nothing of the licensing system in force in Finland. After the refusal of a licence the sellers approached the association for assistance and asked whether they could join the association but were informed that it was impossible as the association did not

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accept any traders making temporary or casual deals. After the formal notification on September 30, 1953, of the refusal of the application for a licence the sellers made no further application. The sellers did not know at any time prior to the refusal of the licence that the State Board of Licences would treat non-membership of the association as a ground for refusing a licence, nor did they know of any special requirements with regard to the export of ant eggs and followed the normal procedure for exports by applying to the State Board for a licence.

The arbitrator further found that the sellers, in making an application for a licence on September 15, had acted with reasonable diligence; that they knew at all material times that the country of destination of the goods was England; that sellers trading in Finland and offering ant eggs for export should have known that licences would only be granted through or by permission of the Ant Egg Exporters' Association; and that, although they had not traded in ant eggs before they had made no inquiries of those engaged in the trade prior to entering into the contracts in question, but had they made such inquiries they would have learned that the association would not approve of a licence being granted other than to a member of the association.

The buyers contended that as the offers were made without any reference to the sale being subject to export licence and such offers were accepted, the sellers had undertaken an absolute obligation to ship the goods or be responsible for damages for their failure to do so; alternatively, that the words "Delivery: "prompt, as soon as export licence granted" were no more than defining the time when shipment would be made, and were not to be read and construed as if the contract were made subject to an export licence.

The sellers contended that until an export licence had been granted there was no obligation upon them to deliver, and they could not in fact deliver until they obtained a licence, and that they intended to sell and assumed the wording used in the contract was equivalent to "subject to export licence."

The umpire held that the words used in the contract as to delivery being prompt as soon as export licence granted implied that the contract was made subject to an export licence being granted, but he made a number of alternative awards including, inter alia, that if the court was of the opinion that the contract was not made subject to export licence, or that the reference to export licence only had relation to the time when shipment should be made, the sellers were in default and should pay to the buyers £1,900.

T. G. Roche Q.C. and *A. J. Bateson* for the sellers.

John Donaldson for the buyers.

The following cases were cited in argument: *Ralli Brothers*

v. *Compania Naviera Sota Y Aznar*[1]; *Foster* v. *Driscoll*[2]; *A. V. Pound & Co. Ltd.* v. *M. W. Hardy & Co. Inc.*[3]; *In re Anglo-Russian Merchant Traders Ltd. & John Batt & Co. (London) Ltd.*[4]; *Brauer & Co. (Great Britain) Ltd.* v. *James Clark (Brush Materials) Ltd.*[5]; and *Partabmull Rameshwar* v. *K. C. Sethia (1944) Ltd.*[6]

DEVLIN J. The parties in this case on September 16, 1953, entered into a contract for the purchase and sale of a certain quantity of ants' eggs. The sellers were a Finnish concern, and the buyers carried on business in England, and delivery was to be made f.o.b. Helsinki. The contract contained this term: "Delivery: prompt, as soon as export licence granted." The position under Finnish law was that it was unlawful to export ants' eggs unless a licence for their export had been granted by the State Board of Licences. The State Board of Licences could not lawfully grant a licence for the export of ants' eggs unless the Ant Egg Exporters' Association approved, and it was the practice of the Ant Egg Exporters' Association not to concur in any application to export ant eggs unless the exporter was a member of the association. The sellers were not members of the Ant Egg Exporters' Association, and, consequently, when they applied for a licence to fulfil their obligations under the contract it was rejected, the reason given being: "Applicant is not a "member of the Ant Egg Exporters' Association," and they were, therefore, unable, in accordance with the law of Finland, to fulfil their contract.

The question, in those circumstances, is whether or not they are liable to pay damages. If the contract said nothing at all about the obtaining of a licence, it is clear that some provision would have to be implied into it about it. The contract could not be fulfilled legally under the law of Finland unless one or the other, either the buyer or the seller, obtained a licence, and it would, therefore, be necessary to imply a term as to whose duty it was to apply for a licence, and it would then further be necessary to imply a term as to what the nature of his obligation was. In this case it is accepted (and I think rightly) that it was the sellers' duty to apply for a licence. The person whose duty it is to apply for the licence may either warrant that he will get it—that is an absolute warranty; or he may warrant that he will use all due diligence in getting it. When nothing is said in the contract it is usually, indeed I think it is probably fair to say almost invariably, the latter class of warranty that is implied, but there can be no doubt that each case must be decided according

[1] [1920] 2 K.B. 287; 36 T.L.R. 456 (sub nom. *Sota & Aznar* v. *Ralli Brothers*).

[2] [1929] 1 K.B. 470; 45 T.L.R. 185.

[3] [1956] A.C. 588; [1956] 2 W.L.R. 683; [1956] 1 All E.R. 639.

[4] [1917] 2 K.B. 679.

[5] [1952] 2 T.L.R. 349; [1952] 2 All E.R. 497.

[6] [1951] 2 All E.R. 352n.; [1951] 2 Lloyd's Rep. 89.

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to its own circumstances and the question of implication settled in the ordinary way in which implied terms are settled. Thus in one of the very early cases where the nature of the obligation had to be considered, *In re Anglo-Russian Merchant Traders Ltd. & John Batt & Co. (London) Ltd.*,[1] Lord Reading C.J., holding that there was an obligation only to use due diligence, said[2]: "A "party to a contract may warrant that he will obtain a licence, "but no such term can be implied in this case."

An absolute obligation was held to apply in *Partabmull Rameshwar* v. *K. C. Sethia (1944) Ltd.*,[3] decided in the House of Lords. The circumstances in the case were unusual; I need not detail them here, and the only purpose for which I wish to refer to the case is that it was there made plain that there are always two alternatives which have to be considered. Denning L.J., in *Brauer & Co. (Great Britain) Ltd.* v. *James Clark (Brush Materials) Ltd.*, said[4]: "The question for decision depends on "the true construction of the words: 'This contract is subject "'to a Brazilian export licence.' Those words serve a most "useful purpose. The parties to the contract knew that the "goods could not lawfully be exported from Brazil without an "export licence. If this clause had not been inserted, the buyers "must have contended that the sellers undertook absolutely to "obtain a licence and ship the goods, and that it was no excuse "for the sellers to say that they could not get a licence." Lastly, in *A. V. Pound & Co. Ltd.* v. *M. W. Hardy & Co. Inc.*,[5] in the House of Lords, while it was, again, not necessary for the House to consider the nature of the obligation, Lord Somervell of Harrow said[6]: "It is also unnecessary to decide other points which were "referred to in argument. Had the appellants undertaken an "absolute obligation to get a licence for any destination? Was "their obligation only to take reasonable steps? Apart from the "general objection to dealing with points which it is unnecessary "to decide, there is, I think, a special difficulty arising from the "absence of certain findings."

That shows once again that that is a point which has to be decided in relation to the circumstances of each particular case.

There is here no clause "Subject to licence." If there had been, then I think, on the authorities, that that would conclude the matter; but in the absence of those words, and if there were no clause at all it would be necessary for me to determine, in relation to all the circumstances of the case, what I thought would be the appropriate terms to be implied. There is, however, a clause, and, in my judgment, that clause, upon its true construction, gives very considerable assistance to the contention of Mr. Donaldson that it is the absolute obligation which was intended in this case. That clause, which I have read, is:

[1] [1917] 2 K.B. 679.
[2] Ibid. 686.
[3] [1951] 2 All E.R. 352; [1951] 2 Lloyd's Rep. 89.
[4] [1952] 2 T.L.R. 349, 354; [1952] 2 All E.R. 497.
[5] [1956] A.C. 588; [1956] 2 W.L.R. 683; [1956] 1 All E.R. 639.
[6] [1956] 2 W.L.R. 683, 699.

"Delivery: prompt, as soon as export licence granted." There is no "subject to"—a piece of phraseology with which all commercial men must be very familiar—it is: "Delivery: prompt, "as soon as export licence granted." That seems to me to show quite clearly that the assumption underlying the contract which was in the minds of both parties was that an export licence certainly would be granted, and the only question was, when was the precise moment of time likely to be, because it was not until the licence was in fact granted that delivery could be made. If that be right, and if that be the underlying assumption, there would be no hardship in holding that the sellers, being, admittedly, in this case the parties responsible, were undertaking absolutely to do that which both parties had assumed would, in fact, be done, or could be done, sooner or later. I think that the true construction of the clause is that the seller is saying: "I can get a licence, but I cannot say for certain just when I "will get it, and therefore the time for delivery must depend "upon the getting of it."

Having regard to what I think is the right construction of that clause and to the circumstances in this case, the proper conclusion is that the sellers were warranting absolutely that they would get a licence. If there be any ambiguity in the clause, and if, therefore, it be legitimate to look at what preceded the drawing up of the contract, it would strengthen very much the conclusion at which I have arrived. The facts are set out in the case, but putting it shortly, the agents of the sellers, in effect, assured the buyers that the getting of a licence was merely a formality, and it was on that basis that the buyers entered into the contract. As that condition has not been fulfilled, it follows that the award in favour of the buyers awarding them damages must be upheld.

There is one further observation I should like to make. McNair J.,[7] not very long ago, called attention to the process of arbitration as compared with the process which is afforded by this court, and his observations on the matter were approved last month in the House of Lords.[8] This point in the present case is extremely short; the facts are not in dispute, and there is a short point of law which, whether I have decided it rightly or wrongly, could not take a very long time to consider. It has, in fact, taken one and three-quarters hours, which is well under the time normally allotted for a short cause. It is, therefore, interesting to see what proceedings have led up to it. The contract was made in September, 1953, and broken in October, 1953. The matter went before two lay arbitrators, who disagreed and appointed an umpire who, no doubt, was also a person experienced in the trade; but plainly this was not a point on

[7] In *J. H. Vantol Ltd.* v. *Fairclough Dodd & Jones Ltd.* [1955] 1 W.L.R. 642, 648, 1302; [1955] 3 All E.R. 750.

[8] Ibid. [1957] 1 W.L.R. 136; [1956] 3 All E.R. 921.

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which an expert knowledge of ants' eggs, or even of the conditions of the export trade in Finland, could possibly be of assistance. The umpire stated a case; a motion was made to this court to remit the case for further consideration and for further findings of fact; affidavits were filed; the motion was granted, the case went back to the umpire, and I think that there were two further hearings before him, and finally he found the further facts upon which the case has been argued before me. It is, of course, beyond dispute that if business men prefer an expensive and lengthy procedure, in this case lasting something over three years, to that which this court provides, they are entitled to have it. There are, no doubt, a great many ways in which arbitration serves a useful purpose, but this, I think, is not one of them, and if, in spite of what has been said time and again in these courts, it is made manifest that business men prefer in these matters the expensive and tortuous process of arriving at a solution of their legal difficulties rather than the one which this court provides, the time may come when it will have to be considered whether there is any longer any value in the Commercial Court providing the City of London with special facilities not granted to ordinary litigants for the solution of its legal disputes. I need hardly say that when that time does come it will not be me who has to decide the question, but if I may venture to express a purely personal opinion, I would say that, in my opinion, it is becoming increasingly difficult to justify the provision of special facilities such as the Commercial Court was designed to provide for the City of London if they are to be taken advantage of in such a way as to occupy a judge for merely a fraction of his time, and if business men make it manifest that they prefer to solve their legal disputes by other and more expensive means.

Award upheld.

Solicitors: *Thomas Cooper & Co.; Richards, Butler & Co.*

J. F. L.

[COURT OF APPEAL.]

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Singleton and Jenkins L.JJ.

* *In re* TAXATION OF COSTS. *In re* A SOLICITOR.

Solicitors — Costs — Registered land — Transfer — Scale fee — Whether applicable if work not wholly done—Change of solicitor—Solicitors' Remuneration (Registered Land) Order, 1925 (*S.R. & O.,* 1926, *No.* 2), *para.* 1 (*d*) (1) *and* (*h*), *Sched.*

The owner of registered land in London entered into a contract to sell it and the contract and conditions of sale were drawn up by his then solicitors. Before the completion of the sale he changed his solicitors, who made some necessary amendments to the conditions of sale and carried out the completion of the contract and

the conveyance to the purchaser. They then sent in a bill of costs amounting to £145 5s. 4d., which included a scale fee amounting to £53 2s. 6d. under the provisions of the Solicitors' Remuneration (Registered Land) Order, 1925, paragraph 1 (*d*).[1] On the application of the owner the bill of costs was referred to the taxing master, who decided that a scale fee was not payable because the contract of sale had been prepared and completed by the vendor's original solicitors, who had been paid for their services in that respect. Pearson J., on appeal by the respondent solicitors, affirmed the decision of the taxing master, who had also assessed the value of the services at the global figure of £60. On appeal:—

Held, that the appellant solicitors, although they had not prepared the contract of sale, had had to consider its terms and to undertake a certain amount of correspondence and additional work because the conditions of sale were not in order. Therefore it could not be said that they had done nothing in regard to the contract, and on the strict reading of paragraph 1 (*d*) of the Order they had done the main part of the work mentioned therein and were entitled to the scale charge and the case must be remitted to the taxing master.

Per Jenkins L.J. I think the principle stated in *In re Lacey & Son* (1883) 25 Ch.D. 301 applies to remuneration in respect of registered land as it does to remuneration in respect of unregistered land.

"Perusal . . . of the contract" in para. 1 (*h*) surely refers to perusal by the purchaser's solicitor, preparation being by the vendor's solicitor.

Per Singleton L.J. There may be occasions within the paragraph where the parties themselves arrive at the contract.

Decision of Pearson J. reversed.

APPEAL from Pearson J.

One, Marshall, the owner of premises at No. 20, Old Compton Street, W.1, entered into a contract to sell that property for £7,500, and his then solicitor prepared the contract and drew up the conditions of sale. Marshall then changed his solicitor and employed the appellants, Lesser, Fairbank & Co. The conditions of sale were found to be not in order and therefore

[1] Solicitors' Remuneration (Registered Land) Order, 1925, para. 1: "The remuneration of solicitors in "conveyancing and other non-contentious business under the Land "Registration Act, 1925, shall be "regulated as follows:—. . . (*d*) For "every completed transfer on sale, or "charge or mortgage of registered "land, or transfer for value of a "registered charge, or sub-charge or "sub-mortgage of a registered charge "or mortgage or transfer for value "thereof whether or not any easement "right or privilege is reserved or the "surface of the mines and minerals "or any part thereof are excepted. "(i) Where the land is registered with "absolute or good leasehold title, the "remuneration shall be that prescribed in the Schedule hereto.

"(*h*) The remuneration prescribed "by the Schedule hereto covers (in "addition to all searches in, attendances at, correspondence with the "Registry, and other matters involved in, incidental to or arising "out of the registration) the preparation or perusal (as the case "may be) of the contract, or conditions of sale, if any, the perusal of "any lease, or other deed mentioned "on the register, and all other work "incidental to or consequential on the "transaction, including all matters "which in the case of sales, purchases, charges, mortgages, sub-charges, and sub-mortgages, and "transfer of charges or sub-charges, "or mortgages of unregistered land "are covered by the remuneration "prescribed by the Remuneration "Order, 1882."

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the appellants had some work to do in connexion therewith and with the contract. The property was registered property. It was transferred or conveyed to the purchaser and on February 10, 1956, the appellants sent in a bill of costs, the total amount of which, including disbursements, was £145 5s. 4d. The first item read: "To our professional charges relating to deducing "title on your sale of the freehold site, No. 20, Old Compton "Street, at the price of £7,500 as per scale, £53 2s. 6d." Other items were stated to be "professional charges and dis-"bursements of and relating to redemption of mortgage and all "matters not covered by scale charge," bringing the total up to the figure stated above.

The bill having been referred to the taxing master he held that the scale fee was not payable, the contract of sale having been, he said, prepared and completed by the first firm of solicitors, who had been paid for their services in that respect. He further decided that a global fee of 60 guineas was an adequate sum to allow for all the work done by the appellants. On appeal to Pearson J. the order of the taxing master was upheld. The appellants further appealed.

Leonard Halpern for the appellants.

The respondent did not appear and was not represented.

Cases cited in argument: none cited other than the one referred to in the judgment.

SINGLETON L.J. This appeal arises upon a solicitors' bill of costs and upon the first item in the bill. The solicitors, Messrs. Lesser, Fairbank & Co., became solicitors for Marshall, who was the vendor of some property. They acted for him for some months. He had had a solicitor before he went to them, but after he had entered into a contract to sell the property in question, No. 20, Old Compton Street, W.1, at the price of £7,500, he changed his solicitors, and the present solicitors, Messrs. Lesser, Fairbank & Co., acted for him thereafter. The earlier solicitors had prepared the contract and drawn up conditions of sale. The conditions of sale were not in order, so that the present solicitors, with whose bill we are concerned, had some work to do in connexion with the contract. The property was registered property. It was transferred or conveyed to the purchaser, and ultimately, on February 10, 1956, the solicitors sent in a bill, the total amount of which, including disbursements, was £145 5s. 4d. The first item upon the bill is contained in five or six lines, though the bill itself takes up many pages. The item is: "To "our professional charges relating to deducing title on your sale "of the freehold site No. 20 Old Compton Street at the price "of £7,500—registered land—as per scale, £53 2s. 6d." That is the scale fee in respect of a sale of registered land at a price of £7,500. The next item—that is entirely apart from the

£53 2s. 6d. item—begins "Our professional charges and disbursements of and relating to redemption of mortgage and all matters not covered by scale charges, namely," . . . and on p. 13 of the bill there appears the figure of £73 10s. 0d.; that is, in matters connected with redemption of the mortgage. There are other items and disbursements, bringing the total amount up to £145 5s. 4d.

The only question before the court arises upon the first item, that which is charged as a scale fee, £53 2s. 6d. When it was considered by the taxing master, he himself took the objection that a scale fee was not payable. He considered the other items amounting to something over £70. Objections were made, and the taxing master's answer was this: He said in the first place that the objections were not correctly stated by the solicitors. He added: "The subject-matter of objection 2 disclosed the fact "that the contract for sale of the property in question had been "prepared and completed by another firm of solicitors and that "such solicitors had been paid for their services in that respect. "It transpires that the sale was completed on the basis of such "contract and that the respondent solicitors, who had taken the "matter over from the former solicitors, prepared no further "contract. These facts show quite clearly that a scale fee "has not been earned."

I cannot agree with the sentence: "These facts show quite "clearly that a scale fee has not been earned." I am not satisfied that they do show that. A scale fee is claimed under the provisions of the Solicitors' Remuneration (Registered Land) Order of 1925.[1] [His Lordship read from paragraph 1 and continued:] The remuneration prescribed in the Schedule is, for the transfer of property of the amount of £7,500, the amount claimed in the first item, £53 2s. 6d.

The view taken by the taxing master was that, as the solicitors had not prepared the contract or conditions of sale, they were not entitled to the scale charge, and Pearson J. dismissed the appeal against his order. I do not think that that, so stated, is right in every case. There may be occasions on which the parties themselves arrive at a contract, but the property is transferred within (*d*) of paragraph 1 of the Order and the solicitors would still be entitled to the scale charge. In this particular case, though they did not prepare the contract, they had to consider its terms and the terms of the conditions of sale. Indeed, they had to undertake a certain amount of correspondence and additional work because the conditions of sale were not in order. It cannot be said that they did nothing in regard to the contract. It appears to me that, on the strict reading of paragraph 1 of the Solicitors' Remuneration Order of 1925, the solicitors did the main part of the work mentioned in the Order, which entitles them to the scale charge. Whether they come

[1] See note 1 on p. 281.

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within that is a question of law. I take the view that they do and that consequently they are entitled to the scale charge.

What gives me some concern is that when the taxing master considered the whole of the solicitors' bill, having decided that they were not entitled to the £53 2s. 6d. scale charge, and having weighed upon and considered the charges which follow, the further £70 or so, he said: "I decided that the two charges were "so interlocked with each other and other matters that the only "practicable way in which to deal with the items was to adjudi-"cate on them together and assess one global fee. In so "assessing, and having perused the papers and heard long "argument, I have allowed the sum of 60 guineas, which I "consider fair and reasonable having regard to all the circum-"stances of the case and in particular to each and all the seven "points for consideration contained in Schedule II, and I am "satisfied that this figure is entirely adequate."

The taxing master considered 60 guineas adequate for all the work, the first item in the bill being £53 2s. 6d. scale fee and the other items amounting to £70 or £80. That does not mean that the solicitors' bill will ultimately be taxed at the sum of £140, or anything like it, for if the solicitors are entitled to the scale fee of £53 2s. 6d., as I think they are, the other items will fall to be taxed by the taxing master, who will bear in mind, as he has said, that they arise out of the same subject-matter, and it may be that the solicitors' charges on those items are much too high. The concern which I have is that if the second batch of items in the solicitors' bill can properly be charged at anything like the figure they put, the result of this order might be that the solicitors would get very much more than an experienced taxing master thinks their work is worth. If that is the result of the scale fee in a case such as this, I cannot help it. It has nothing to do with this court; but it may mean that the question of scale fees is worthy of examination. I do not know as to that. What does cause me some surprise is that in a matter of this kind the solicitors' bill should be considerably more than twice the amount which the taxing master thinks would be the right amount to cover all the work done by them.

On the sole question before this court, as to whether or not the solicitors are entitled to the scale fee on the first item on this bill, it seems to me that the appeal should be allowed, though I point out that the way in which the charge is framed is not precisely in accordance with the wording of the Order itself.

JENKINS L.J. I agree that this appeal must be allowed. The sole question with which this court is concerned is whether the solicitors are entitled, on the facts of the case, to be remunerated by reference to the scale charge set out in the schedule to the Solicitors' Remuneration (Registered Land) Order, 1925, as amended. That question turns upon the true construction of the Order. The solicitors say that under paragraph 1 (*d*) of the Order

they are entitled, for every completed transfer on sale of property of the kind here in question (namely, registered land, registered with a possessory title, and with no title excluded from the effect of registration to be investigated), to the scale of remuneration set out in the schedule. The matters which that remuneration is to cover are set out in sub-paragraph (*h*) of paragraph 1 of the Order.

The argument against the applicants' contention is simply this, that as they did not act in the preparation and completion of the contract, they did not carry out the whole of the transaction and therefore should not be remunerated by means of the scale, but should have what is known as Schedule II remuneration, which derives from the General Order made under the Solicitors' Remuneration Act, 1881, and brought into force on January 1, 1883, as subsequently amended; that is to say, should be paid by reference to the work done.

In my view, that contention cannot stand, having regard to the language of the 1925 Registered Land Order. It will be noted that sub-paragraph (*h*) of paragraph 1 says that the remuneration prescribed by the schedule "covers" certain matters. Then, amongst the matters covered, it goes on to include "the "preparation or perusal (as the case may be) of the contract, "or conditions of sale, if any." It seems to me that this language is impossible to reconcile with the theory that the scale charge can only be earned by a solicitor who prepares or peruses the contract. The words "if any" are, I think, fatal to that contention, and I think the expression "covers" points in the same direction. The fact that there is no contract, or that the contract has been prepared by somebody else, does not, in my view, generally speaking, suffice in itself to render the scale fee inappropriate.

I do not, however, wish it to be thought that we are deciding that in every case any solicitor who takes any part in the business leading up to the completed transfer of registered land must necessarily be entitled to the whole of the scale charge. I think the principle stated in the case of *In re Lacey & Son* [2] applies to remuneration in respect of registered land as it does to remuneration with respect to unregistered land. In that case the court had to deal with the General Order under the Solicitors' Remuneration Act, 1881, as originally framed, which provided for a scale fee in language not materially different from that used in the Solicitors' Remuneration General Order as at present in force, "for deducing title to freehold, copyhold, or leasehold "property, and perusing and completing conveyance (including "preparation of contract or conditions of sale, if any)." It will be observed that this language describes the remuneration as being "for" doing certain things, and that may be distinguished from the expression "The remuneration prescribed by the

[2] (1883) 25 Ch.D. 301.

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"schedule hereto covers," which is the expression used in the Solicitors' Remuneration (Registered Land) Order. But having noted that difference, one does find at the conclusion of the description of the matters for which the scale remuneration was payable under the earlier Order the words "including preparation "of contract or conditions of sale, if any." Broadly speaking, then, the provision for scale remuneration in the Order before the court in *In re Lacey & Son*[2] was similar to the provision for scale remuneration with which we are now concerned.

Cotton L.J., after criticizing certain charges in the bill before the court, said this[3]: "In my opinion the rules do not authorize "the charging the percentage there mentioned, unless the work "there mentioned as being the work for which it is chargeable "has in substance been done." Lindley L.J., after dealing with a different matter on which the case in fact turned, said[4]: "This "is all that it is necessary to decide; but a question of general "importance has been argued on which we think it right to give "our opinion. The bill is framed on the supposition that the "new rules apply, and that supposition, I think, is right; but it "is also framed on the supposition that Schedule I applies, and "that, in my opinion, is wrong. I think that the 30s. per cent. "can only be charged in the case provided for, viz., where "substantially the whole of the work mentioned, i.e., deducing "the title and perusing and completing the conveyance, is done. "The rules cannot, in my opinion, be construed as authorizing "the solicitor to charge the percentage where he does nothing "but peruse and complete the conveyance."

Then Fry L.J. said[5]: "The clause of Schedule I which bears "on the present case mentions four things—deducing the title, "perusing the conveyance, completing the conveyance, and "preparing contract or conditions of sale. It is not necessary "in order to enable the solicitor to make the charge, that a "contract or conditions should be prepared, the schedule saying "that the work for which the charge is made includes the "preparation of the contract or conditions, 'if any'; but in my "opinion the charge cannot be made unless the other three things "are done. Here an important part of the business specified "was not done. I think, therefore, that Schedule I is not "applicable."

That case does show that to earn the scale charge the solicitor must do substantially all the work which the charge is intended to cover. It, I think, also affords some support to the effect I have attributed in the present case to the use of the words "if any." That appears from the judgment of Fry L.J.[5] In the present case there can, I think, be no doubt that the solicitors did do substantially the whole of the work to which the scale charge related. They did not actually prepare or see to the completion of the contract; but, as my Lord has pointed out,

[2] 25 Ch.D. 301.
[3] Ibid. 309.
[4] Ibid. 310.
[5] Ibid. 311.

the contract did contain imperfections which involved the solicitors in a good deal of work. It appears that the services of the previous solicitor in and about the preparation and completion of the contract were assessed at only a matter of five guineas, or it may have been £5 12s. 6d.; I am not quite sure which, but something of the order of five guineas was considered enough.

For the reasons I have endeavoured to state, I agree with my Lord that the appeal should be allowed. But, in fairness to the taxing master, I think I may point out that the argument which has succeeded in this court was not in fact taken, or was not clearly taken, in the objections raised by the solicitors to the taxation. That appears, I think, from their reasons for objections. They are referred to in those reasons as the respondents, the applicant for the taxation being the client Marshall: "The "respondent contends that on the strict interpretation of para- "graph 1 (*h*) of the Solicitors' Remuneration (Registered Land) "Order, 1925, the scale charge prescribed in the schedule to "that Order is applicable in this case because there was neces- "sarily a 'perusal' of the contract and conditions of sale as a "preliminary to the performance of the remaining work referred "to in the said paragraph 1 (*h*)." So the solicitors were there seeking to say that they had, within the meaning of sub-paragraph (*h*), perused the contract. The master answered that objection, as I think, quite effectively. He said: "It transpires "that the sale was completed on the basis of such contract"—that is the contract previously prepared before the solicitors were employed—"and that the respondent solicitors, who had taken "the matter over from the former solicitor, prepared no further "contract. These facts show quite clearly that a scale fee has "not been earned. The work to be covered by a scale fee in "these circumstances is set out in paragraph 1 (*h*) and (*j*) of the "Solicitors' Remuneration (Registered Land) Order, 1925 and "1953. In such clause 1 (*h*) the words 'as the case may be' "obviously mean 'according to whether acting for vendor or "'purchaser.'"

In that view of the meaning of "as the case may be" I think the taxing master was right and, although the solicitors had a good point as regards the application of the scale fee, they sought to support it on the wrong ground, for I think it is reasonably plain that there was no perusal of the contract by them within the meaning of sub-paragraph (*h*). The perusal there referred to is surely perusal by the purchaser's solicitor, preparation being by the vendor's solicitor, and "as the case may be" meaning "as may be appropriate having regard to the party for "whom the solicitor is acting." I think the real issue may well have been obscured by the mistaken way, as I think it to have been, in which the solicitors sought to support the contention, in

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itself well founded, that the work here did fall within the work to be remunerated by means of the scale fee.

Accordingly, I agree that this appeal should be allowed.

Appeal allowed.
Bill remitted to the taxing master with a direction that the solicitor was entitled to the scale fee of £53 2s. 6d. in respect of the first item.

Solicitors: *Lesser, Fairbank & Co.*

A. W. G.

[COURT OF APPEAL.]

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Nov. 27, 28, 29, 30; *Dec.* 13.
Lord Evershed M.R., Birkett and Romer L.JJ.

*EVANS MEDICAL SUPPLIES LTD. *v.* MORIARTY (INSPECTOR OF TAXES).

Revenue—Income tax—Capital or income receipt—Sale of "know-how" by manufacturing chemists to Burmese Government—To aid establishment of pharmaceutical industry in Burma—Whether receipt of company's trade or proceeds of sale of capital asset—Depreciation of capital asset—Meaning of "know-how"—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 123 (*Sched. D, Case I*).

A company which carried on the business of manufacturing chemists and wholesale druggists entered into an agreement with the Government of Burma, by which the company agreed to assist the Government in the establishment and operation of a pharmaceutical industry. Under the terms of the agreement the company was to supply technical data and designs for the erection of the factory and the installation of machinery required for the manufacture of the pharmaceutical products. They were also to disclose to the Government the secret processes used by them in the preparation, storage and packaging of the various pharmaceutical products, the products themselves being of known composition. These processes had never been disclosed before to anyone else, and during the seven years' currency of the agreement the company agreed not to disclose them to anyone else in Burma, and to manage the factory and whilst training native personnel to provide the necessary staff meanwhile. The company was permitted to continue its agency in Burma, but that agency would become of less value as the Burmese Government established their own industry. The consideration for the agreement was a lump sum payment of £100,000, together with an annual fee of not less than £25,000 for the obligation to operate and manage the factory during the currency of the agreement:—

Held, (1) that on the true construction of the agreement, the lump sum payment of £100,000 was made in consideration of the obligation undertaken by the company to give to the Government of Burma the necessary information to set up in that country a pharmaceutical industry, as distinct from the further obligation of operating and managing the factory when it had been established, for the period of the agreement.

(2) That there was evidence before the commissioners which

supported their finding that the lump sum payment arose to the company as a receipt of its trade as wholesale druggists, and that that finding was a finding of fact exclusively.

Edwards v. *Bairstow and Harrison* [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48; 36 T.C. 207 distinguished.

(3) That the agreement provided for the disclosure of secret processes of a type analogous to patents and such processes were property of a capital nature. It was not, however, clear whether that disclosure was merely incidental to the provision of services by the company, or whether it constituted a significant part of the consideration for the payment of the lump sum, which to that extent was a capital receipt in the hands of the company, not subject to income tax. The case should be remitted to the commissioners to determine that question and, if necessary, to apportion the payment.

British Dyestuffs Corporation (Blackley) Ltd. v. *Inland Revenue Commissioners* (1924) 12 T.C. 586 and *Handley Page* v. *Butterworth* (1935) 19 T.C. 328 applied.

Decision of Upjohn J. [1956] 1 W.L.R. 794; [1956] 2 All E.R. 706 varied.

APPEAL from Upjohn J.[1]

The assessment to income tax of the appellant company, Evans Medical Supplies Ltd., under Case I of Schedule D for the year 1954–1955 included in the computation of the company's profits for the purpose of the said assessment a sum of £100,000 paid to the company by the Government of Burma under an agreement dated October 20, 1953.

The following facts appeared from paragraphs 3 to 12 inclusive and paragraph 15 of the case stated:

3. The company was incorporated on November 24, 1925, "to carry on business as manufacturing chemists, wholesale "druggists, drug grinders, importers, exporters, and manu-"facturers of pharmaceutical, medicinal, bacteriological and "chemical preparations and articles." The company took over a business which began in the year 1809, and was one of the leading pharmaceutical manufacturers, with a world-wide trade.

4. The company carried on its trade abroad, in some cases by means of subsidiary companies in various countries, in other cases by means of foreign agencies, and for a considerable period prior to the year 1953 it had an agency in Burma. In the year 1953 the Burmese Government decided to build a factory and laboratories in Burma for the purpose of establishing an industry there for the production of pharmaceutical and other products. Accordingly, the Burmese Government dispatched a trade mission to Europe, with a view to inducing some leading firm of manufacturing chemists to advise as to the erection of such a factory, the supply of equipment for manufacture, and to impart to them the processes, formulae, and knowledge necessary to the production and manufacture of pharmaceutical products in Burma.

5. The trade mission got into touch with firms of wholesale

[1] [1956] 1 W.L.R. 796; [1956] 2 All E.R. 706.

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manufacturing chemists on the continent of Europe, and, also, through the medium of United Kingdom Government departments, with the Association of the British Pharmaceutical Industry and finally treated with three leading firms of manufacturing chemists in the United Kingdom of which the company was one. There was keen competition with several continental firms and the British Government was anxious that a British firm should, if possible, come to terms with the Burmese Government. Negotiations were opened between the company and the trade mission on behalf of the Burmese Government; and the company at first suggested a lump sum of £350,000 for the sale of drawings, designs, plans, and technical and other data, and "know-how" necessary for the establishment, erection, and installation of the factory and the commencement of production, and for management services for a period of years. The Burmese Government were unwilling to agree upon a single lump sum, but desired that part of the consideration should take the form of fees based on production. The company then made fresh proposals, which were accepted on behalf of the Burmese Government and embodied in the agreement of October 20, 1953.

[The relevant terms of this agreement are set out in the judgment of Lord Evershed M.R. and were summarized as follows in the case stated:]

6. The agreement, which was in five parts with a schedule, provided under Part I that the company should provide the knowledge which would make large scale manufacture of medical products possible in Burma. The said facilities were to be exclusive to the Burmese Government and were not during the currency of the agreement, which was a period of seven years subject to renewal, to be furnished to any other person or corporation in Burma.

The consideration for the foregoing was described in Part I as "a capital sum of £100,000 . . . payable in the United "Kingdom free from any deductions whatsoever."

7. Under Part II of the agreement, the company agreed to act as purchasing agent for all plant and equipment; to advise on the selection of architects and consulting engineers and on the design and lay-out of a factory on a site chosen by the Burmese Government; to train Burmese nationals in the United Kingdom and in Burma for all technical and administrative positions; to provide experienced European staff in the interim period; and to manage the factory for an initial period of seven years. The remuneration for the said services was to be an annual fee, during the currency of the agreement, of five per cent. of the value of all products produced at the factory or the sum of £25,000, whichever sum was the greater. Under paragraph 6, Part II, the company was also entitled to be reimbursed for moneys expended on behalf of the Burmese Government and to remuneration of the company's directors and employees who proceeded to Burma.

8. Under paragraph 2, Part IV, the Burmese Government agreed not to export, without prior assent of the company, to any other country any of the goods manufactured under the agreement. But, in the event of the consent of the company to the export of goods from Burma being given, there was provision for a royalty upon such goods to be mutually agreed or, failing agreement, to be paid at a rate not exceeding ten per cent. of the sales value.

9. (i) Under Part V, the Burmese Government undertook not to divulge to any other Government, person, body or corporation, information conveyed to them by the company without written consent of the company.

(ii) Under paragraph 2, Part V, it was stated to be "the "desire and intention of the parties to this agreement to enter "into similar agreements in respect of other pharmaceutical and "similar products": viz., products additional to those specified in the schedule.

10. (i) The schedule referred to, forming part of the said agreement specified two main classes of biological products (A) and (B) and a number of pharmaceutical products enumerated under a few broad descriptions (C), (D) and (E). All the products referred to were general types and did not include any of the company's proprietary products. By far the most valuable from the company's point of view were the secret processes involved in the preparation, storage, and packaging of certain human and veterinary anti-toxins, sera and vaccines.

(ii) The secret processes referred to in sub-paragraph (i) above had been evolved at great cost in several fields over a period of 50 years and the company considered that such secret processes were superior to those evolved by other companies. At least two other companies in the United Kingdom, and firms in Western Germany and Holland had the necessary knowledge to prepare such products and did, in fact, prepare them. The company had, however, over a number of years experimented and perfected its own methods of preparing and conserving these products and had never, until it entered into this agreement with the Burmese Government, communicated these methods to any other person or corporation.

(iii) The pharmaceutical products, as broadly classified in the schedule to the agreement, numbered about 3,500 out of 6,500 such products, actually manufactured by the company. Here again, there was no secret as to the composition of the various ointments, pastes, tablets and capsules. The ingredients were set out in the British Pharmacopoeia, and similar products were manufactured by other British and foreign manufacturing chemists. The secret processes consisted in the actual methods of preparation of the products and, also, in the method of storing and packaging. For example, a special type of ampoule was

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used by the company for certain of its products, and the company, by its agreement, undertook to impart its own methods of manufacture and packing to the Burmese Government.

(iv) The processes referred to in sub-paragraphs (i), (ii) and (iii) above, could not be learned by the study of textbooks. Knowledge of these processes was in some cases imparted by the company to the Burmese Government by training suitable Burmese or European staff for employment in the factory in Burma. In other cases the knowledge was being imparted by the direct communication of written information.

11. The company might have erected its own factory in Burma, but its directors were convinced that the Burmese Government was determined to have its own chemical industry in Burma and that several continental firms were willing and able to provide the Burmese Government with the means to do so. In entering into the agreement, the company chose the method of developing its business which seemed to its directors to be the best available in the circumstances. No similar agreement with any other foreign government or any other party had been made by the company. Since entering into the agreement, the company had retained its agency in Burma and had continued to supply this agency with its own products. The company's Burmese agency would become progressively less important as the government factory in Burma came into production. At the time of the hearing of [the appeal before the commissioners] (February, 1955) the factory was not completed but, as provided by the agreement, the minimum sum of £25,000 was being paid as from October 20, 1953.

It was common ground between the parties in this appeal that the annual sum of £25,000 was a receipt of the company's trade as wholesale druggists, to be brought into account in computing its profits for purposes of the said assessment to income tax for the year 1954–1955. The sole issue before the commissioners was as to the sum of £100,000, described in Part I of the agreement as the capital sum of £100,000.

12. For international reasons the company desired not to disclose in its published accounts the said sum of £100,000. Accordingly, with the approval of the Board of Trade, only general reference was made in the chairman's report for the year ended December 31, 1953, and in the supplement to the report. The actual sum was included in the balance sheet and profit and loss accounts, with other figures not material to this case, under the headings "Undistributed profits including reserves"; "Tax "refund for exceptional depreciation, tax provision no longer "required and a capital receipt," "Transfer from profit and "loss appropriation account." It was common ground between the parties to this appeal that this method of accounting for the said sum of £100,000 was not material to the question whether such sum was properly to be included in computing the profits of the company's trade for the said year 1954–1955.

15. The commissioners who heard the appeal held: (i) that it was not possible, on the evidence set out above, to consider each part of the agreement of October 20, 1953, separately. While the factory was in course of erection; while the training of staff was proceeding; and while plant and machinery were being obtained, payments, which the company admitted to be of an income nature, were being made, and they were unable to take the view that the said sum of £100,000 was paid simply for the sale or assignment to the Burmese Government of secret processes analogous to patents.

(ii) Even if the view was taken that the main part of the consideration of £100,000 was received by the company for imparting these secret processes to the Burmese Government, they were still of opinion that the company had not sold or assigned any property. For example, other British and continental firms admittedly had the knowledge and did prepare anti-toxins, and the company after the signing of the agreement, as much as before, was still in a position to prepare such products according to the formulae and methods which it had perfected, which remained secret, except to the extent that some of them had been imparted to the Burmese Government.

(iii) Considering as they did that the whole agreement had to be read together, they thought that it was one for the provision of services. The provision by the company under Part I of the agreement of what, in paragraph (D) of that part, were called "facilities" was not in their opinion the sale or assignment of a capital asset in consideration of a capital price, nor was it the grant of a licence in consideration of a capital payment.

(iv) They also rejected the company's alternative contention that the said sum did not arise to the company as a receipt of its trade as wholesale druggists because it had never previously entered into such an agreement. On the contrary, they held that the company had, on the evidence in this case, chosen the method which appeared to its directors to be the best means of exploiting its business as wholesale druggists in Burma, such method being in their opinion clearly within the powers taken by the company in its memorandum of association. They, therefore, held that the sum of £100,000 arose to the company either in the course of the trade which it had hitherto carried on or in the course of a new trade which it commenced to carry on on October 20, 1953, and that in either event the said sum was properly included in the computation for income tax purposes of the company's profits as wholesale druggists for the said year 1954–1955.

(v) Accordingly, they dismissed the company's appeal and adjourned it for agreement of figures in accordance with their decision in principle.

The company appealed and Upjohn J. reversed the decision of the commissioners, holding that their finding that the agreement was within the general scope of the company's continuing

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and existing business though one of fact could not be supported by the evidence before them, and, secondly, that even if the agreement had been within the scope of the company's business at the relevant time the payment of the £100,000 should not be treated as part of the profits or gains arising out of that trade because it related to the sale by the company of a capital asset, that is, its "know-how."

The Crown appealed.

Sir Frank Soskice Q.C., *Sir Reginald Hills* and *Montagu Temple* for the Crown.

John Senter Q.C. and *Anthony Barber* for the company.

In addition to the cases referred to in the judgments the following were cited in argument: *Stevenson Jordan and Harrison* v. *Macdonald & Evans* [2]; *Constantinesco* v. *The King* [3]; *Mills* v. *Jones* [4]; *Exchange Telegraph Co. Ltd.* v. *Gregory & Co.* [5]; *The Federal Commissioner of Taxation* v. *United Aircraft Corporation* [6]; *Glenboig Union Fireclay Co. Ltd.* v. *Inland Revenue Commissioners* [7]; *Rustproof Metal Window Co.* v. *Inland Revenue Commissioners* [8]; *Wiseburgh* v. *Domville* [9]; *Anglo French Exploration Co. Ltd.* v. *Clayson* [10]; *Desoutter Bros. Ltd.* v. *Hanger & Co. Ltd.* [11]; *Californian Copper Syndicate Ltd. and Reduced* v. *Harris* [12]; *Rees Roturbo Development Syndicate Ltd.* v. *Ducker* [13]; *J. Gliksten & Son Ltd.* v. *Green* [14]; *Harvey* v. *Caulcott* [15]; *Cooper* v. *Stubbs* [16]; *Fry* v. *Salisbury House Estate* [17]; *Bentleys, Stokes and Lowless* v. *Beeson* [18]; *Golden Horseshoe (New) Ltd.* v. *Thurgood.* [19]

Cur. adv. vult.

December 13. LORD EVERSHED M.R. The question raised on this appeal is whether a sum of £100,000 paid to Evans Medical Supplies Ltd. (whom I will hereafter call "the company") by the Government of Burma pursuant to an agreement dated October 20, 1953, was rightly included in the company's assessment for income tax for the year 1954–1955 as part of "the annual profits or gains arising to the company from its trade" during the year of assessment under Case I of Schedule D, now

[2] [1952] 1 T.L.R. 101.
[3] (1927) 43 T.L.R. 727; 11 T.C. 730.
[4] (1929) 46 T.L.R. 118; 14 T.C. 769.
[5] [1896] 1 Q.B. 147; 12 T.L.R. 18.
[6] (1943) 68 C.L.R. 525.
[7] 1921 S.C. 400; 1922 S.C.(H.L.) 112; 12 T.C. 427.
[8] [1947] 2 All E.R. 454; 29 T.C. 243.
[9] [1956] 1 W.L.R. 312; [1956] 1 All E.R. 754.
[10] [1956] 1 W.L.R. 325; [1956] 1 All E.R. 766.
[11] [1936] 1 All E.R. 535.
[12] (1904) 6 F. 894; 5 T.C. 159.
[13] [1928] A.C. 132; 44 T.L.R. 307; 13 T.C. 366.
[14] [1929] A.C. 381; 45 T.L.R. 274; 14 T.C. 364.
[15] (1952) 33 T.C. 159.
[16] [1925] 2 K.B. 753; 41 T.L.R. 614; 10 T.C. 29.
[17] [1930] A.C. 432; 46 T.L.R. 336; 15 T.C. 266.
[18] [1952] W.N. 280; [1952] 1 T.L.R. 1529; [1952] 2 All E.R. 82; 33 T.C. 491.
[19] [1934] 1 K.B. 548; 18 T.C. 280.

incorporated in section 122 of the Income Tax Act, 1952. [His Lordship stated the facts and continued:]

The agreement begins by certain recitals, thus: "(1) The "Government of the Union of Burma propose to build in Burma "a factory and laboratories (hereinafter together referred to as "'the factory') for the purpose of establishing an industry there "for the production of pharmaceutical and other products. "(2) Evans Medical has developed and owns processes formulae "and knowledge relating to the manufacture of pharmaceutical "products and to the use of machinery plant appliances and "devices used in such manufacture. (3) For facilitating the "building and running of such factory Evans Medical propose to "supply the Government of the Union of Burma with informa-"tion and to organize the factory in the manner hereinafter "mentioned." The agreement is then divided into separate parts—I, II, III, IV and V—and it may be said that the second and third recitals relate particularly to Parts I and II respectively. The first part, which I will read substantially in full, is as follows: "Part I. In consideration of the payment to Evans "Medical by the Government of the Union of Burma of the "capital sum of £100,000 sterling payable in the United Kingdom "free from any deduction whatsoever (A) Evans Medical will "provide and make available to the Government of the Union "of Burma all drawings designs and plans and technical and "other data and 'know-how' necessary for the establishment "erection and installation of the factory and the commencement "of production thereat of the pharmaceutical and other products "mentioned in the schedule hereto. (B) Evans Medical will "supply to the Government of the Union of Burma designs and "lay-out for the erection of plant including machinery and equip-"ment and all other requisites and shall supply full data and "specifications with drawings and instructions and all other "information relating to the sources and manufacturerers and "suppliers of such machinery and equipment. (C) Evans "Medical will make available to the Government of the Union "of Burma all information relating to the supply of prototype "machinery and equipment. . . . (D) Evans Medical hereby "undertake that during the currency of this agreement the "facilities hereby agreed to be furnished to the Government of "the Union of Burma under the preceding sub-clauses of this "clause shall be exclusive to the said Government and shall not" —that is, the facilities supplied by Evans Medical shall not— "during the currency hereof be furnished to any other person or "corporation in Burma."

Part II is of greater length and consists of eight clauses, many of them subdivided. I shall not read them all. But under the first clause Evans Medical undertook to advise the Government about how to proceed with the building and operation of the factory, and also provided that they would act as purchasing agents for the purchase of the plant. Clause 2 put upon the

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company an obligation to act as managers, and, according to clause 3, they therefore undertook to provide and train all the necessary staff, particularly to train Burmese nationals for the purpose.

In clause 5 it is provided that "As remuneration for the "services provided for in Part II of this agreement the Govern-"ment of the Union of Burma will pay to Evans Medical a fee "in respect of each year of the continuance of this agreement "amounting" to whichever should be the greater of two sums, five per cent. of the value of the products produced at the factory, or £25,000 sterling. There were further provisions as to that payment. In clause 6 was a provision for repaying disbursements. The rest of Part II I can, I think, for present purposes pass over.

Part III consists of one single sentence: "With the exception "of Part I of this agreement"—that is the first obligation to give advice and all the rest of it—"this agreement shall apply "to alcohol and medicinal yeast."

Part IV states the term of the agreement, and it will be recalled that in paragraph (D) of Part I the obligations as to non-disclosure to anyone else in Burma were expressed to be for the currency of the agreement. "The period during which "this agreement shall remain in force shall be seven years from "the date hereof but this agreement may be renewed on the "same or similar terms," and it is said that the parties should consider renewal by a certain date. Paragraph 2 provides: "Subject as hereinafter mentioned the Government of the Union "of Burma will not without the written consent of Evans "Medical export to any other country any of the goods manu-"factured in accordance with the provisions of this agreement"; and there were provisos which qualified, to some extent not material for present purposes, that obligation.

Part V contained two provisions. "1. The Government of "the Union of Burma will not divulge to any other Government "person body or corporation such information as is conveyed "to them by Evans Medical under the provisions of this agree-"ment without the written consent of Evans Medical which "consent is not to be unreasonably withheld." The last provision was more an aspiration than a bargain: "It is the desire "and intention of the parties to this agreement to enter into "similar agreements in respect of other pharmaceutical and "similar products as may be mutually agreed from time to time."

The schedule, which had been referred to, as will be recalled, in Part I, contained under five heads various types of pharmaceutical, medicinal, bacteriological, chemical and similar products. The first was "human and veterinary antitoxins sera and "vaccines toxins and toxoids." The second was "vaccine "lymph," and the third, fourth and fifth were other types of products. I have mentioned, however, specifically (A) and (B) for reasons which will later appear.

I have recited the terms of the agreement at length, since one of the complaints made by the company of the determination of the Special Commissioners is that it proceeded upon an erroneous interpretation of the agreement, in so far as the commissioners declined to treat the consideration moving from the company in return for the payment of £100,000 provided by Part I as limited by the terms of Part I itself.

[His Lordship read paragraph 15, subparagraphs (i) (ii) and (iii), of the case and continued:] It is an obvious truism that as a general rule no part of any written document can be read or construed save in the relevant context provided by the document as a whole; and, to do them justice, I am not entirely clear that the commissioners meant by the language I have read from paragraph 15 of the case to do more than acknowledge the general rule. At the same time, I think it is true that the obligations which the company undertook in return for the payment were confined to those specified in the four paragraphs lettered (A) to (D) of the agreement, and if the commissioners intended otherwise, then they were wrong. Having said so much, I doubt whether the solution of the present problem is thereby much advanced. Part I of the agreement cannot on any view be considered in complete isolation from the rest of the agreement. To take one example, the duration of the obligations imposed in paragraph (D) involve a necessary reference to Part IV. Broadly speaking, it may fairly and justly be said that the obligations undertaken by the company in Part I were obligations not merely to impart secret formulae, but were obligations to give to the Burmese Government the necessary instructions, information and advice to enable the Government to erect and establish the local factory capable of producing thenceforward the required supply of pharmaceutical and other articles. By way of contrast, Part II imposed on the company an obligation for a specified period to manage the production business, when started, and for that purpose to train the necessary Burmese personnel, and in the meantime to provide trained personnel themselves. For the former obligation, the single sum of £100,000 was to be paid by the Burmese Government; for the latter an annual sum of not less than £25,000, from the date of the agreement. Put as briefly as possible—and this is the substance of the company's case—the payment of £100,000 was a single lump sum payment, the price which the Government of Burma agreed to pay in order to be given the necessary information so as to be put in the required position to enable them to set up in Burma the means of production of the required pharmaceutical and other articles.

But, in my judgment, this analysis of the agreement does not in the end much advance the solution of the questions which have to be determined. These are stated by the judge thus: first, whether the transaction recorded in the agreement fell within the scope of the company's business as it was carried out

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at the time the agreement was made; and, second, whether, if it did, nevertheless the sum of £100,000 ought in the company's hands to be treated not as capital but as income or as part of the annual profits or gains arising from the company's trade. If either of these questions ought properly to be answered in the negative, then the company is entitled to succeed on this appeal.

The judge so answered both questions. As regards the first, the commissioners undoubtedly, in my judgment, purported to give an affirmative answer; to find as a fact upon the evidence that the 1953 agreement, though of a special and unprecedented character imposed by special conditions dictated by Burmese Government policy, was none the less within the general scope of the company's continuing and existing business operations—the means which the company's board of directors chose as best adapted in the circumstances for the development of its business interests. The judge, however, though of opinion that the question was one of fact exclusively, came to the conclusion that the determination of the commissioners could not be supported.[1] "I "am content to rest my judgment on this part of the case by "saying that, in my view, there was no evidence to support "the commissioners' determination or in Lord Radcliffe's words, ". . . the true and only reasonable conclusion contradicts their "determination."

Upon this matter I am, with all respect to the judge, unable to agree with him. Upon this question, as also upon the second, it seems to me that the difficulties of the judge may have been increased by the suggestion originally put forward by or on behalf of the Crown that the transaction entered into with the Burmese Government constituted a new departure on the company's part, an embarking by it upon a distinct trade or business different from that (sometimes in the case called, though I venture to think inadequately, "wholesale druggists") in which the company had previously engaged. Had this been in truth the case, the Crown would plainly have been in difficulty in sustaining the claim for the inclusion of the £100,000 in the general sum of taxable profits arising from the company's then trade for the taxable year in question. During the hearing before him Upjohn J., as we were informed, strongly pressed counsel for the Crown upon this part of their contentions as recorded in paragraph 14 (iv) of the case stated,[2] and the particular contention was ultimately abandoned before him by the Crown.

It may be that this course of events in some degree influenced the judge's conclusion. Agreeing with him, however, that the question is one "essentially of fact" I have found it impossible

[1] [1956] 1 W.L.R. 794, 802.

[2] Paragraph 14: "(iv) that the "provision of the facilities agreed to "be furnished under Part I of the "said agreement was within the trad-"ing objects of the company, and, in "so far as the said sum of £100,000 "was received in consideration for "provision of these facilities, it arose "to the company either from the trade "it had previously carried on or from "a new trade which it had commenced "to carry on on October 20, 1953."

to accept his view that there was no evidence to support the commissioners' determination.

The situation which in Burma faced this world-wide business was that, as a matter of policy, the Government of that country had determined to undertake locally themselves or through some government agency the production of the pharmaceutical and other articles which had hitherto been imported into Burma from abroad. That being so, what, as a matter of business, was the company to do? The evidence of the company's chairman and managing director upon the matter (given, no doubt, in answer to questions put by one or other of the commissioners but nonetheless reliable on that account) is recorded as follows in paragraph 11 of the case: "In entering into the agreement, the "company chose the method of developing its business which "seemed to its directors to be the best available in the circum-"stances." This evidence is picked up, as it were, and repeated in the commissioners' conclusions in paragraph 15, subparagraph (iv), of the case: "We also rejected the company's alternative "contention that the said sum did not arise to the company as "a receipt of its trade as wholesale druggists because it had "never previously entered into such an agreement. On the "contrary, we held that the company had, on the evidence in "this case, chosen the method which appeared to its directors "to be the best means of exploiting its business as wholesale "druggists in Burma, such method being in our opinion clearly "within the powers taken by the company in its memorandum "of association."

Mr. Senter subjected this paragraph to considerable textual criticism. Thus, he said that the reference to the memorandum and articles indicated that the commissioners had regarded the fact that what was done in October, 1953, was intra vires the company's memorandum as being conclusive of the question of fact which they had to determine. I do not agree. It does not seem to me that the commissioners were doing more than note (as Bankes L.J. did in *British Dyestuffs Corporation (Blackley) Ltd.* v. *Inland Revenue Commissioners*[3]) that what was done was in fact within the scope of the company's business powers.

Mr. Senter also strongly criticized the final sentence of paragraph 15 (iv), which reads as follows: "We, therefore, held that "the said sum of £100,000 arose to the company either in the "course of the trade which it had hitherto carried on or in the "course of a new trade which it commenced to carry on on "October 20, 1953, and that in either event the said sum was "properly included in the computation for income tax purposes of "the company's profits as wholesale druggists for the said year "1954–1955." The sentence undoubtedly reflects the argument of the Crown that the agreement marked the adoption by the company of a new and distinct trade, to which I have already

[3] (1924) 12 T.C. 586.

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referred. But, in my judgment, the sentence records the determination of liability—possibly not with entire accuracy in the circumstances—which flowed from the finding of fact in the all-important sentence preceding it, which in turn echoed the clear finding, based on the evidence of the chairman and managing director, contained in paragraph 11 of the case. I add a reference to a supplement issued by the directors to the company's report and accounts for the year 1953 which was exhibited to the case stated. In that document occur the following observations: "Experience and technology, let us call it know-how, is "becoming an increasingly important export commodity. Under-"developed countries are no longer content to buy goods of the "Western world, they want to make the goods themselves. So "the West must be prepared to sell know-how. . . . Some time "ago the Burmese Government decided to set up a pharma-"ceutical industry to make Burma less dependent on outside "supplies of necessary medical goods. It was no use, in Britain, "to shed tears about the possible loss of future exports. Burma "meant to have her new industry, and many continental firms "were willing and able to provide her with the means to do so. "Evans Medical, with the approval of Her Majesty's Govern-"ment, joined in the competition. On October 20 the agreement "was signed." Then it states what was the substance of the agreement.

In my judgment, it cannot be doubted, with all respect to the judge, that there was ample evidence to justify the commissioners' conclusion of fact in paragraph 15, subparagraph (iv), of the case stated.

Upjohn J.'s reference to Lord Radcliffe in the passage from his judgment which I have read was a reference to the noble Lord's speech in *Edwards* v. *Bairstow and Harrison*.[4] The question there was whether the purchase for resale by the taxpayer of certain spinning machinery and its later resale in parcels at a substantial profit constituted "an adventure in the nature "of trade." The question had been answered negatively by the Special Commissioners, and this court, affirming the decision of the judge of first instance [Wynn-Parry J.], had thought (in reliance upon certain earlier decisions) that the determination of the Special Commissioners ought not to be disturbed. The House of Lords, on the other hand, held that the question whether the facts, as found to have occurred, did or did not constitute "an "adventure in the nature of trade" was, in truth, one of law, and that the facts found pointed irresistibly and inevitably to the result that they did.

I quite agree with Mr. Senter that the principle stated by Lord Radcliffe cannot be confined to the simple question whether particular deals constituted "an adventure in the nature of "trade." Whatever the specific question is—whether particular

[4] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48; 36 T.C. 207.

facts fall or do not fall within some formula in the statute—that question must ultimately depend upon a proper interpretation of the formula. No such question, however, here arises. The point here is whether what the company did was done by it in the course of its trade then being carried on; and that question, as the judge himself stated, is essentially one of fact and does not involve any question of interpretation of the terms of the statute.

There remains the second question, namely, is the £100,000, though received in the course of trade generally, capital in the hands of the company? The judge answered "Yes." He said [5]: "The effect of the contract was this: the company parted "with its secret processes to the Burmese Government for ever, "but upon the terms that the Government would not without "the consent of the company impart such information to another, "such consent not to be unreasonably withheld. The company "remained at liberty to carry on its wholesale trade there, and, "in legal theory, could no doubt have thereafter set up a com-"peting factory in Burma. In addition, the company was to "supply technical data, drawings, designs and plans for the erec-"tion of a factory and of the installation of machinery appropriate "and suitable for the manufacture of these known pharmaceutical "products and for their processing by these secret processes. "After the expiry of the contract (but not before), the company "was at liberty to impart its 'know-how' in relation to these "matters to others in Burma." The judge thought, and I agree with him, that for this purpose the recitals which I have already read (particularly the second recital) were important. As appears from the passage I have read, in his view the company was "parting for ever" with an asset. So again he says [6]: "the "company was, in fact, parting for ever with its secret "information in its methods of preparation, packing and preser-"vation . . . it was parting for ever with part of a valuable "asset, and was doing so to enable an entirely new and competing "industry to be set up there. That industry established by the "skill and 'know-how' of the company, could embark on an "export trade which could compete with the company's own "products in other countries. In that sense the company was "dissipating its asset, and it must be remembered that a secret "process once communicated to another is in jeopardy; if it gets "into the wrong hands, the grantor has no protection." In reference to that paragraph it will, however, be recalled that the Burmese Government was under obligation (subject to certain qualifications) not to export the goods and information save with the consent of the company.

The commissioners had taken a different view, as evidenced from paragraph 15, subparagraphs (ii) and (iii), of the case, already recited. In their opinion, Part I amounted to no more than an obligation to provide services without any sale or assignment.

[5] [1956] 1 W.L.R. 794, 805. [6] Ibid. 806.

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I have found this point one of considerable difficulty, but I take as my test the proposition stated by Bankes L.J. in the *Dyestuffs* case [7]: "The real question is, looking at this matter, "is the transaction in substance a parting by the company with "part of its property for a purchase price, or is it a method of "trading by which it acquires this particular sum of money as "part of the profits and gains of that trade?"

On the side of the Crown it is said, first, that the obligations in Part I and Part II of the agreement are really of the same kind. They are, as the commissioners describe them, obligations to provide services. Secondly, it is said that although there are references to secret processes in the argument and also in Upjohn J.'s judgment and in the case, there is, save in the recital in Part I, no mention in terms of such secret processes at all. Therefore, the disclosure of secret processes was merely incidental to the main obligation; and it does not follow, as Sir Reginald Hills pointed out, that a payment is not an income payment merely because some capital assets are thereby involved. Consequently, thirdly, once it is agreed or held that the transaction was within the scope of the ordinary existing business of the company, there is nothing amounting to a parting at all with a capital asset.

To my mind these arguments are formidable. There is no evidence that the £100,000 was "paid for the company's "superiority" in this field of business. There are no grounds, as Sir Frank Soskice observed, for saying that any secret processes or knowledge were necessarily impaired; it may be that their value might be enhanced. In other words, on this argument, there is no capital asset involved, and, in any case, no parting with it.

On the other side, Mr. Senter has said that the secret processes were in fact extremely valuable assets, and that the obligation in Part I was to give the benefit of them to the Burmese Government. In other words, says he, the sum paid by the Burmese Government was to put them in a position to start up their work. An example was given in the course of the argument of a well-known beverage, made according to a secret formula. If the proprietors of that beverage agreed to disclose that formula to someone else, there is no doubt that that someone else would pay a very large price for it, and no doubt also, I should have thought, that the sum received by the proprietors would be capital in their hands.

It will be seen that the question of secret processes looms, therefore, very large, and I refer particularly to paragraph 10, subparagraphs (i) and (ii) of the case stated. [His Lordship read the subparagraphs and continued:] We were referred to a very large number of cases. For the most part they deal with such obvious subject-matters of property as patents or copyrights and show that a parting with some interest in these, even though

[7] 12 T.C. 586, 596.

limited, may be equivalent to parting with a capital asset, especially when supported by restrictive covenants. Lord Greene M.R. said in *Withers* v. *Nethersole* [8] that the only principle to be extracted was that each case depended on its own circumstances, which (states the Master of the Rolls [9]) "is not particularly "helpful." Later, however, in his judgment in that case, he used these words,[10] after referring to *Inland Revenue Commissioners* v. *British Salmson Aero Engines Ltd.*[11]: "This decision "is a clear authority, so far as this court is concerned, that a "lump sum payment received for the grant of a patent licence "for a term of years may be a capital and not a revenue receipt; "whether or not it is so must depend on any particular facts "which, in the particular case, may throw light upon its real "character, including, of course, the terms of the agreement "under which the licence is granted. If the lump sum is arrived "at by reference to some anticipated quantum of user it will, "we think, normally be income in the hands of the recipient. "If it is not, and if there is nothing else in the case which points "to an income character, it must, in our opinion, be regarded as "capital. This distinction is in some respects analogous to the "familiar and perhaps equally fine distinction between payments "of a purchase price by instalments and payment of a purchase "price by way of an annuity over a period of years."

One case, however, is more directly in point, namely, *Handley Page* v. *Butterworth*.[12] In that case, part of the payment received by the taxpayer was in respect of the disclosure by him of secret processes. The question arose, therefore, as it has arisen here, whether the disclosure could be regarded sensibly as in the nature of the sale of some asset or piece of property. In that connexion, the late Lord Romer, when sitting as a member of this court, said [13]: "A patentee has, of course, a monopoly, "and that monopoly, which is a right of preventing other people "utilising his invention, is a capital asset in his hands. He may "exploit that capital asset in either or both of the following "ways: he can himself exercise his invention for profit, or he "can grant licences to others to do so on payment of royalty. "The profit he derives by exercising the invention himself or the "profit he derives from the royalty are profits and gains within "the meaning of Schedule D, notwithstanding the fact that "every year his capital asset is diminishing in value. If, on the "other hand, he sells the monopoly, or if—I cannot remember "that such a case has ever happened—he surrenders his "monopoly in consideration of a payment, the payment he "received for the sale of the patent or the payment he received "for surrendering his monopoly would be a capital asset in his "hands and none the less so because, after surrendering the

[8] (1948) 64 T.L.R. 157; [1948] 1 All E.R. 400; sub nom. *Nethersole* v. *Withers* (1946) 28 T.C. 501.
[9] 28 T.C. 501, 510.
[10] Ibid. 512.
[11] [1938] 2 K.B. 482; [1938] 3 All E.R. 283; 54 T.L.R. 904; 22 T.C. 29 (C.A.).
[12] (1935) 19 T.C. 328.
[13] Ibid. 359.

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"monopoly, he himself was in a position which enabled him, in "competition with the rest of the world, still to exercise his own "invention. The owner of a secret process, such as was possessed "by Mr. Handley Page, stands in a very analogous position; he "has not a monopoly at law, but he has a monopoly in fact— "a monopoly in fact arising from the possession by him of the "secret knowledge of the process that he is carrying on. That "secret knowledge is as much his capital asset as is the patent "monopoly the capital asset of the patentee, and, like the patent, "he can use that capital asset in either or both of the following "ways: he can himself carry on the secret process or he may— "it is very seldom done owing to the obvious danger involved— "grant a licence to a third person to carry on the secret process, "securing himself against his secret process being divulged by "that third party to others. In both these cases the profits he "derives from carrying on the secret process himself and the "royalty he might derive from the licensee would be annual "profits or gains within the meaning of Schedule D. But, "supposing he sells his secret process, or supposing, as here, he "surrenders his *quasi* monopoly by making it public to the world, "then I say that, if he gets paid for doing either one or the other "of those things, the money he receives in payment is a capital "asset. Here, at the invitation of the Government, he surren- "dered to the world his secret knowledge, and his capital asset "thereupon ceased to exist." I note, however, that in that case Mr. Handley Page had disclosed his secret processes to the world and had therefore destroyed the secret processes as such. Here the disclosure is only made to one person, and the substantial benefit of these processes still remains with the company.

If the true view of the transaction is that the obligations under Part I are, in substance, obligations to give advice and instruction for completing the factory and getting it ready to start production, and if communication of the secret knowledge and processes is but incidental, then it would appear to me, having regard to the answer which I have already given to question (1), that question (2) should likewise be answered in the same sense as it was answered by the commissioners; that is, that no sale or disposition of a capital asset has been involved, but that the £100,000 was a fee for general services rendered in the course of business.

It was pointed out in support of this view that, as I have already recited, the obligations in Part I, like those in Part II, would endure over a period of time. It was also observed that the factory has not yet, in fact, been built; and Mr. Senter agreed, as I understood him, that the company would have to disclose relevant information and "know-how" acquired at least up to the date when the factory was completed. Paragraph (D) of Part I is in terms linked with the whole period of the agreement, and by those terms the company undertakes not to furnish "facilities" to anyone else in Burma. In these respects, there

is an obvious similarity between Part I and Part II. This is not a case of making once and for all and at one time disclosure of some secret formula or secret formulae, as in the suggested case of the beverage which I have mentioned. Moreover, there is undoubtedly some overlap between Part I and Part II—the obligation to give advice so as to enable the Government to proceed with the building of the factory in paragraph 1 (A) of Part II is, so far as I can see, equally covered by Part I (A).

If, therefore, the alternatives available to the court were to decide the second question either wholly in favour of the company or wholly in favour of the Crown, I should myself feel, on the evidence and the other material available, strongly inclined, if not compelled, with all respect to the judge, to adopt the latter alternative. But I think these are not the only choices and that there is a middle course, having regard to the findings in paragraph 10, subparagraphs (i) and (ii), of the case and to the law as it has been laid down in the *Handley Page* case,[14] I am not satisfied that it would be just to conclude that the disclosure of the secret processes was merely incidental to the general obligations. In my judgment, the company ought at least to have the opportunity of establishing that the disclosure of these processes was an important part of the obligation, and that to a substantial extent, at any rate, the sum of £100,000 ought (upon apportionment if necessary) to be attributable to this disclosure and, to that extent, to be treated as a capital receipt. For it is not, in my judgment, an answer to Mr. Senter's argument in this respect that the company did not part with the information in the sense of making it over wholly to the other party so as to exclude the further use of it by the company anywhere in the world. The cases on patents, for example, *Margerison* v. *Tyresoles Ltd.*,[15] show that it is not a sufficient answer to a claim to treat money received as capital that only limited and non-exclusive rights were granted. In the example given of the beverage, it would be idle to say that the large price paid for disclosure was not capital because the proprietor still remained in possession of the secret himself, and still remained entitled to trade as before.

I would on the whole, therefore, refer the case back to the commissioners to inquire and determine to what extent the £100,000 should be attributed to the transmission by the company to the Burmese Government of their secret processes. This court somewhat rarely refers back cases to the commissioners for further findings; but, having regard to the terms of their existing findings (in paragraph 10 (i) particularly), I think this is a case in which justice requires that we should exercise that discretion. But the right to treat the £100,000 as capital must be limited to the extent to which it was referable to secret processes properly so-called; that is, to formulae or secret processes truly analogous to the subject-matter of letters patent, copyright and things of that kind. It would not, for example, include the sort

[14] 19 T.C. 328. [15] (1942) 25 T.C. 59.

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of information recorded in the plans which were shown to us illustrating the way in which the company would lay out the factory and dispose the apparatus therein. Plans and designs of that kind only represent, I think, the recorded fruit of practical manufacturing or operational experience.

The form of the order may require to be considered so as to give the greatest possible help to the commissioners and to the parties, and this can be discussed by counsel after my brethren have delivered their judgments.

I would discharge the order made by the learned judge and substitute the order which I have indicated in its place.

Birkett L.J. I agree with the judgment of the Master of the Rolls, and I have had the opportunity of reading and considering in advance the judgment which is about to be delivered by Romer L.J., and I agree with it.

These two judgments, in my opinion, cover most adequately and most fully every aspect of this case, both of fact and of law, and I feel that any further judgment would savour, inevitably, of repetition. I am most anxious to avoid that, for no useful purpose is to be served by saying again what has been so well said before. Therefore, I am content in this appeal to express my full agreement with the judgment delivered by the Master of the Rolls and that about to be delivered by Romer L.J.

Romer L.J. I respectfully agree with the Master of the Rolls, and for the reasons which he has stated, in the conclusion that there was evidence before the Special Commissioners upon which they could properly find that the sum of £100,000 now in question was received by the company in the course of its trade. There is nothing that I desire to add upon that aspect of the case, and I propose to confine such observations as I have to make to the question whether the sum should, for purposes of taxation, be treated in the hands of the company as income or as capital.

Upjohn J., reversing the decision of the commissioners, held that the £100,000 ought properly to be regarded as capital; and in so far as it represented consideration moving from the Burmese Government for the communication to them of the company's secret processes (properly so called) I am in agreement with the judge.

The commissioners, in my judgment, approached this question on a misconstruction of the agreement of October 20, 1953. Their relevant finding on the matter is stated in paragraph 15 (i) of the case as follows: "We . . . held that it was not possible on the "evidence . . . to consider each part of the agreement . . . "separately. While the factory was in course of erection; while "the training of staff was proceeding; and while plant and "machinery were being obtained, payments, which the company "admitted to be of an income nature, were being made, and we "were unable to take the view that the said sum of £100,000

"was paid simply for the sale or assignment to the Burmese "Government of secret processes analogous to patents." It appears to me from this reasoning that the commissioners were construing the agreement in the light of what was done under it, which is not, in my judgment, a permissible course to adopt. Whether they would have come to a different conclusion if they had construed the language of the document in the light only of admissible surrounding circumstances, I do not know.

It is, of course, quite true that regard must be had to a written instrument as a whole in order to ascertain the meaning of each and every part of it; and it would be permissible, and indeed, obligatory, to consider the whole of the agreement of 1953 in inquiring, for example, as to the true nature of the activities into which the company was entering, and whether such activities did or did not constitute a new or different trade from that which it had carried on before. But where the commissioners went wrong, as I think, was to alter a clear and specific provision in the agreement because of the general complexion which they attributed to the agreement as a whole. The document is divided into five parts. Under Part I, the company, in consideration of the payment to them of £100,000, undertook the obligations which were set forth in that part. Under Part II, the company undertook the further obligations therein mentioned and "as "remuneration for the services provided for in Part II" were to receive the annual payments provided for by paragraph 5 of that part. It appears to me that the parties to the agreement deliberately isolated the consideration payable to the company under Part I from that to which the company would become entitled under Part II. If the company had fully discharged the obligations undertaken by it under the first part and the Burmese Government had then diverted away from the company the obligations which it had agreed to discharge under the second part, it seems reasonably clear to me that the company could have successfully sued for the £100,000. From this it follows, and is in my opinion the fact, that the £100,000 was solely referable to the promises given by the company under Part I of the agreement, and none the less because there appears to be some degree of overlap between those promises and the services which it agreed to perform under Part II. Accordingly, the only relevant investigation, for the purposes of this aspect of the matter, is as to what the company had to do in order to earn the £100,000 as distinct from what it had to do before it could claim the annual remuneration.

It appears to me sufficiently clear that one of the obligations imposed upon and accepted by the company under Part I of the agreement was to communicate to the Burmese Government the "know-how" relating to its secret processes. The relevant recital in the agreement as to these is the second which, so far as is material, provides: "Evans Medical has developed and owns "processes formulae and knowledge relating to the manufacture

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"of pharmaceutical products." Subheading (A) of Part I provides: "Evans Medical will provide and make available to "the Government of the Union of Burma all . . . technical and "other data and 'know-how' necessary for the commencement "of production thereat" (that is, the factory which was to be built) "of the pharmaceutical and other products mentioned in "the schedule hereto." This obligation is clearly linked up with, and was intended to implement, the second recital; and under it the company bound itself to communicate to the Government the "processes, formulae and knowledge" mentioned in that recital. That this is the effect of paragraph (A) of Part I is, I think, plain, for the Government could not commence production of the scheduled products unless they knew how to make them; and some at least of such products were made under formulae, and in accordance with processes, which were secret. I therefore conclude that part, at all events, of the £100,000 which was to be paid to the company was in respect of secret information as to pharmaceutical products which the company was to impart to the Government.

That this information was of value sufficiently appears from certain findings of the commissioners which are stated in the case. By paragraph 4 the commissioners, after referring to the Burmese Government's decision in 1953 to build a factory and laboratories for the purpose of establishing an industry for the production of pharmaceutical and other products, said: "Accordingly, the Burmese Government despatched a trade "mission to Europe, with a view to inducing some leading firm "of manufacturing chemists to advise as to the erection of such "a factory, the supply of equipment for manufacture, and to "impart to them the processes, formulae, and knowledge neces-"sary to the production and manufacture of pharmaceutical pro-"ducts in Burma." Then, in paragraph 10 of the case it is stated that all the products referred to in the schedule to the agreement "are general types and do not include any of the company's "proprietary products. By far the most valuable from the "company's point of view were the secret processes involved in "the preparation, storage, and packaging of certain human and "veterinary anti-toxins, sera and vaccines. The secret processes "referred to . . . have been evolved at great cost in several "fields over a period of 50 years and the company considers "that such secret processes are superior to those evolved by "other companies. . . . The company has, however, over a "number of years experimented and perfected its own methods "of preparing and conserving these products and has never, until "it entered into this agreement with the Burmese Government, "communicated these methods to any another person or corpora-"tion. . . . The secret processes consist in the actual methods "of preparation of the products and, also, in the method of "storing and packaging. . . . The processes . . . cannot be "learned by the study of text books."

Notwithstanding these findings the commissioners decided that the whole of the £100,000 in question ought properly to be regarded as taxable profits of the company's trade. They did so for two reasons. First, they thought that the whole agreement must be read together; and finding that, so read, it was an agreement for the provision by the company of services, they declined to regard the £100,000 as referable only to the obligations which the company assumed under Part I. In this they were, in my judgment, as I have already said, mistaken. But secondly they held that "even if the view were taken that the main part of the "consideration of £100,000 was received by the company for "imparting these secret processes to the Burmese Government, "we were still of opinion that the company had not sold or "assigned any property. . . . The provision by the company "under Part I of the agreement of what, in clause (D) of that "part, are called 'facilities' is not in our opinion the sale or "assignment of a capital asset in consideration of a capital price, "nor is it the grant of a licence in consideration of a capital "payment."

Upjohn J. took a different view. After pointing out that the commissioners had misconstrued the agreement in the manner which I have already indicated, he said that the company [16] "was "parting for ever with part of a valuable asset, and was doing so "to enable an entirely new and competing industry to be set up "there. That industry established by the skill and 'know-how' "of the company could embark on an export trade which could "compete with the company's own products in other countries. "In that sense the company was dissipating its asset, and it must "be remembered that a secret process once communicated to "another is in jeopardy; if it gets into wrong hands, the grantor "has no protection." I find myself in complete agreement with this analysis of the position.

As to the decision of the commissioners, they were, I think, in strictness correct in saying that the company had not "sold or "assigned any property." The company had not sold or assigned anything. What it did was to share commercial information which was known only to itself, information as to secret processes. In my judgment, however, it was not open to the commissioners, in view of the decision of this court in *Handley Page* v. *Butterworth*,[17] to hold that the secret processes which the company owned were not "property." In referring in that case to certain designs which the well-known aircraft designer Mr. Frederick Handley Page had worked out, but which were not capable of being registered or of being the subject of letters patent, Slesser L.J. said [18]: "what was his property? His property "was the knowledge which he had acquired of the methods for "constructing these machines. . . . His property was his secret "process and his knowledge." Romer L.J. said [19]: "The

[16] [1956] 1 W.L.R. 794, 806.
[17] 19 T.C. 328.
[18] Ibid. 358.
[19] Ibid. 359.

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"owner of a secret process . . . has not a monopoly at law, but "he has a monopoly in fact—a monopoly in fact arising from the "possession by him of the secret knowledge of the process that "he is carrying on. That secret knowledge is as much his "capital asset as is the patent monopoly the capital asset of the "patentee."

The position then is, in my opinion, that at the date of the agreement the company was in possession of certain secret knowledge relating to pharmaceutical products; that that knowledge constituted property of a capital nature; that under the agreement it bound itself to communicate that knowledge to the Burmese Government; and that the obligation which the company so incurred constituted a part, at least, of the consideration for which the company was to receive £100,000. Why, then, should that part of this sum which was properly referable to the imparting by the company of its secret processes be regarded as taxable income? The answer of the Crown is that the company did not part with any capital asset and that the knowledge of the secret processes which the company had is still vested in it; that the company could still continue to exploit this knowledge for its own commercial purposes, and that there was nothing in the agreement to prevent it from doing so or from carrying on its operations in Burma or elsewhere in the same way as it had been doing before; and that, consequently, there was no justification for the view that the value of the secret processes to the company had been in any way impaired by the communication of those processes to the Burmese Government.

This appears to me to be an unrealistic way of regarding the position. The value of the processes to the company lay in the fact that they were secret; and those in question ceased to be secret from the moment when they were communicated to the Burmese Government. True it is that by Part V of the agreement the Government pledged itself not to divulge the information to anyone else without the company's consent; but they became possessed of the information themselves and they would possess it for ever. When, in addition to this, it is realized that the Government wanted the information in order to inaugurate and carry on the manufacture and sale in Burma of products in which the company had hitherto enjoyed a factual monopoly, I cannot doubt but that the imparting of the information diminished the value to the company of its secret processes. What then is the result? "If the property," said Lord Greene M.R. in *Nethersole* v. *Withers*[20] "is permanently diminished or "injuriously affected, it means that the owner has to that extent "realized part of the capital of his property as distinct from "merely exploiting its income-producing character." Lord Greene M.R. was there speaking of copyright, but in my opinion exactly the same principle applies in the case of secret processes.

[20] 28 T.C. 501, 511.

"supposing," said Romer L.J. in *Handley Page* v. *Butterworth*,[21] "he sells his secret process, or supposing, as here, he "surrenders his quasi monopoly by making it public to the "world, then I say that, if he gets paid for doing either one "or the other of those things, the money he receives in payment "is a capital asset." The difference between sharing a secret process with the world and sharing it with only one organization is undoubtedly a difference in degree, but it cannot be regarded as a difference in kind; in the former case a capital asset is destroyed, whilst in the latter case its value is (in Lord Greene's words) "permanently diminished or injuriously affected."

Upjohn J. treated the whole of the £100,000 as being attributable to the impairment of the value of the company's secret processes. This, I think, is unduly favourable to the company, for the subject-matter of Part I of the agreement extended also to such things as drawings, designs and plans and information relating to the supply of prototype machinery, etc., none of which, so far as I can see, is analogous to secret processes, though we have no detailed information about them. It may be, as Sir Frank Soskice suggested in an alternative submission, that the diminution in value of the company's secret processes resulting from the agreement is not great having regard to the world-wide activities of the company. This may or may not be so; as, however, on the true construction of the agreement, some part at least of the £100,000 related to the imparting of information as to the secret processes, that part, in my judgment, reflects the diminution in value of a capital asset of the company and is, accordingly, not subject to tax. The case should therefore be remitted to the commissioners so as to afford to the company an opportunity of proving what proportion of the £100,000 should be treated, having regard to all the relevant circumstances, as referable to the secret processes which were imparted to the Government; and that part, when ascertained, should be deducted from the assessment which has been made upon the company.

Case remitted to commissioners to call further evidence and to determine what part, if any, of the amount of £100,000 should be attributed to the imparting of the secret processes, such part to be treated as a capital receipt, and to adjust the assessment accordingly.

Leave to appeal to House of Lords.

Solicitors: *Solicitor of Inland Revenue; Whitfield, Byrne & Dean for Whitley & Co., Liverpool.*

E. D.

[21] 19 T.C. 328, 360.

[COURTS-MARTIAL APPEAL COURT.]

C.-M. A. C.

1956
Nov. 29.

Lord Goddard C.J., Hilbery and Ormerod JJ.

* REGINA *v.* LINZEE.

REGINA *v.* O'DRISCOLL.

Military Law—Court-martial—Judge-advocate—Status—Summing up by — Retirement of court to consider verdict — Rules governing — Consultation after retirement with senior officer of judge-advocate's department.

The position of a judge-advocate is not the same as that of a judge and he does not have the same authority over a court-martial as a judge has in a court over which he is presiding.

A court-martial is a court sui generis and no analogy can be drawn between the rules governing that court when in retirement and considering its findings, and the rules governing a jury or bench of magistrates under similar circumstances.

APPEALS against convictions.

The appellants, Captain Robert Alexander Craig Linzee of the Gordon Highlanders and Captain Gerald O'Driscoll of the Intelligence Corps appealed against their convictions by a general court-martial at Nicosia, Cyprus. There were four charges against Linzee and three against O'Driscoll. The first charge alleged that both appellants committed an assault occasioning actual bodily harm on a Cypriot subject, named Constantinou, while he was in custody. On the second charge both appellants were charged with a similar assault on a subsequent occasion on Constantinou. The third charge charged both appellants with a conspiracy to pervert the course of public justice. The fourth charge alleged that the first appellant alone committed an assault occasioning actual bodily harm on another Cypriot suspect named Koronides.

The court-martial acquitted both appellants on the first charge and acquitted Linzee on the fourth charge; they convicted both the appellants on the second and third charges and sentenced each to be cashiered. The confirming officer did not confirm the finding of guilty against O'Driscoll on the second charge, but confirmed the finding of guilty against Linzee on the second charge and against both appellants on the third charge. The sentence of cashiering was commuted to dismissal from Her Majesty's service.

The appellants appealed against their convictions.

The case is reported on the points dealing with the following grounds of appeal: (1) That the Deputy Assistant Adjutant-General, the convening officer's representative, Major Brough, was in communication with the court-martial after they had retired to consider their findings, and that that was contrary to the well-established principles that a court which has retired to

consider their findings must do so in private and without consultation with anyone, and that justice must not only be done, but must be seen to be done; and (2) that the judge-advocate misdirected the court-martial on corroboration and should have directed them to acquit.

D. A. Lloyd and *Julian Byng* for Linzee. One of the grounds of appeal is that after the court-martial had retired, Major Brough, the D.A.A.G., was sent for by the president and interviewed by him, which procedure was wholly irregular. A court-martial should be enclosed and be in the same position as a jury who have retired to consider their verdict. Once a court-martial has retired they must remain by themselves together, until they have reached a finding and must not adjourn. By rule 43 of the Rules of Procedure a court-martial must deliberate on their finding in closed court, and rule 63 provides: "Where "a court-martial sit in closed court, no person shall be present "except the members of the court together (but subject to the "next following paragraph) with the judge-advocate (if any), "and any officers under instruction." Major Brough was not under any view an officer under instruction or a judge-advocate. It is important that the appellant should know that everything is justly done.

[Reference was made to *Rex* v. *Bodmin Justices, Ex parte McEwen* [1] and *Reg.* v. *East Kerrier Justices, Ex parte Mundy.* [2]]

P. E. Lewis for O'Driscoll. With regard to the third charge the warning given as to corroboration was not sufficient for the present case. The witnesses on that charge were all co-conspirators and the judge-advocate should have advised the court-martial that they should not convict on the uncorroborated evidence of accomplices. Under such circumstances a judge may in his discretion advise a jury not to convict: *Rex* v. *Baskerville.* [3]

[LORD GODDARD C.J. I should like to hear your submission on the position of a judge-advocate. Is he in the same position as a judge with a jury?]

A judge-advocate is now appointed by the Lord Chancellor and is a judicial officer in every sense of the word. Rule 103 sets out the functions of a judge-advocate. It is true that the rule says that he should advise on questions of law, but his position is far more analogous to that of a judge and jury than to a magistrate and his clerk. The warning given by the judge-advocate as to the danger of convicting without corroboration was not strong enough.

[Reference was made to *Reg.* v. *Stubbs* [4] and *Rex* v. *Harris.* [5]]

[1] [1947] K.B. 321; [1947] 1 All E.R. 109.
[2] [1952] 2 Q.B. 719; [1952] 1 T.L.R. 1618; [1952] 2 All E.R. 144.
[3] [1916] 2 K.B. 658; 12 Cr.App. R. 81
[4] (1855) Dears.C.C. 555.
[5] (1927) 20 Cr.App.R. 144.

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With regard to the point concerning the D.A.A.G.'s communication with the court-martial, it is not what the evidence showed had happened that had to be taken into account when considering whether a serious irregularity in procedure had occurred, but what might have happened. The evil of the matter is that the D.A.A.G., as the convening officer's representative, would have access to all the facts of the case, which might include matters of hearsay, etc. If asked a question, the D.A.A.G. might have been in a position to give a reply which might have been wholly prejudicial. Proceedings before a court-martial should be scrutinized as carefully as those before a jury. The authorities relating to irregular proceedings in connexion with a jury apply to the present case.

[Reference was made to *Rex* v. *Ketteridge*,[6] *Rex* v. *Willmont*[7] and *Rex* v. *Neal*.[8]]

E. Garth Moore, for the Crown, was only called on to address the court on the position of Major Brough.

The appellants' objections are based on fallacies: (1) that a court-martial should be equated with a jury; (2) that the fact that Major Brough was the D.A.A.G. made the matter worse, whereas in fact it made it innocuous; and (3) that the court-martial should not adjourn.

A court-martial should not be compared with a jury or a bench of magistrates. In fact they are in some sense delegates of the confirming authority and are entitled to consult him: rule 44 (*c*). The confirming authority is usually the same as the convening authority. A court-martial may certainly separate, and one reason for so submitting is that the Rules of Procedure, which have been set down with such meticulous care, do not suggest that a court-martial may not separate.

Lloyd and *Lewis* replied.

LORD GODDARD C.J. stated the facts and held that there was no ground for allowing the appeals against the convictions under the second count. Considering the third count his Lordship said: The judge-advocate more than once warned the court-martial of the danger that there might be of acting on uncorroborated evidence, and indeed it was uncorroborated. No one can say that the judge-advocate did not sum up fairly. It is complained that he did not put the matter as strongly to the court-martial as a judge might have done. I do not think it can be put higher than "might have done." The position of the judge-advocate is certainly not that of a judge. He has not the authority over a court-martial that a judge has in a court over which he is presiding; and it can hardly be expected, and I should not expect, a judge-advocate to address a court-martial in

[6] [1915] 1 K.B. 467; 31 T.L.R. 115; 11 Cr.App.R. 54.

[7] (1914) 30 T.L.R. 499; 10 Cr.App.R. 173.

[8] [1949] 2 K.B. 590; 65 T.L.R. 557; [1949] 2 All E.R. 438.

the same way in which a judge may at times address or direct a jury. The judge-advocate's duty is to advise the court-martial on questions of law and to sum up; and we have heard that by an amendment which comes into force in January he himself will rule on questions of law; but he will still have to sum up the facts, and I have no doubt that from time to time there are cases in which a judge says to a jury: "Although I cannot say "that there is no evidence in this case to be left to you as a jury, "I tell you that you ought to acquit." If the judge once leaves a case to a jury which he must do if he thinks there is any evidence to go to the jury, and the jury chooses to convict, they have the right to do it. I cannot imagine a judge-advocate directing a court-martial to acquit, but a judge can sometimes say to a jury: "I think you ought to acquit." Of course, a judge directs to acquit if there is no evidence, and so would a judge-advocate. He would say: "There is no evidence on which "you can convict"; but assuming there is evidence, he can do no more than tender advice to the court-martial. It is said that he did not advise them strongly enough. I do not think we can go into the way the words are used but, as I say, I should not expect the judge-advocate necessarily to address the court-martial in the same way in a particular case that a judge exercising his discretion might direct a jury. It has not been even faintly suggested in this case that there was not evidence on which the court-martial could find this conspiracy, and therefore, again, whatever we may think of the evidence, it is impossible for us to interfere.

The last point raised in the case is that it is said that after the court-martial retired to consider their findings in closed court, as it is called, the Deputy Assistant Adjutant-General, Major Brough, was in communication with them, having been sent for by the president. We have had some rather interesting discussion about the position of the court-martial, and how far it is analogous to a jury. I do not think it is analogous to a jury, and there is no true analogy between a court-martial, a jury or a bench of magistrates. It is a court which is sui generis. It is a peculiar court of itself, but it is certainly not a court in which the old common law rule of jury closure and jury retirement would be applied unless there was statutory force to compel one to do so. Of course, a court-martial must consider their verdict in private, and they must consider their verdict without anybody being called in unless the Rules of Procedure enable them to do it. I certainly should not say that because they separated, that would disqualify or nullify all their further proceedings. A jury is in an entirely different position. Since the earliest days, as soon as a judge has finished his charge to the jury, they are given in charge of the bailiff, who is sworn to keep them in a private place and suffer no one to speak to them except to ask whether they have agreed upon their verdict without the leave

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of the court. The court-martial is not in that position. They are always in the position, and no doubt they generally do so, to consider their verdict and pronounce their finding without separating, but if they want to separate and go to lunch, as far as I know, there is no reason why they should not, but, no doubt, they must not consult other people about the case. But here it was known, as it was getting late, that some message was sent by the president to the Deputy Assistant Adjutant-General, who would be the staff officer of the convening authority, and all we have before us is this note, which was put upon the proceedings: "After the court had closed to deliberate on their "findings and at 1700 hours on April 7, 1956, the president not "in open court and before he could be stopped told judge-"advocate that he was proposing to adjourn the court until "0900 hours on April 9, 1956"—that is certainly not a matter which this court would hold would invalidate the proceedings—"that is, following Monday morning when the court would "recommence their deliberations on the findings. He was told "that this was improper and he must reopen the court where "the matter could be fully discussed. Major Brough, D.A.A.G., "H.Q., Cyprus, for whom the president had sent, subsequently "took this message in to him and came back and reported that "the president had withdrawn his proposal and the court would "then resume their deliberations on the findings." Whether Major Brough had gone into the room before he was sent in by the judge-advocate with that direction, we are left in doubt, or whether he had been into the room on the occasion when the judge-advocate told him to go in to tell the president he could not adjourn, I do not know. But if it is suggested or thought that there had been any sort of suspicion that anything which might be unfair to the accused officers had been done, surely it should have been raised at the time and inquiry could have been made as to why Major Brough went into the room; and it is not to be left on an ambiguous note of this sort for this court to say that there was some serious breach of the rules of procedure or something so irregular that this court would be obliged to find that it invalidated the whole proceedings. It seems to me on a fair reading of this note, it really means this: the president had sent for Major Brough, who was the Deputy Assistant Adjutant-General in charge of all the arrangements for holding the court-martial. It appears from this note that it was simply on the question whether the court-martial had to give their decision that night or whether it was proper for them to adjourn over the week-end. The judge-advocate found that this was going on, and he sent a message by Major Brough to the president to say that that was improper. The court cannot possibly say on anything in this note that they would be obliged to quash the conviction.

For the reasons I have endeavoured to state, however lamentable this matter may be, and however much one may sympathize

with these gallant officers who committed a serious crime of which their fellows take a serious view, this court can only dismiss the appeal.

Appeal dismissed.

Solicitors: *Lomer & Wheater; Registrar of the Courts-Martial Appeal Court; Director of Army Legal Services.*

C. J. E.

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[COURT OF APPEAL.]

* HAYMAN *v.* ROWLANDS.

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Dec. 19, 20.
Denning, Hodson and Morris L.JJ.

Court of Appeal—County court—Appeal from—Judge's note incomplete — Whether court can receive affidavit from solicitor concerned — R.S.C., Ord. 58, *r.* 18 (5).

County Court—Practice—Judgment given in defendant's absence—Defendant mistaken as to date of hearing—New trial refused—Discretion wrongly exercised—County Court Rules, 1936, *Ord.* 37, *r.* 2.

Landlord and Tenant — Rent restriction — Possession application — Arrears of rent—Usual order—Suspended order.

A tenant of premises to which the Rent Restrictions Acts applied withheld his rent for some months on the ground that the premises were out of repair. The landlord started an action for possession; the tenant was informed of the date of the hearing but he failed to appear, and judgment for possession against him was given in his absence. On learning of the order against him, the tenant paid the full amount of rent due into court and applied for a new trial on the ground that he had misread the date of the hearing in the notice and wished to be heard. The application was refused by the county court judge.

On the hearing of the tenant's appeal to the Court of Appeal the court was furnished with the judge's note, which contained only a statement of the evidence given before him and no reasons for his decision. Counsel were not engaged in the county court. An application was made to the Court of Appeal to receive an affidavit about what happened in the county court from a solicitor engaged in the case:—

Held, (1) that R.S.C., Ord. 58, r. 18 (5), applied only where there was a complete note by the county court judge and in the absence of such a note and counsel's notes an affidavit from the solicitor concerned could be received by the Court of Appeal. Such evidence ought, especially if there is any difference, to be submitted to the county court judge beforehand for his comments.

(2) That the tenant, having paid the arrears of rent into court, and having failed to appear at the hearing by reason only of a mistake on his part, should be granted a new trial.

Grimshaw v. *Dunbar* [1953] 1 Q.B. 408; [1953] 2 W.L.R. 332; [1953] 1 All E.R. 350, applied.

APPEAL.

The tenant appealed from an order of His Honour Judge Rawlins, at Windsor County Court, dated October 3, 1956,

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refusing his application for a new trial. The facts are fully set out in the judgment of Denning L.J.

J. G. K. Sheldon for the tenant.
Christopher French for the landlord.

DENNING L.J. An application has been made to us to receive an affidavit from a solicitor about what happened in the county court. The judge's note contains a statement of the evidence given before him but no note of the reasons for his decision. It has been submitted by Mr. French, on behalf of the plaintiff, that we ought not to look at this affidavit. He refers to R.S.C., Ord. 58, r. 18 (5), which states that the judge's note has to be furnished and "in default of production of such a note" the Court of Appeal may hear and determine the appeal upon any other evidence or statement of what occurred before the judge of the county court which appears to the Court of Appeal to be sufficient. He says that as there is the judge's note in the present case we ought not to look at any other evidence or statement. I think that the rule applies only when there is a complete and full note by the county court judge. If his note is not complete and is only a part of a note, then we habitually allow it to be supplemented by the note of counsel or by any other means which appears to us to be suitable. Just as counsel's notes can be adduced before us, so I think, in a case where counsel were not engaged, an affidavit from the solicitor concerned can be received. It ought, especially if there is any difference, to be submitted to the county court judge beforehand for his comments. That has not been done in this case. However, I do not think that we need stand the case over for that to be done. The affidavit has been in the hands of the other side for nearly three weeks, and if they had anything to query in it they ought to have queried it before now.

I think, therefore, that we should receive this affidavit.

HODSON L.J. I agree.

MORRIS L.J. I agree.

The court then proceeded to hear argument on the appeal.

No cases were cited in argument other than those referred to in the judgment.

DENNING L.J. One Hayman is the landlord of a house in Windsor. He bought it only three years ago, and he seeks to eject the tenant on the ground of non-payment of rent. The tenant has been tenant of the house for nine and a half years and is clearly protected under the Rent Restrictions Acts. He withheld the rent for some months at the beginning of this year

because, as he said, the premises were out of repair. That is not in law a good ground for not paying rent. So the landlord summoned him in the county court. On September 12, 1956, the case came on for hearing, but unfortunately the tenant did not appear. We now know from his affidavit that the reason he did not appear was that he had misread the notice; he thought the hearing was for October, not September. At all events, he was not there on September 12, and the judge accordingly gave judgment for the landlord for £30 17s. 10d., the arrears of rent, and ordered the tenant to leave by October 10, only giving him just under a month.

When the tenant learned of the order which had been made against him he promptly went to his solicitor. The solicitor told him that the fact that the premises were not in repair was not a good ground for withholding the rent, and he told him to pay the rent into court. The tenant promptly paid into court on October 1 the full amount of the rent, £30 17s. 10d., and he applied to the judge on October 3 for a new trial. The tenant gave evidence about his mistake in the date. The judge did not disbelieve him, but he refused his application for a new trial. The tenant now appeals to this court, saying that he ought to have a new trial as he has paid all the rent into court and he wants to be heard.

The judge's note did not contain any reasons for his decision. We have under the rules in that behalf admitted an affidavit by the solicitor who appeared in the case. From that affidavit it appears that the judge's reason for refusing a new trial was: "I would have come to the same conclusion anyway, even if the "case was heard afresh today. Even with knowledge that the "full amount of rent had been paid into court I would come "to the same conclusion and order the tenant out." I cannot agree with this reasoning. It would be very unusual indeed for a tenant to be ordered out on the ground of non-payment of rent when the full amount was already paid into court. The every-day practice in these cases under the Rent Acts, if the tenant is in arrear, is to make an order for possession, but to suspend it so long as the current weekly rent and the rent in arrear is paid in. If all the arrears have been paid into court I should not have thought it right that an order for possession forthwith should be made on the ground of non-payment of rent, unless there was something more in the case of which we do not know.

What, then, is to be done? I have always understood that if, by some oversight or mistake, a party does not appear at the court on the day fixed for the hearing, and judgment goes against him, but justice can be done by compensating the other side for any costs and trouble which he has incurred, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits, but so long as he does so, the strength or weakness of it does not matter. I think it plain in this case that the tenant had a defence on the merits. He had a

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defence as to whether it was reasonable to make an order for possession against him. It seems to me that, as the tenant has paid the full amount into court and wants a new trial, he ought to have it. He will probably have to pay the costs thrown away in the court below; but subject thereto I think that he ought to have a new trial. I would allow the appeal accordingly.

Hodson L.J. I agree. Ord. 37, r. 2 of the County Court Rules provides: "Where a defendant to an action or a "defendant to a counterclaim does not appear at the hearing "and a judgment or order is given or made against him in his "absence, the judgment or order and any execution thereon may "on application be set aside and a new trial may be granted." That order gives a discretion to the county court judge, in cases where, as here, the defendant does not appear at the hearing of the case, to grant him a new trial. It is said that, as the county court judge has exercised his discretion, we ought not to interfere. A situation of this kind, however, was considered by this court in *Grimshaw* v. *Dunbar*,[1] where a defendant gave an excuse for not having appeared at the hearing, and that excuse was not contradicted and was accepted. It was pointed out that it is essential that a party to an action should, if possible, have the action heard in his presence, and if by some mischance or accident a party is shut out from that right and an order is made in his absence, justice demands, so far as it can be given effect to without injustice to the other parties, that the party who was accidentally absent should be allowed to come and present his case. I think, following what was said in that case, that we should take the same course here. The county court judge, on the application made by the tenant for a rehearing on the ground that he was not present on the first occasion, said (in effect) that, having heard what he had heard, he did not doubt that he would have made the same order as he made on the previous occasion. He had at that stage heard the evidence of the tenant, who had certain grievances against the landlord, and he also had heard that, on the advice of his solicitor, the tenant had a few days before paid the arrears of rent into court. The county court judge then said that he had heard all that the tenant wanted to say; and on the facts as he knew them he would have made the same order as he originally made. I confess that I do not think that will do, because although he had heard some evidence from the tenant, the landlord, who had given evidence on the previous occasion, had said that the tenant was an unsatisfactory tenant, and his evidence on that point had never been challenged by cross-examination. It cannot, therefore, be said that there has already been in substance the new trial which the tenant seeks. I think that the tenant is entitled to a new trial, at which the question whether or not it is reasonable to

[1] [1952] 1 Q.B. 408; [1953] 2 W.L.R. 332; [1953] 1 All E.R. 350.

make an order in the circumstances of this case should be considered.

In *Dellenty* v. *Pellow* [2] Jenkins L.J. said [3]: "I would agree, "taking the questions in that order, that prima facie where possession is sought on the ground of non-payment of rent, and the "tenant pays the rent into court, or tenders it before judgment, "it would not be reasonable to make an order for possession." It is true that here the payment of rent was not made until judgment had been entered against this tenant because he was absent; but the tenant has paid the rent, and paid it before he made the application to the court. Therefore this case prima facie comes into the same class as *Dellenty* v. *Pellow*.[4] It is true that in that case this court did not interfere with the order for possession which had been made, the county court judge having found that it was not unreasonable to make an order. But no final conclusion upon evidence given on both sides has been given at the trial of this case, and that matter remains to be determined.

MORRIS L.J. I agree with the judgments that my Lords have delivered.

Appeal allowed.

Solicitors: *Bower, Cotton & Bower for William J. Wade, Slough; Charsley Leonard & Co., Slough.*

P. P.

[2] [1951] 2 K.B. 858; [1951] 2 T.L.R. 733; [1951] 2 All E.R. 716.

[3] [1951] 2 K.B. 858, 859.

[4] Ibid.

[CHANCERY DIVISION.]

* HUNTLEY v. THORNTON AND OTHERS.

[1954 H. 976.]

1956
Nov. 27, 28, 29, 30; *Dec.* 3, 4, 5, 6, 7, 11, 12, 13, 20.

Harman J.

Trade Dispute — Act in furtherance of — Conspiracy — Predominant object — Preventing member of union from obtaining employment —Internecine quarrel between members of union—Whether trade dispute—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 3.

The plaintiff, a fitter and turner by trade, was employed at a shipyard at Hartlepool and was a member of the Amalgamated Engineering Union, a duly registered trade union. The district was one in which the great majority of the engineering works were "closed shops." On December 1, 1953, a printed leaflet issued by the executive council of the union was served on the plaintiff instructing him to stop work for 24 hours from the morning of the next day in support of a wage claim. The plaintiff, feeling doubtful about the justification for this step, announced that he

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did not intend to abide by the instruction, and on December 2, 1953, he went to work as usual. In consequence the plaintiff was requested to attend the district committee of the union on December 11, 1953, to explain his conduct which had aroused resentment. At this meeting the plaintiff took up a truculent attitude towards the members of the committee which culminated in abusive language and walked out of the meeting, whereupon the committee passed a resolution in his absence that the executive council of the union be recommended to expel the plaintiff as being "not a fit and proper person to hold membership of the union." This resolution was forwarded to the executive council who declined to act upon it despite several requests from the committee.

The plaintiff, owing to the hostility shown towards him at the shipyard, gave notice terminating his employment there and obtained work at Bradford, 80 miles away, thus being separated from his wife and children and his home, and taking a wage less than he had been receiving. After a fortnight he determined to return and he came back to Hartlepool on January 18, 1954, to seek work. On January 26, 1954, the secretary of the Hartlepool district committee circulated to all shop stewards in the district a letter which contained a resolution of the district committee that "efforts be made in all factories where we have official shop "stewards, to ensure that" the plaintiff was "not allowed to "start work under any consideration" and ending "Trusting "that you will inform your labour office to the effect that should "they give the plaintiff a job, it is our intention to withdraw all "labour in protest." On January 27, 1954, the secretary wrote a letter to T., the secretary of the Tees-side district committee of the union, and informed him that it was believed that the plaintiff was trying to obtain work in that district and apprising him of the Hartlepool committee's decision.

The plaintiff made several attempts to obtain work in Hartlepool but failed. On February 3, 1954, however, he was engaged at a power station in the Tees-side district. On that date T. had brought the letter from Hartlepool before his committee with the result that this body directed him to inform the shop stewards that the plaintiff was not desirable in that district until he had made his peace with his own district committee. In consequence T. directed one L. a shop steward at the power station to oppose the plaintiff's employment there and both of them pressed the employers to dismiss him. As a result the plaintiff was paid off on February 9, 1954. Subsequently the plaintiff endeavoured to make peace with the Hartlepool district committee but his efforts were rejected out of hand pursuant to a resolution of the committee dated February 16, 1954. In July, 1954, he was informed that he had been expelled by the union for arrears of contributions, although in fact the "expulsion" was not authorized and was unknown to the executive council. In May, 1955, after periods of temporary employment, the plaintiff obtained work at an Admiralty establishment 15 miles from his home where non-union labour was employed.

The plaintiff brought an action for damages for conspiracy against T. and L. and the secretary and members of the Hartlepool district committee of the union, and contended (a) that he was unlawfully ordered to strike on December 2, 1953, and (b) that the defendants had since that date conspired to injure him for having refused to comply with that direction. Alternatively, the plaintiff alleged that the acts of the defendants, apart from any element of conspiracy, were in themselves wrongful and tortious.

The defendants denied the plaintiff's allegations and in addition

pleaded section 3 of the Trade Disputes Act, 1906,[1] as a defence to the action:—

Held, (1) that the acts of the defendants, other than T. and L., amounted to a combination to injure the plaintiff in his trade and were not done to further the legitimate trade interests of these defendants, and that, accordingly, those acts were done without justification and the action for conspiracy was maintainable against them.

Observations of Viscount Cave L.C. in *Sorrell* v. *Smith* [1925] A.C. 700, 712; 41 T.L.R. 529 applied. *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* [1942] A.C. 435; 58 T.L.R. 125; [1942] 1 All E.R. 142 applied.

(2) That T. and L. were not guilty of conspiracy since there was no evidence that their predominant motive was to injure the plaintiff, nor were their individual acts of a tortious nature for it could not be said that they did more than inform the employers that the continued employment of the plaintiff would have untoward results.

Hodges v. *Webb* [1920] 2 Ch. 70; 36 T.L.R. 311 applied.

(3) That the defendants guilty of conspiracy were not protected by the Trade Disputes Act, 1906, for there was no "trade dispute" within the meaning of the Act. These defendants were not asserting a trade right, and the dispute if it could be so called was a struggle between members of the same union and no interests of the trade were involved. Nor, in any event, were these defendants' actions in furtherance of a trade dispute, for they were not furthering a trade dispute but merely a grudge they harboured against the plaintiff.

Dallimore v. *Williams & Jesson* (1914) 30 T.L.R. 432 distinguished.

ACTION.

The plaintiff, Leslie Clifford Huntley, a fitter and turner by trade, who at the material times was a member of the Amalgamated Engineering Union, and belonged to the Hartlepool No. 5 branch, brought an action claiming (a) damages for conspiracy, and (b) damages for wrongful interference with his trade or employment against the defendants, Harold Thornton, secretary

[1] Trade Disputes Act, 1906, s. 1: "The following paragraph shall be "added as a new paragraph after the "first paragraph of section three of "the Conspiracy and Protection of "Property Act, 1875:—'An act done "'in pursuance of an agreement or "'combination by two or more per-"'sons shall, if done in contempla-"'tion or furtherance of a trade "'dispute, not be actionable unless "'the act, if done without any such "'agreement or combination, would "'be actionable.'"

S. 3: "An act done by a person "in contemplation or furtherance of "a trade dispute shall not be action-"able on the ground only that it "induces some other person to break "a contract of employment or that it "is an interference with the trade, "business, or employment of some "other person, or with the right of "some other person to dispose of his "capital or his labour as he wills."

S. 5: "(3) In this Act and in the "Conspiracy and Protection of Pro-"perty Act, 1875, the expression "'trade dispute' means any dispute "between employers and workmen, "or between workmen and workmen, "which is connected with the employ-"ment or non-employment, or the "terms of the employment, or with "the conditions of labour, of any "person, and the expression 'work-"'men' means all persons employed "in trade or industry, whether or not "in the employment of the employer "with whom a trade dispute arises; "and, in section three of the last-"mentioned Act, the words 'between "'employers and workmen' shall be "repealed."

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of the Tees-side district committee of the union; John W. Lupton, secretary of the Hartlepool district committee; Norman Langford, convener of shop stewards at North Tees Power Station; and ten members of the Hartlepool district committee of the union, namely, Harold Bryson, Stanley Webster, Charles R. Warnes, Oswald Bradshaw, Robert S. Halcrow, Henry G. Dixon, John Mitchell, John McCann, George N. Winship and William E. Verrill.

The plaintiff also claimed injunctions restraining the defendants from interfering with his employment. The defendants, by their defence, denied the conspiracy, and pleaded section 3 of the Trade Disputes Act, 1906.

The facts are set out in the judgment.

I. J. Lindner Q.C. and *J. L. Arnold* for the plaintiff.

F. W. Beney Q.C., *John Thompson Q.C.* and *Hugh Trenchard* for the defendants.

The following cases not referred to in the judgment were cited in argument: *D. C. Thomson & Co. Ltd.* v. *Deakin* [2]; *Milligan (John) & Co. Ltd.* v. *Ayr Harbour Trustees* [3]; *South Wales Miners' Federation* v. *Glamorgan Coal Co.* [4]; *Brimelow* v. *Casson* [5]; *Rex* v. *Meyrick* [6]; *Loudon* v. *Ryder* [7]; *Pratt* v. *British Medical Association* [8]; *Fowler* v. *Kibble.* [9]

Cur. adv. vult.

Dec. 20. Harman J. read the following judgment: The plaintiff is a fitter and turner by trade and a native of West Hartlepool, where he lives with his wife and children. At the time when the events about to be related begin he was employed at the shipyard of William Gray & Son at Hartlepool and convenient to his home.

At all times material to this action—that is to say, between October, 1953, and March, 1954—and, indeed, since he was apprenticed in 1938, with an interval in and after the war, he was a member of the Amalgamated Engineering Union, a duly registered trade union. That body is governed by rules apparently last revised in 1950. A more confusing document than the rule book it has rarely been my lot to attempt to construe. [His Lordship referred to the relevant rules including rule 22 (1) which provided that a member might for various causes be expelled by his branch with the approval of the executive committee, or might be expelled by the executive council. His Lordship observed that there was no express power in a district committee to deal with expulsions at

[2] [1952] Ch. 646; [1952] 2 T.L.R. 105; [1952] 2 All E.R. 361.

[3] 1915 S.C. 937.

[4] [1905] A.C. 239; 21 T.L.R. 441.

[5] [1924] 1 Ch. 302.

[6] (1929) 45 T.L.R. 421; 21 Cr. App.R. 94.

[7] [1953] 2 Q.B. 202; [1953] 2 W.L.R. 537; [1953] 1 All E.R. 741.

[8] [1919] 1 K.B. 244; 35 T.L.R. 14.

[9] [1922] 1 Ch. 140, 487 (C.A.); 38 T.L.R. 58, 271 (C.A.).

all, and continued:] In the autumn of 1953 a trade union known as the Confederation of Shipbuilding and Engineering Unions, of which the Amalgamated Engineering Union was a constituent, was apparently negotiating with the engineering and shipbuilding employers for a rise in wages. In October a flat rate increase of 15 per cent. had been claimed, and refused by the employers. Following this there was a meeting on November 16 of the national committee of the Amalgamated Engineering Union, when a resolution was passed in the following terms: "This national "committee instructs executive council to call upon the Con-"federation of Shipbuilding and Engineering Unions at the "November 19 meeting, to recommend to all unions party to the "claims to undertake a 24-hour token stoppage in support of the "15 per cent. wage claim."

On November 19 there was a joint meeting of all the executive councils of the constituent unions at which the following resolution was put forward: "This executive council therefore recommends, "at this stage, that all workers in factories and shipyards should "confine their activities to leaving their places of employment for "24 hours on a date to be fixed by the Confederation executive "council."

After an adjournment, at which the executive council of the A.E.U. decided in pursuance of the recommendations of their national committee of November 16 to vote for this resolution, it was put to the vote and carried. Immediately afterwards the Federation executive met again and decided that the 24 hours "cessation of work" should be on December 2, 1953.

Now to call this a cessation of work or a stoppage is a quibble. It is no less a strike if it is only to last 24 hours, and if labour is to be withdrawn without such notice as is required by the various contracts of the strikers with their employers it is an illegal strike and none the less illegal because the several unions who approve it are protected from action by section 4 of the Trade Disputes Act. Moreover, so far as the A.E.U. was concerned the strike was recommended (not called) by the national committee, and assented to by the executive council, and does not seem to have been within any rule of the union. Indeed, the president of the union, in the witness-box, was fain to appeal in justification to the general powers given by rule 15 (17) for action by the executive council "where the rules do not provide to the "contrary."

On December 1, 1953, one Wallace, the shop steward at Gray's Yard, served on the plaintiff at the shop a printed leaflet issued by the executive council instructing him to stop work for 24 hours from the morning of the next day. It appears that the plaintiff felt doubtful about the justification for this step and, having consulted his rule book in the lunch hour and getting (not surprisingly) scant enlightenment from that, he returned to the shop and announced that he did not intend to abide by the instruction.

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He also made some attempt to persuade a fellow member, one Hugill, to do likewise, but without success.

On December 2, the plaintiff came to work as usual, and his mates, who did not, resented this. They held a meeting in the shipyard next day and sent a deputation to the employers asking for the plaintiff's dismissal. The employers refused, whereupon it seems that the plaintiff's fellow workmen refused to speak to him, but took no further action.

On December 4, at a meeting of the Hartlepool district committee Wallace reported that the plaintiff had ignored the instructions to strike, and it was resolved that he be summoned to attend the next committee meeting "for having abrogated the "executive council's direction." Accordingly on the next day the defendant Lupton wrote to the plaintiff as follows. He started by citing the wrong rule, but that again is not surprising. "Dear Sir and Brother . . . I am instructed by my district "committee to summons you to attend the district committee "meeting to be held on Friday, December 11, 1953, in the "Engineers' Club at 7.45 p.m. The reason for the summons "follows on a report that has been given, to the effect that you "failed to carry out the instructions of executive council to cease "work for 24 hours on Wednesday, December 2, 1953. Trusting "that you will avail yourself of the opportunity to defend yourself "on the above charge. Yours fraternally, John W. Lupton, "District Secretary."

On December 5, there was a normal branch meeting of Hartlepool 5, which was attended by, among others, the plaintiff and Lupton. The plaintiff desired to ventilate his position, but was prevented from doing so by the chairman at Lupton's request on the ground that this was a matter to be dealt with by the district committee. The plaintiff then left, followed by Lupton, after which the branch meeting passed the following resolution: "That the branch secretary inform district committee that this "branch recommend to district committee that Brother Huntley "be expelled."

This resolution was, it is said, prompted by a letter to the press which was read to the meeting and assumed to emanate from the plaintiff. It was communicated to Lupton by a letter of December 6. This seems not to have been in accordance with the rules, by which the letter should have been sent to the executive council. It was in these terms: "Dear Sir and "Brother, During the course of the December 5 meeting of this "branch the token stoppage was discussed, arising from this a "resolution was carried which is as follows." Then I omit a bit. "A further resolution was carried, namely, 'That this branch "'recommend that Brother L. C. Huntley (Brassfinisher) be "'expelled from this Union.' This arose through Brother "Huntley working on December 2, 1953, and his statements at "our December 5 meeting made in spite of warnings as to

"jeopardising his position further. Yours fraternally, J. A. "Wilkinson. Branch Secretary."

It will be observed that this resolution was passed in the plaintiff's absence without any warning and after refusing to hear him. Lupton, when he laid it before his committee, did not disclose this fact, though it must have been well known to him.

The district committee meeting was held on December 11. The plaintiff attended it and there were present, according to the minute book, the defendants Bryson, Webster, Warnes, Verrill, Winship, Halcrow, Mitchell, Dixon, McCann and the secretary. In addition Wallace, the shop steward, and Hugill, already mentioned, were present as witnesses.

Item 4 of the minutes reads as follows: "Bro. L. C. Huntley, "Turner, employed at the Central Shipyard, attended in answer "to D.C. summons of December 5, 1953, to answer a charge "of his having refused to carry out E.C.'s instruction to absent "himself from work for 24 hours on December 2, 1953.

"The chairman in opening the discussion asked Bro. Huntley "if he had received his official summons to attend the meeting, "which summons related to rule 13, clause 19. Bro. Huntley "stated that he had received same.

"Bro. Huntley was then asked as to why he had ignored the "instruction of E.C. to carry out the terms of the 24 hours "stoppage of work, to which he replied that the decision of E.C. "was contrary to rule, and that he was not prepared to conform "to any such decisions, and that he would adopt the same "attitude in the future as he had adopted on December 2nd the "the day of the stoppage.

"The chairman then called upon the witnesses to give "evidence, and Bro. Wallace stated that he had given Bro. "Huntley a copy of E.C.'s leaflet at his place of employment. "The secretary then asked Bro. Wallace if it was true that Bro. "Huntley had endeavoured to get other members at his firm to "ignore the instruction of E.C. Bro. Wallace stated that Bro. "Huntley had done so, and he named Bro. Hugill as a witness to "same.

"The chairman then called upon Bro. Hugill, who was in "attendance, to give his evidence; as Bro. Hugill rose to speak "Bro. Huntley jumped to his feet and with arms waving hurled "his rule book and his summons letter on to the table and walked "out of the room shouting that we were only a 'shower'!

"The district committee then considered all the available "evidence and arising from same it was unanimously agreed, "'That D.C. condemn the action of Bro. Huntley in refusing to "'carry out the instructions of E.C. and desire to place on record "'their disgust at the arrogant attitude adopted by him at the "'meeting, also his attempt to coerce other brothers at his place "'of employment to also disregard E.C.'s instructions, and "'recommend to E.C. that Bro. Huntley be expelled from our

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" ' Union, as in D.C.'s opinion he is not a fit and proper person " ' to hold membership of our Union.' "

This appears to be a tolerably accurate account, though no doubt much condensed. It seems that the plaintiff did not conduct his defence with discretion or tact, and that the dispute developed into a wrangle. Two points, however, emerge: first, that the plaintiff justified his action by asserting that the strike was not called in accordance with the rules. I must say that as at present advised I think he was right on this point. If so he was under no obligation to obey the instruction. Secondly, he was confronted with a new charge of which he had had no notice, and which should have been ruled out of order by the chairman. It is not altogether surprising that the plaintiff was angered by this manoeuvre of Lupton's and that he lost his temper, but that, of course, does not excuse the foul language he used.

It seems that there was no evidence that the plaintiff ever tried to persuade more than one fellow member to follow his example, nor any justification for the statement that he had tried " to coerce other brothers." Nevertheless this was one of the grounds on which the district committee, in his absence, decided to recommend his expulsion.

Now it is to be remembered in connexion with these two recommendations by the branch and the district respectively to expel the plaintiff that in this district, as it was boasted on behalf of the defendants, 95 per cent. of the engineering works are closed shops. This means that expulsion from the Union makes it almost impossible to earn a living at the trade in the district. It is not for English lawyers to dislike or distrust the principle of the closed shop, for they are all members of a society which itself lives and thrives on this principle. No man, unless he has served his time and received his union card—that is to say, his call to the Bar—may (save in his own cause) address the Supreme Court of England. Such monopolies are only justified if they are so regulated as to promote the public interest. Moreover, the weapon of expulsion from such a society is a step of the most extreme gravity, only to be entered on after very careful inquiry and in the case of the very gravest offence.

It was admitted by at least some of the defendants that the plaintiff's action had not the slighest effect on the success of the demonstration constituted by the one-day strike. To seek to use such a weapon on such a pretext can only be characterized as a gross abuse. This would appear to have been recognized by the Amalgamated Engineering Union itself, for when the defendant Lupton wrote to the general secretary giving an account of the happenings on December 11 (which repeats the substance of the minute) and urged the executive council to uphold the district committee's decision, he received the following sensible and moderate answer: " Dear Sir and Brother, executive council " acknowledge receipt of your letter dated December 12, 1953, " wherein you set out in detail a report of your committee's

"deliberations concerning the case of Brother Huntley, for "working on the day of the token stoppage.

"We are not surprised to learn of a few cases like your "particular case in view of the time fixed for the operation of the "token stoppage being so close to the date on which the decision "was reached and which left insufficient time to adequately cover "all points which were likely to arise.

"Executive council caused circular letters and leaflets to be "issued covering what was thought to be the main points and "taking into consideration the whole of the different circum-"stances of the various districts, executive council are satisfied "that the demonstration was a huge success.

"Nevertheless, there is the question of action of the various "districts in dealing with the members who failed to give effect "to the instructions of executive council and district committee, "but executive council feel that apart from a strong censure being "passed it would be inadvisable to embark on any other action. "Further, executive council do not feel disposed to approve of any "such disciplinary action you suggest. Yours fraternally, . . . "B. Gardner. General Secretary."

Meanwhile there had been a certain amount of press comment and so-called interviews with the plaintiff. Nothing in this press matter which was drawn to my attention was in any way inaccurate, but evidently public criticism was much resented by the district committee.

On December 18 a further district committee meeting was held, to which the plaintiff was not summoned, and at which the following resolution was passed: "E.C. Letter: Re: Case of "Brother Huntley—After very lengthy discussions it was unani-"mously agreed by D.C. that secretary write E.C. once again "with a view to E.C. approving of D.C.'s decision to expel this "member"; whereupon Lupton wrote the following letter to the general secretary: "Dear Sir and Brother, I am to acknowledge "receipt of your letter of the 15th instant relating to the case of "Brother Huntley, to which I am directed to reply as follows:

"After very careful consideration of executive council's letter, "wherein E.C. do not feel disposed to approve of the disciplinary "action, i.e., expulsion of Brother Huntley as unanimously agreed "by the Hartlepool District Committee at the D.C. Meeting held "December 11, 1953, it is felt by all concerned that we should "again request executive council to reconsider their decision, in "view of the fact that the position of both the district committee "and the whole of the shop stewards' movement in the Hartle-"pools will be placed in jeopardy in view of the fact that "Hartlepool 5th branch, of which Brother Huntley is a member, "at their last branch meeting unanimously adopted a resolution "urging D.C. to recommend this Brother Huntley's expulsion "to E.C.

"Furthermore, D.C. have had the greatest difficulty in "keeping our members employed in the same shop as Brother

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"Huntley from taking this matter into their own hands, as it "was felt with confidence by D.C. that E.C. would without "any doubt agree to his expulsion for having ignored the instruc- "tions of E.C. It must also be pointed out that when Brother "Huntley attended the D.C. meeting to answer the charge "against him he adopted an insulting and arrogant attitude and "hurled not only his rule book, but also an abusive expression "as 'You are only a shower,' at the members of the district "committee; as a result, my committee feels that for the above "expression *alone* E.C. should have, without any hesitation, "agreed to uphold D.C.'s recommendation.

"I am also asked by D.C. to point out that many shop "stewards in the district have stated that in the event of this "man being allowed to retain his membership of our union, that "they will immediately resign from their office; furthermore, "I feel it only right that I should inform E.C. to the effect "that the whole of the branch delegates to D.C. have stated that "should E.C. refuse to agree to D.C.'s recommendation that "they will have no other alternative than to resign, as in their "considered opinion the decision of E.C. is nothing other than "a vote of no confidence in the district committee.

"Trusting you will ensure E.C. give consideration to D.C.'s "request and that you will let me have a reply as early as "possible, as a further special meeting of D.C. has been called "for Wednesday, December 23, 1953, to consider same."

This is really a shocking document, suggesting first of all that the plaintiff's outburst of temper alone warranted his expulsion, and secondly using threats about the resignation of the district committee and others which Lupton in the witness-box in effect admitted to be perfectly empty.

The general secretary was quite unmoved by this exhibition and wrote the following letter: "Dear Sir and Brother, executive "council have to acknowledge receipt of your letter dated "December 19, 1953, wherein you again raise the question of "Brother Huntley and the district committee's desire to expel "him from the union.

"In reply, might we make it perfectly clear that executive "council have no desire whatsoever to frustrate the efforts of "district committees when it comes to a question of disciplining "members. We would point out that there are special circum- "stances surrounding this one-day's token stoppage which execu- "tive council had to take into consideration when they issued "their general instructions in relation to the expulsion of "members who may have worked on that particular day.

"However, you are now raising the question of this "member's behaviour when attending the district committee "and, of course, that raises another issue. If the district com- "mittee feel so inclined, executive council would not be averse "to the district committee dealing with the member in relation "to his conduct when summoned before the district committee.

"but the question of expulsion for that offence, in the opinion "of executive council, goes too far.

"Having regard to this explanation, perhaps the district "committee will reconsider their approach from a different angle, "other than expulsion, based upon his conduct when attending "the district committee meeting. Yours fraternally." It looks from this that the executive council itself had qualms about the legality of the one-day strike.

Nothing daunted, on December 23, the district committee met and purported to expel the plaintiff for his "disrespectful "attitude" towards themselves. This they did in the plaintiff's absence and without any notice to him, and followed it up through Lupton by another letter to Mr. Gardner: ". . . After "very careful consideration of the executive council's letter, "wherein E.C. suggest that D.C. could approach the whole "question from a different angle, it was unanimously agreed that "E.C.'s letter be accepted, but that D.C. observe with very deep "regret the fact that E.C. are not prepared to approve of the "unanimous decision to expel this member for having worked on "the day of the token stoppage. However, it is the unanimous "decision of D.C. that we recommend to E.C. that Brother "Huntley be expelled from our union for having used such "disrespectful conduct towards the members of the district com-"mittee when he attended to answer the charge against him.

"My committee also direct me to forward the enclosed press "cutting for your information, and also to point out that in the "event of E.C. refusing to uphold their decision of expulsion, "that the whole of the branch delegates to D.C. will resign from "the district committee, and I also anticipate that D.C. will also "get a host of resignations from shop stewards at the quarterly "meeting to be held on Monday, December 28, '53, as many "stewards have *already* informed me that it is their intention "to resign should Brother Huntley be allowed to retain his "membership."

This, too, was treated with proper contempt by the general secretary in his letter of January 6: "Dear Sir and Brother, "Executive council have given very careful consideration to your "letter dated December 26, 1953, with respect to the case of "Brother Huntley.

"As already indicated, executive council do not favour the "expulsion of this member from the Union. Executive council "are of the opinion that there are other steps which you could "take, providing a specific charge has been made against the "member, regarding his conduct and that charge ought to be "made in writing.

"If the district committee are prepared to discuss this case "further, in accordance with the rules of the Union executive "council will give consideration to your further report thereon "and to any decision which may be reached."

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In the meanwhile the plaintiff had given notice to determine his employment with Wm. Gray & Son in Hartlepool and obtained a job at Bradford, 80 miles away, thus being separated from his wife and children and his home, and taking a wage less than he had been receiving. After a fortnight of this he determined to return and came back to Hartlepool on January 18, 1954, to seek work. News of his return seems to have preceded him, for on January 15, the district committee passed the following resolution: "E.C. Letter: Re:—L. C. Huntley. Arising from same "it was agreed secretary write various districts respecting same." It was said that Lupton took no step in pursuance of this resolution, but I cannot doubt the nature of the letters he was instructed to write. They were intended to support the ban next to be related.

The plaintiff's return was the occasion of further press interviews and comments which seem, though in no way inaccurate, to have enraged the district committee further, and that body held a special meeting on January 25. No minute of this meeting appears in the minute book. This was explained on the ground that the meeting was an emergency one, but I cannot but feel some doubt whether there is not a more sinister reason. Be that as it may, the outcome is sufficiently disclosed in a letter which the defendant Lupton wrote the next day and circulated among all shop stewards in the district: "To all shop stewards. Dear "Sir and Brother, As no doubt you are aware, L. C. Huntley, "the only member of our Union in this district who defied the "E.C.'s call for a 24 hour token stoppage, has now returned to "West Hartlepool and has announced through the press that he "intends to obtain work once again in West Hartlepool.

"At a special meeting of my district committee held "January 25, '54, the question of action to be taken against "Huntley was fully discussed, and arising from the deliberations "it was unanimously agreed, 'That efforts be made in all factories "'where we have official shop stewards to ensure that L. C. "'Huntley is not allowed to start work under any consideration.'

"Trusting you will inform your labour office to the effect that "should they give L. C. Huntley a job, it is our intention to "withdraw all labour in protest. Yours fraternally, John W. "Lupton."

He followed this up on the next day by a letter to the defendant Thornton, secretary of a neighbouring district, namely, Teeside, in these terms: "Dear Sir and Brother, As no doubt "you are aware we had one member of the Hartlepool District "who ignored E.C.'s call for the 24 hour token stoppage and as "a result of the hostile attitude of our members to L. C. Huntley "he left the district but has now returned.

"At a recent special meeting of my district committee to "consider the official action to be taken with respect to this man, "it was agreed that every effort should be made to resist him

"from taking up employment in this district, which we have been "able to do to date.

"The reason for my writing you, to inform you of our action "is in the belief that he is endeavouring to obtain employ-"ment in your district. Yours fraternally, J. Lupton, district "secretary."

The plaintiff, on his return, attempted to find work in the district. He applied to the Labour Exchange and was informed that so long as he was at loggerheads with the union the chances of employment were slender. He was, however, introduced to the South Durham Steel Works on January 23, but failed to obtain employment because it was there known he was in trouble with the union. The plaintiff alleged in his statement of claim that his failure to obtain this engagement was due to threats by the defendant McCann, a shop steward at the South Durham Steel Works, but he failed to prove this. It appears, indeed, that McCann approached the employers and informed them that if the plaintiff were engaged there would be trouble, but this, on the evidence, was after the decision not to engage him; so that McCann, though willing to make mischief, in fact effected none at this time. He was no doubt acting on his knowledge of the district committee's resolution of January 25, for he was a member of that committee and present on that occasion, as also at the previous meeting on January 15.

Subsequently the plaintiff applied for work at Gray's Yard and at one or two other places, but he was refused. The plaintiff, having been out of work from the middle of January till the beginning of February, applied for unemployment benefit, which he received during the week ending February 3.

On the latter date, or just before it, he was engaged at the power station of the British Electricity Authority at Haverton Hill, Stockton, nine miles from West Hartlepool, thus beginning a new chapter of this story. He was asked by the employer whether he was a member of the Union and he said, and truthfully, that he was.

The defendant Langford was convener of shop stewards at this power station, which is within the Tees-side district of the Union; the defendant Thornton, a full-time official, being secretary of the district committee. On February 3 Langford asked the plaintiff for his union card. The plaintiff produced his admittance card, which showed that he was a member of the Union, but could not produce his contribution card because he had left the 1953 card at the branch meeting on December 5 and had not received it back or obtained a new one, though he was entitled to both. He had not paid his subscription since December 5. The plaintiff told Langford that he had no contribution card, but would obtain it and show it next day. He did in fact visit Wilkinson [secretary of the plaintiff's branch of the Union] that evening but failed to obtain a card. This appears to have been a breach by Wilkinson of rule 27 (8). On being asked on

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February 5 by Langford for his card the plaintiff explained that the 1953 card was lost and, after some fencing, admitted that he was the man about whom there had been trouble at West Hartlepool. This was a Friday. Langford said that the men in the shop were unwilling to work with the plaintiff and were urging him (Langford) to go to the management and demand the plaintiff's dismissal. On the evidence before me this is true not because of the Hartlepool trouble, the reason Langford gave, but because the men in the shop were under the impression that, as the plaintiff could not produce his contribution card, he was not a member of the Union; and as this was, according to them, a closed shop, they were unwilling that he should stay there unless he was a member. These men—namely, the witnesses Fishburn, Hymer, Collier and Drinkel—all put their objections to the plaintiff on this ground and said that the attitude was that the plaintiff could not start until he produced his contribution card. At least two of them also said that if he had been able to produce it there would have been no trouble.

It appears that on Friday, February 5, Langford communicated with Thornton on the telephone and was told by Thornton that he was not to allow the plaintiff to be employed. This was in accordance with a resolution of the Tees-side district committee of the union at a meeting on February 3, when Lupton's letter to Thornton was considered, and the following resolution was passed: "Letter from the Hartlepool district secretary stating "that a member employed in his district who had refused to "absent himself from work on December 2, 1953, and who was "not allowed to obtain employment in the Hartlepool district "was endeavouring to gain employment on Tees-side. Moved "'That the conveners be circulated.' (Carried)."

On the Friday afternoon, February 5, Langford had an interview with one Henson, assistant superintendent at the power station, and told him that he wanted the plaintiff discharged. This was, of course, in accordance with the instructions he had received from Thornton, and I do not believe Langford's statement that he made this demand merely on pressure from the A.E.U. members in the shop.

On the Saturday morning, February 6, Langford was interviewed by Henson's superior, one Whiteside. Whiteside's evidence, which I accept on this point, was that he asked Langford what the trouble was, and that Langford replied that the plaintiff appeared to be a full member, but that he was under instructions from Thornton to call a meeting of the men, the probable result of which would be no work over the week-end. Langford, in his evidence, confirmed this, saying that he told Whiteside that the opinion of the A.E.U. members on the station was that the plaintiff was not a member, and that he, Langford, would be obliged to hold a meeting which he knew would end in a downing of tools.

At this juncture Whiteside got into touch with a Mr. Little.

his superior at Newcastle, and the latter in turn communicated over the telephone with Thornton, who told him that there was a question of the plaintiff's membership, that he was not being allowed to work in the Hartlepool district, that the Tees-side members supported that attitude and demanded the plaintiff's immediate dismissal. Little also said that Thornton informed him that the Hartlepool committee had made repeated attempts to get the plaintiff to meet them without success. This, of course, was untrue, but it did not appear that Thornton knew it to be untrue. Little asked Thornton to put his demands in writing and arranged that the matter should stand over the week-end without an immediate strike. Thornton complied with his undertaking by writing the following letter: Dear Sir, Mr. L. C. "Huntley—Fitter. Further to our telephone conversation of "this morning, I confirm that the above-named member of the "A.E.U. is in trouble with the Hartlepool District Committee, "and is not allowed to work in that district. It is for that "reason that our members at the North Tees Power Station "refuse to work with him, and the Tees-Side district committee "fully support our members in their attitude and ask that you "dispense with the services of this man until he has made his "peace with his own district committee. Yours faithfully, "H. Thornton—district secretary." Mr. Thornton also instructed Langford to tell the men not to make trouble over the week-end, which Langford did.

On the Monday morning, February 8, Langford again saw Henson, and there is some conflict of evidence at this point. It is common ground that Langford asked to hold a meeting. Henson said he refused this, but apparently Langford did call such a meeting in the afternoon. Shortly before the time fixed for this meeting Henson and Langford met again, and according to Henson Langford then threatened that if the plaintiff were not dismissed at once he would call out all his members. This, according to Henson, would include the maintenance men, without whom the power station could not operate. Langford disagrees to this extent, that his version is that he told Henson the men would come out. Langford also saw Whiteside on Monday and informed him that the men were demanding the dismissal of the plaintiff. Meanwhile Little had been in touch with Thornton and suggested that the plaintiff be given a week in which to make his peace with the union. This Thornton would not accept and demanded instant dismissal. He also said that if this were not done the employers might find the men "out." Whiteside eventually got instructions, through Little, that the plaintiff should be paid off and told that if within the week he made his peace with the union he would be re-engaged.

The plaintiff attended on the Tuesday morning at 9 o'clock and did not go to work, but was given a week's pay in accordance with this arrangement.

On the same Monday, February 8, Thornton, in accordance

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with the directions of his committee, sent the following circular letter to all conveners of shop stewards in his district: "Dear Sir and Brother, A member of Hartlepool District, L. C. "Huntley, has not been allowed to obtain employment in his "own district, owing to his non-compliance with the instruction "from executive council to absent himself from work on "December 2, 1953. This member is endeavouring to obtain "employment on Tees-Side, and I am instructed by district "committee to inform all shop stewards that he is not desirable "in this district, at least until he has made peace with his own "district committee. Yours fraternally, H. Thornton. District "secretary."

The plaintiff, thus once more out of work—again, though he did not then know it, owing to the machinations of the Hartlepool district committee—made an effort to make peace with that body by writing on February 11, the following letter to Lupton: "Dear Sir, I would be greatly obliged if you could "arrange an early meeting of your district committee with the "object of my having an opportunity to discuss my industrial "position with them.

"As you are no doubt aware, I am at present being prevented "from obtaining employment in this district and for this reason "I ask that as little time as possible be lost in the convening of "this meeting." He had previously seen Lupton and been rebuffed, Lupton saying that it was a committee matter. The plaintiff's letter was not considered until a meeting of the D.C. on February 16, when a special meeting passed the following resolution: "The chairman explained to the meeting the reason "for the calling of this special meeting, which had been brought "about through the secretary receiving a letter from L. C. "Huntley, wherein he requested an interview with the district "committee to discuss his position industrially, as he has found "it impossible to get a job at his trade owing to the hostile "attitude that has been shown towards him by our members "who are employed in the organized shops in this district, also on "the Tees-side, where he has now been endeavouring to get a job.

"Arising from the discussion that arose from this matter, it "was unanimously agreed that the interview requested by "L. C. Huntley, not be granted, as in the opinion of D.C. no "useful purpose would be served by same, having in mind the "fact that this man stated in an article that appeared in the "'Northern Daily Mail,' that he no longer considered himself "a member of the A.E.U. and that he was right in refusing to "take part in the 24 hours' token stoppage."

Mr. Lupton wrote a letter to the plaintiff on the same day in these terms: "Dear Sir, Your letter of February 11, 1954, has "been considered by my district committee who direct me to "reply as follows:

"After very careful consideration of your request for an "interview with the members of the district committee to discuss

"your industrial position with them, it was decided by that body "that no useful purpose would be served by such an interview "as you suggest, having in mind the fact that you yourself "announced through the press that you regarded yourself as "being no longer a member of the union."

Thus the plaintiff's effort to make his peace was rejected out of hand, and this appears to me inexcusable, the statement attributed to the plaintiff by the newspaper that he no longer considered himself a member of the Union being the merest pretext. The plaintiff agreed that he said something of the sort, meaning that the committee was attempting to expel him. He had not been told that the executive council had refused to countenance this plan. The district committee were perfectly well aware that the plaintiff remained a member until expelled in due course according to the rules.

Not content with this, the district committee determined to find some means of circumventing the executive council's refusal to expel the plaintiff, and Lupton, on the same February 16, wrote this letter to Wilkinson, the branch secretary: "Dear Sir "and Brother. . . . I am directed by my district committee to "inform you to the effect that it has been decided by that body "to resist the above named from retaining his membership of our "Union. D.C. trust that your branch will support them in their "endeavours, and would suggest that your branch committee be "called to consider the position."

He received a favourable reply by return of post from Wilkinson: "I am in receipt of your letter of February 16 concerning "your committee's decision for which I thank you. No doubt "when my chairman reads your letter to the branch on February "27 the decision of the district committee will be wholly endorsed. "Yours fraternally."

On March 17, the writ in this action was issued against Thornton alone, asking for an injunction to restrain him from interfering with the plaintiff's trade and preventing his employment at the power station, and the court was moved before me on March 23, when the motion was adjourned.

Meanwhile on March 18, the plaintiff applied to Wilkinson for his contribution card, sending 4s. which he claimed to be the amount of his arrears. This 4s. was returned on the next day, but no card was sent nor any intimation as to the amount claimed for arrears. This again was a breach of the rules by the branch secretary, but I cannot doubt that it was prompted by the district committee's request of February 16 which I have read, and was thus indirectly their doing.

On March 27 the plaintiff's solicitors received from an anonymous source a copy of Lupton's circular of January 27, and as a result the writ was amended by joining the members of the district committee. The motion came on for hearing on April 14, and I did not feel I could grant any relief on that occasion.

On April 17 and 23 the plaintiff's solicitors again applied for

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his card. On May 14, arrears of £3 3s. 6d. were claimed, but no card was sent. These figures were disputed. On June 8, the branch secretary wrote a letter announcing that the plaintiff had been expelled for arrears of contributions under rule 27. Whether this expulsion was lawful is not in question in this action and I express no further opinion upon it. The plaintiff was a member of the Union at any rate until the beginning of June, 1954.

The plaintiff was out of work and in receipt either of unemployment benefit or national assistance until July 26, 1954, when he joined the Durham County Constabulary. He left that body in February, 1955, had a temporary job in March, 1955, and in May of 1955 obtained employment at Stockton in the Admiralty Spare Parts Department where there is no closed shop. This employment he still retains. His place of employment is 15 miles from his home.

By his statement of claim the plaintiff alleges, firstly that he was unlawfully ordered to strike on December 2, 1953, and secondly that the defendants have since that time conspired to injure him for having refused to comply with that direction.

The overt acts of conspiracy on which the plaintiff relies begin with the district committee meeting of January 25, 1954, and continue till the meeting of that committee of February 16. Alternatively the plaintiff alleges that the acts of the defendants were in themselves wrongful and tortious, omitting any element of conspiracy. The plaintiff claims damages for conspiracy or alternatively for the alleged wrongful acts against all the defendants and certain injunctions which I need not explain at this point. The defendants did not sever in their defences. They admit the plaintiff was a member until expelled under rule 27 in June, 1954. They deny the wrongfulness of the call to strike on December 2, and they deny conspiracy or that the acts alleged by the plaintiff amount to conspiracy in law, justifying their course of conduct from January 25, 1954, first by the plaintiff's refusal to join in the stoppage, secondly by the statements said to have been made by him or on his behalf in the press, and thirdly by his behaviour at the district committee meeting on December 11, 1953. The defence of Thornton and Langford is that they were not partners to the conspiracy and that they did not threaten to call out the men at the power station but merely informed the employers of the attitude of the men there employed. In addition all the defendants rely on section 3 of the Trade Disputes Act, alleging that all the acts done were done in contemplation or furtherance of one or other of four trade disputes. In the defence section 4 of the Trade Disputes is also relied on, but this was abandoned at the Bar.

The first question, therefore, on the facts as I find them is whether there was a conspiracy to injure the plaintiff and who were the parties to it. Now the elements of conspiracy in the civil sense of that word have been exhaustively examined in the House of Lords in *Crofter Hand Woven Harris Tweed Co.*

Ltd. v. *Veitch*,[1] and I think it unnecessary to examine the earlier authorities. Lord Simon's well-known analysis in that case is as follows: "The question to be decided is whether the "appellants have proved that the respondents are liable to them "for illegal conspiracy. In other words, is it proved that the two "respondents combined together 'to injure' the appellants in "the way of their trade, and that the appellants have suffered "damage from the respondents' illegal action? Conspiracy, "when regarded as a crime, is the agreement of two or more "persons to effect any unlawful purpose, whether as their "ultimate aim, or only as a means to it, and the crime is "complete if there is such agreement, even though nothing is "done in pursuance of it. (I am omitting consideration of those "cases on the borderland of illegality, where the combination was "held to amount to a criminal conspiracy because the purpose "aimed at, though not perhaps specifically illegal, was one which "would undermine principles of commercial or moral conduct.) "The crime consists in the agreement, though in most cases "overt acts done in pursuance of the combination are available "to prove the fact of agreement. But the tort of conspiracy is "constituted only if the agreed combination is carried into effect "in a greater or less degree and damage to the plaintiff is thereby "produced. It must be so, for, regarded as a civil wrong, "conspiracy is one of those wrongs (like fraud or negligence) "which sound in damage, and a mere agreement to injure, if "it was never acted upon at all and never led to any result "affecting the party complaining, could not produce damage to "him. The distinction between the essential conditions to be "fulfilled by the crime and the tort respectively are conveniently "set out by Lord Coleridge C.J. in his judgment in the *Mogul* "*Steamship Co.* v. *McGregor, Gow & Co.*[2]" That I need not read.

His Lordship proceeds in these words[3]: "The appellants, "therefore, in order to make out their case have to establish "(*a*) agreement between the two respondents (*b*) to effect an "unlawful purpose (*c*) resulting in damage to the appellants. "As regard (*c*), there can here be no doubt."

Then his Lordship continues[4]: "The only difficulty in the "case arises under (*b*). What exactly is meant, in this branch "of the law, by a combination to effect an unlawful purpose? "Lord Cave L.C. in *Sorrell* v. *Smith*,[5] when what he called 'the "'famous trilogy of cases in your Lordships' House': *Mogul* "*Steamship Co.* v. *McGregor, Gow & Co.*,[6] *Allen* v. *Flood*,[7] and "*Quinn* v. *Leathem*[8] were submitted to a close examination in "order to extract from them the principles involved, formulated "as a result two propositions of law which he stated as follows:

[1] [1942] A.C. 435, 439; 58 T.L.R. 125; [1942] 1 All E.R. 142.
[2] (1888) 21 Q.B.D. 544, 549.
[3] [1942] A.C. 435, 440.
[4] Ibid. 441.
[5] [1925] A.C. 700, 711, 712; 41 T.L.R. 529.
[6] [1892] A.C. 25; 8 T.L.R. 182.
[7] [1898] A.C. 1; 14 T.L.R. 125.
[8] [1901] A.C. 495; 17 T.L.R. 749.

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"'(1) A combination of two or more persons wilfully to injure a "'man in his trade is unlawful and, if it results in damage to "'him, is actionable. (2) If the real purpose of the combination "'is, not to injure another, but to forward or defend the trade "'of those who enter into it, then no wrong is committed and no "'action will lie, although damage to another ensues.'"

Lord Simon sums up his conclusions in these words [9]: "I am "content to say that, unless the real and predominant purpose "is to advance the defendants' lawful interests in a matter where "the defendants honestly believe that those interests would "directly suffer if the action taken against the plaintiffs was not "taken, a combination wilfully to damage a man in his trade is "unlawful."

Lord Maugham, in the same case,[10] based his judgment on Lord Cave's observations in *Sorrell* v. *Smith* [11] which I have just read. He points out also [12] that the absence of spite or malice does not preclude a finding of conspiracy, and that it is not enough to justify wrongful acts to show that the predominant motive was not the injury of the plaintiff. He formulates the question thus [13]: "Was the real or predominant purpose of the "combination to forward or defend the trade or business interests "of the trade union and its members and of the mill owners? If "the answer is in the negative it would be necessary very care-"fully to examine 'the real purpose' or 'the true motive' (which "I think is the same thing) of the combination and to consider "whether there was in the eyes of the law a just cause or excuse "for taking or directing acts in combination which will destroy "the present means of subsistence of the appellants. On this "point, if it arises, there is little authority to guide us, but I will "add that when the question of the real purpose is being con-"sidered it is impossible to leave out of consideration the principle "that men are in general to be taken as intending the direct "consequences of their acts."

Was there then a conspiracy on the part of the Hartlepool District Committee to injure the plaintiff? In my judgment there was, because the acts of these defendants were "without "justification," to use Lord Cave's words. It might be arguable that in the early days the members of the district committee honestly took the view that nothing would uphold the prestige of the union in the district but the plaintiff's expulsion, though this is a view so wrong-headed that it would be hard to accept it. The only element in the charges against the plaintiff relevant here is his disobedience to the instruction to stop work on December 2, and that is indeed the charge made in the letter summoning him before the district committee on December 11. But the recommendation to expel relies not only on that but on the new charge of "coercing" other members, a charge of which no notice was

[9] [1942] A.C. 435, 446.
[10] [1942] A.C. 435, 449.
[11] [1925] A.C. 700, 712.
[12] [1942] A.C. 435, 451.
[13] Ibid. 452.

given and which was entirely unsupported by evidence. The third ground is the "arrogant attitude" of the plaintiff. If this refers to the fact that the plaintiff insisted on questioning the validity of the summons to strike it is a denial of the right to hold an opinion. It would be no ground even if the plaintiff was mistaken; it becomes grotesque when, as I have shown, he was probably right. If it be a reference to the plaintiff's use of bad language, it is enough to point out that the rules themselves provide a penalty of a fine of 2s. 6d. for that offence (rule 22 (3)).

The matter does not end there. When the executive council declined to sanction expulsion for disobedience of the strike summons the district committee persisted in asking for expulsion for the plaintiff's "disrespectful attitude" to themselves. This looks very like punishment for personal reasons.

Be this as it may, all question of expulsion was closed by the general secretary's letter of January 6, 1954. The district committee then knew that nothing more than a reprimand and perhaps a fine would be countenanced by the executive council. Nevertheless by the resolution of January 15, and still more clearly by that of January 25, they sought to flout the executive council's decision and to produce by other means, at any rate within their own district, and as the letter to Mr. Thornton shows also on Tees-side, all the effects of expulsion. It is an ironic comment that while pretending to visit the plaintiff with a penalty for disloyalty to the union they were themselves guilty of that very offence.

In my judgment it is true to say that by this time the district committee had entirely lost sight of what the interests of the union demanded, and thought only of their own ruffled dignity. Probably the publicity given to the affair in the press was largely responsible, but in saying this I cast no reflection on that organ which was reporting fairly enough on a matter of public interest. It had become a question of the district committee's prestige; they were determined to use any weapon ready to their hand to vindicate their authority, and grossly abused the quite frightening powers at their command. The threat "to withdraw "all labour" from any employer daring to engage one of their own members whom they had been elected to protect was, as events showed, effective enough, even though they had as they well knew, no right to take any such step. The district committee had no power to call a strike.

The matter does not end there. It was none of their business to interfere in another district, and the letter to Thornton was only justifiable if the plaintiff was or was about to be expelled. This is the inference that Thornton drew, and in my judgment was intended to draw.

Moreover, when the plaintiff in February attempted to make his peace he was refused a hearing and the aid of his branch was solicited in order to serve the district committee's end, which was by this time to be revenged upon the plaintiff for the slight put

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upon the district committee by their superiors, the executive council, and to demonstrate the fact that they were greater than he. As McCann said, "To make the punishment fit the crime." What crime? The crime of standing up to the district committee. That damage was suffered by the plaintiff cannot be questioned, so all the elements of a civil conspiracy are present.

In view of this finding I need not consider whether the actions of any member of this group was in itself a tortious act against the plaintiff. Assuming that what was done might not be a legal wrong if done by an individual, it is clear that the combination may make the act wrongful: see Scrutton L.J. in *Ware and De Freville Ltd.* v. *Motor Trade Association*,[14] cited by Lord Porter of the *Crofters* case[15] in these terms: "The general "proposition has been summed up by Scrutton L.J. in *Ware and* "*De Freville, Ltd.* v. *Motor Trade Association*[14] as follows: "'I take *Allen* v. *Flood*[16] and *Bradford Corporation* v. *Pickles*[17] "'to decide that an act otherwise lawful, though harmful, does "'not become actionable by being done maliciously in the sense "'of with a bad motive or with intent to injure another. . . . "'I take the *Mogul* case[18] as deciding that a combination to do "'acts, the natural consequence of which was to injure another "'in his business, was not actionable if those acts were not "'otherwise unlawful, such as assaults or threats of assaults, "'and were done in furtherance of the trade interests of those "'combining. I understand *Quinn* v. *Leathem*[19] to decide that "'a combination to injure another in his trade and business, not "'in furtherance of the trade interests of those combining but "'out of spite against the person injured, is actionable.' This "is a summing-up of the principles to be deduced from the "so-called trilogy of cases upon conspiracy, and I think it is a "correct one. It has since received support from the reasoning "upon which your Lordships' House decided *Sorrell* v. *Smith*.[20]"

Lord Porter also said this[21]: "There may, however, be com-"binations which are criminal, though entered into for purposes "which would not be criminal if done by an individual, but "whether this be so or not it is now established that a con-"spiracy, the object of which is to injure a third person, is an "actionable wrong. *Quinn* v. *Leathem*[22] and *Sorrell* v. *Smith*[23] "in your Lordships' House are sufficient authority for this "proposition."

It is true that Lupton was not a voting member of the committee but in my judgment he cannot escape liability on the ground that he was only its servant. No such defence is pleaded, and having observed his demeanour in the witness box I formed the conclusion not merely that he identified himself with the

[14] [1921] 3 K.B. 40, 67; 37 T.L.R. 213.
[15] [1942] A.C. 435, 486.
[16] [1898] A.C. 1.
[17] [1895] A.C. 587; 11 T.L.R. 555.
[18] [1892] A.C. 25.
[19] [1901] A.C. 495.
[20] [1925] A.C. 700.
[21] [1942] A.C. 435, 488.
[22] [1901] A.C. 495.
[23] [1925] A.C. 700.

committee's acts but that he was the instigator and prime mover of them and, in fact, fons et origo mali.

When I turn to consider the case against the officials of the Tees-side district, the defendants Thornton and Langford, the picture is at once seen to be very different. I could have wished they had delivered a separate defence, though it was perfectly proper that they should be represented by the same counsel as appeared for the members of the Hartlepool district committee. Against these defendants it is said that they lent themselves to the design of the other defendants and so joined the conspiracy to injure him. This must have been after January 27, when Lupton appealed to Thornton. No doubt it is not necessary that all the conspirators should join at the same time, but it is, I think, necessary that they should know all the facts and entertain the same object. Now one essential fact was not communicated to them, namely, that the executive council would not countenance the plaintiff's dismissal and that he was a member of the union entitled to be treated as such.

Thornton is drawn into the controversy by Lupton's letter to him of January 27, and it is true that this letter speaks of the plaintiff as a member at the time of the strike. It says no more on this subject, but refers to "the official action to be taken" as though no disapproval of the Hartlepool district committee's action had been expressed from headquarters. Thornton said in the witness box that it left a doubt in his mind whether the plaintiff was still a member, and this I accept. As secretary he brought this letter before his committee on February 3, with the result that this body directed him to inform the shop stewards that the plaintiff was not desirable in the district until he had made his peace with his own district committee. This Thornton did by his letter of February 8. Meanwhile, on February 5 he received Langford's message as to the unrest at the Haverton Hill power station caused by the fact that the plaintiff could not produce his contribution card, and he directed Langford to oppose his employment. On February 6 and 8 he himself pressed the employers to dismiss the plaintiff. Langford, for his part, carried out his instructions. He was no doubt under some pressure from the members; but, as I have said, the evidence is that their views were based on the absence of the plaintiff's card and not on the Hartlepool trouble. No doubt Thornton and Langford lent themselves to their co-defendants' plan, but I have no evidence that their motive was to injure the plaintiff rather than to forward the interests of the union as they saw them. They had none of their co-defendants' personal reasons for attacking the plaintiff, who was in fact unknown to them. I cannot hold them to be participators in the conspiracy I have found to exist. It was suggested that they might themselves have formed a separate conspiracy. No doubt they acted in concert, but I cannot find that their predominant motive was to injure the plaintiff.

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I must then consider their individual acts apart from conspiracy. It was undoubtedly through the pressure they applied that the plaintiff lost his job at the power station. The law on this point has been admirably stated by Peterson J. in *Hodges* v. *Webb*,[24] a judgment which has received the highest approbation. I read from the headnote: "In the absence of conspiracy or "unlawful combination, a firm or even emphatic statement by "one person that unless the person whom he is addressing "consents to the adoption of a particular course which he can "lawfully take, the speaker will do that which he is lawfully "entitled to do, is not a threat for which the speaker can be held "liable at law."

On this subject also see *White* v. *Riley*,[25] hereafter more particularly to be mentioned.

If then all that Thornton or Langford did was to inform the employers that the continued employment of the plaintiff would have untoward results they did no more than they were entitled to do. If, however, their actions amounted to threats of illegal strike action—that is to say, action to withdraw labour in breach of contract—then those acts were tortious and illegal.

There is, as I have said, some conflict of evidence on this subject. [His Lordship reviewed the evidence and continued:] On the whole I must acquit these two of tortious acts, though Thornton is open to grave criticism for accepting Lupton's suggestion without inquiry. Langford merely did what he was told by Thornton, and what he was urged to do by the members at the station.

There remains the plea of the Hartlepool district committee members that they are protected by the Trade Disputes Act, 1906. This I have found the most troublesome part of the inquiry.

Under section 1 of that Act the following paragraph is now inserted in the Conspiracy and Protection of Property Act, 1875: "An act done in pursuance of an agreement or combination by "two or more persons shall, if done in contemplation or further-"ance of a trade dispute, not be actionable unless the act, if "done without any such agreement or combination, would be "actionable."

Section 3 [of the Act of 1906] says: "An act done by a person "in contemplation or furtherance of a trade dispute shall not be "actionable on the ground only that it induces some other person "to break a contract of employment or that it is an interference "with the trade, business, or employment of some other person, "or with the right of some other person to dispose of his capital "or his labour as he wills"; and in section 5, the definition section, "the expression 'trade dispute' means any dispute "between employers and workmen, or between workmen and "workmen, which is connected with the employment or non-"employment, or the terms of the employment, or with the

[24] [1920] 2 Ch. 70, 71; 36 T.L.R. 311.

[25] [1921] 1 Ch. 1; 36 T.L.R. 849.

"conditions of labour, of any person, and the expression 'work-"'men' means all persons employed in trade or industry, "whether or not in the employment of the employer with whom "a trade dispute arises."

Two questions arise out of this: first, was this a trade dispute; and, secondly, were the actions of the district committee done in furtherance of it?

I need not reconsider here the earlier efforts to have the plaintiff expelled, for they were frustrated by higher authority and came to nothing. This issue was settled by January 6. The facts to be considered begin on January 15, when the first move was made to boycott or black-list the plaintiff. It was not argued that these acts were "in contemplation" of a trade dispute, and the plea in the defence that the dispute was as to the 15 per cent. increase in wages then being demanded by the union was not persisted in. Further, in my judgment the employers were in no way parties to any dispute. But was it a dispute within the meaning of the Act, and, if so, was it one between workmen and workmen? According to the defendants the contestants were the district committee on the one side and the plaintiff on the other, and the subject whether the plaintiff (a member of the union) should be allowed to earn his living as an engineer in a closed shop in the district. It was contended for the plaintiff that the members of the committee did not act in their capacity as workmen. I feel the force of this point, but on the whole feel bound to reject it. The committee consisted of elected representatives of the workmen in the district who were members of the union. There are a number of cases to show that if the plaintiff had not been a member of the union and his right to work had been contested on that ground, this would have been considered a trade dispute. A more persuasive argument for the plaintiff is that the committee embarked on a policy of embargo entirely unauthorized by the rules of the union, and that they cannot escape the consequences of a wrong which was of their own invention by labelling it a trade dispute. This is to say that there was no "dispute" at all. It was argued nonetheless for the defendants that the words of the definition clause cover the case: it was a dispute, say they, "as to the employment of the plaintiff" within the words of the clause.

The plaintiff's contention derives some support from the speeches in *Conway* v. *Wade*,[26] and in particular the speech of Lord Shaw. In that case the defendant Wade had no authority from the union to threaten the employers with a strike unless they dismissed Conway. What Wade was trying to do was punish Conway for not having paid a union fine in the past, as to which apparently no dispute at that time existed.

Lord Shaw says this[27]: "It is no doubt true that by section 5 "(3) the expression 'trade dispute' receives a very wide inter-"pretation. It 'means any dispute between employers and

[26] [1909] A.C. 506; 25 T.L.R. 779. [27] [1909] A.C. 506, 520, 521, 522.

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"'workmen, or between workmen and workmen, which is "'connected with the employment or non-employment or the "'terms of the employment . . . of any person,' etc. But I "cannot see my way to hold that 'trade dispute' necessarily "includes accordingly every case of personal difference between "any one workman and one or more of his fellows. It is true "that after a certain stage even such a dispute, although "originally grounded, it may be, upon personal animosity, may "come to be a subject in which sides are taken, and may develop "into a situation of a general aspect containing the characteristics "of a trade dispute; but until it reaches that stage I cannot hold "that a trade dispute necessarily exists.

"My Lords, I cannot better illustrate my meaning than by "simply taking the facts of the present case in the light of the "rules of the trade union to which the appellant belonged. It is "said that eight years ago he had been fined by his union and had "not paid. In the interval he had rejoined the membership and "was apparently a full paying member. Wade, the respondent, "was an official delegate of the union. By the rules of the "union, district committees were appointed to decide all "complaints and disputes between members or branches in their "district, and with regard to the official delegates it is provided," and his Lordship states the rule. He continues: "the conduct "of Wade was contrary not only to the terms but to the spirit "of the rules, and I am not surprised to observe that the trade "union accepts no responsibility whatever for such conduct. "Suppose, however, these rules, instead of being violated, had "been followed in the present case," and his Lordship considers that.

Lord Shaw continues: "In this view, what is meant by the "words 'in contemplation or furtherance of a trade dispute'? "My Lords, I think the argument was well founded that the "contemplation of such a dispute must be the contemplation of "something impending or likely to occur, and that they do not "cover the case of coercive interference in which the intervener "may have in his own mind that if he does not get his own "way he will thereupon take ways and means to bring a trade "dispute into existence. To 'contemplate a trade dispute' is to "have before the mind some objective event or situation, with "those elements of fact or probability to which I have adverted, "but does not mean a contemplation, meditation, or resolve in "regard to something as yet wholly within the mind and of a "subjective character. I think that any other construction would "be ill-founded and would lead to strange and mischievous "results.

"With regard to the term 'furtherance' of a trade dispute, "I think that must apply to a trade dispute in existence, and "that the act done must be in the course of it and for the "purpose of promoting the interests of either party or both "parties to it."

The plaintiff also relied upon the Irish case of *Cooper* v. *Millea*.[28] It was there held that the action of the defendants was unlawful at common law, the threat being to procure a strike in breach of contract by the employees with the railway company, and it was held under those circumstances that section 3 of the Trade Disputes Act, 1906, did not apply, the reason being, I think, that the word "only" in the section excluded the act. This view has the support of Lord Loreburn in *Conway* v. *Wade*.[29]

The Irish decision was followed in *Riordan* v. *Butler*.[30]

Here I have held that the acts were done in pursuance of a conspiracy which is itself unlawful, and therefore this reasoning would seem to apply, but the issue is clouded by the fact that under section 1 of the Trade Disputes Act, 1906, a combination is not actionable unless the acts done would be actionable if done by a single person. On the whole, therefore, I do not think this line of cases helps me.

It was argued for the defendants that the case of *Dallimore* v. *Williams & Jesson*[31] shows that it does not matter that an element of spite exists, and that the motives of the defendants are immaterial. That case was twice tried. It was brought by an employer against officials of a trade union for inducing workmen to break their contracts with the plaintiff. The case was ordered to be retried after the first trial because Ridley J. had misdirected the jury. The same thing happened at the second trial, but on the second occasion the Court of Appeal overruled the jury's verdict and entered judgment for the defendants, holding that section 3 of the Trade Disputes Act, 1906, was a defence. In that case, however, there undoubtedly was a trade dispute in existence, namely, whether the employers should be entitled to employ bandsmen on Sundays at a less rate than that advocated by the trade union. The court held that the fact that the motives of the defendants, who were officials of the union, might be bad did not prevent their acts being done in furtherance of this dispute.

Lord Sumner said this[32]: "Secondly, was there a trade "dispute at the time? In his opinion the plaintiff's own "evidence required the jury to answer the question whether "there was a trade dispute at the time in the affirmative and "not in the negative. Then, were the acts of which the plaintiff "complained done in contemplation or furtherance of a trade "dispute? Whatever might have been the motives of the "defendants—and he would assume that the jury had found "that they were sinister and improper—it was apparent on the "plaintiff's own case that the defendants did in fact get up a "trade dispute. Except by confusing the motive of an act with "the act itself, he was unable to see how it could be said that the

[28] [1938] I.R. 749.
[29] [1909] A.C. 506, 511.
[30] [1940] I.R. 347.
[31] (1912) 29 T.L.R. 67; 30 T.L.R. 432 (C.A.).
[32] 30 T.L.R. 432, 433.

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"acts complained of were not done in contemplation or further-"ance of a trade dispute. The argument for the plaintiff involved "reading the Act as though it spoke of an act 'honestly' or "'solely' done in contemplation or furtherance of a trade dispute. "The facts in the case of *Conway* v. *Wade* [33] were quite different "from the facts in this case. In his opinion it was clear that "here there was a trade dispute, and that the acts were done in "contemplation or furtherance of a trade dispute. A complete "defence was therefore made out. In his opinion it was "unnecessary to decide any other question."

It seems to me that this case does not cover the present, for the question here is not whether sinister motives disentitle the defendants to rely on the Act but whether a trade dispute existed at all.

Whether a trade dispute exists is a question of fact, as to which Lord Sterndale M.R. in *White* v. *Riley* [34] says this: "Now "was there a trade dispute in this case? That, in my opinion, "is a question of fact. It has been so treated in several cases, "and being a question of fact it is not easy nor indeed possible "to lay down any general rule which would apply to all cases. "We have to see what is the circumstance to which we have "to apply our minds in determining the question of fact in this "case. It seems to me that there is no doubt that there was a "dispute between the two unions, the Curriers' Union objecting "to the Workers' Union including in their membership craftsmen "such as the plaintiff and to their negotiating with the employers "on behalf of such men, and they insisted that all craftsmen "should be members of their union. To this the Workers' Union "would not agree. There was therefore a dispute between the "two unions on this point. We have had a good deal of discus-"sion as to whether it was a burning question or not. I rather "agree with the learned counsel for the respondents that it did "not burn very brightly, but there was the dispute, there is no "question about that, and in accordance with and by reason "of the attitude of the two unions the plaintiff soon after he went "to these works was asked to join the Curriers' Union. It was "suggested to him by one of his employers and by Mead and "by Wood, and he refused in each case unless he was allowed "still to remain a member of his own union. In 1919, as I have "said before, the matter was raised in a more acute form, partly "in consequence of a question put by Hardwick and partly, I "dare say, by the intervention of the defendant Wood, who was "one of the executive of the Curriers' Union. The result of it "was that the plaintiff was told that the men would not work "with him unless he did join and that if he did not either join or "leave the employment they would cease work. He was quite "willing, as he said, to join if he could remain in his own union, "but that they would not allow. In those circumstances, it

[33] [1909] A.C. 506.

[34] [1921] 1 Ch. 1, 18, 19, 20.

"seems to me that the only fair conclusion of fact is that there "was a dispute between workmen and workmen in connexion "with the employment of a person—namely, the plaintiff, the "dispute being that the men in the shop insisted that no skilled "man should be employed unless he belonged to the Curriers' "Union, and that this dispute arose because of the restrictions "which the union thought fit to put upon the employment of "persons as buffers, in what they thought was the interest of "their union, and its members, and perhaps in the interest of "the trade at large.

"It is said that this conclusion is inconsistent with the case "of *Conway* v. *Wade*[35] and *Giblan* v. *National Amalgamated* "*Labourers' Union*,[36] but I do not think that is so. The facts "in those cases were different. The complaint which the other "workers had against the plaintiffs in those cases and the cause "of their refusing to work with them were not matters in con-"nexion with the regulation of employment in the trade, but "were matters of complaint against the personal conduct of the "plaintiffs as members of their union. It was truly said by the "learned counsel for the respondents that it is very difficult to "draw a line between what is a trade dispute and what is not. "It is always the case in questions of fact, and I do not intend "to attempt a general definition. I must, however, say that I "prefer the reasoning of Peterson J. in *Hodges* v. *Webb*[37] to "that of Astbury J. in *Valentine* v. *Hyde*,[38] and I think it is "really almost a reductio ad absurdum of this section to say, as "the respondents are bound to say, that it does not include any "dispute between union and non-union men and that if union "and non-union men are working in the same employment and "the union men say, 'We will no longer work with the non-union "'men unless they join our union,' that is not a dispute between "workmen and workmen connected with the employment or non-"employment of any person. It seems to me that that is con-"trary to the words of the section. I do not think it is necessary "to say where the limitation lies which is to be put upon this "section. It is a question of fact in each case and I decide the "question in the present case as a question of fact. It is quite "possible that the extension of this legislation, which was "originally passed for the benefit of workmen in their disputes "with their employers, to disputes between workmen and work-"men, has produced results which many workmen in some trade "unions did not anticipate, but it does not seem to me that that "is any reason for not giving to the subsection its natural "meaning."

On the whole I have come to the conclusion that this was not a trade dispute. The defendants were not asserting a trade right, for they knew they could not procure the plaintiff's expulsion

[35] [1909] A.C. 506.
[36] [1903] 2 K.B. 600; 19 T.L.R. 708.
[37] [1920] 2 Ch. 70.
[38] [1919] 2 Ch. 129; 35 T.L.R. 301.

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from the union. The dispute, if it could be so called, had become an internecine struggle between members of the union and no interests of "the trade" were involved. It was a personal matter.

Behind these considerations lies a more fundamental point, namely, whether the committee's actions were "in *furtherance* "of a trade dispute." In my judgment this raises the same question as the issue of conspiracy. If, as I have held, the paramount object of the committee was to injure the plaintiff, then that was the object in furtherance of which they acted. They did not intend to further the dispute arising out of the plaintiff's refusal to strike—that was settled by higher authority; they intended to injure the plaintiff in his trade by their embargo, and it was to that end that their actions were directed. They were not furthering a trade dispute, but a grudge; the Act does not protect them.

On these conclusions what should be the plaintiff's remedy? First, damages. These are at large. If this were a case—as I wish it were on this point—where the judge had the help of a jury, he would not, in charging them, direct them to weigh in golden scales the days during which the plaintiff was unemployed, or to measure exactly the difference between the wage he has been earning and that which he might have earned but for the wrong done to him, or the expense to which he is put by working so far from his home. All these factors are no doubt material, as is the persecution to which the plaintiff has been subjected. I was asked to award "exemplary damages," a vague phrase and one never in my experience heard before in a Chancery court. I do not think I ought to be influenced by phrases. I propose to consider in a general way the injury done to the plaintiff by these defendants' misconduct, but to remember that an exaggerated sum may be thought to be a punishment.

On the whole I think that £500 is an appropriate award.

As to the remedy by way of injunction, it is true that some of the defendants said they would again act in the same way and that the resolution imposing the embargo still stands, but that is now a matter of history. The plaintiff has employment where he need not be a member of the union. He has paid no contribution since December, 1953, and I see great difficulty in framing any injunction that will fit the present circumstances. What the future will bring cannot be foreseen. I can only hope that wiser counsels will prevail. I do not even know who are the present members of the committee. I propose, therefore, to give the plaintiff leave to move for an injunction if further victimization requires it, but not to grant an injunction at present.

Judgment for the plaintiff for £500 against 11 defendants (i.e., all defendants excepting Thornton and Langford); the 11 defendants to pay the costs of the action,

excluding any costs incurred by reason of Thornton and Langford having been defendants.

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Solicitors: *Elwell & Binford Hole for A. N. & S. I. Levinson, West Hartlepool; W. H. Thompson.*

J. A. G.

[COURT OF APPEAL.]

* TRAYFOOT *v.* LOCK.

[Plaint No. M. 4142.]

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1957 *Jan.* 11.

Denning, Romer and Parker L.JJ.

Landlord and Tenant—Rent restriction—Death of tenant—Two applicants qualified by residence—Son and stepdaughter of tenant—Reference by county court judge to registrar as arbitrator—Documentary evidence of tenant's wish for son to succeed rejected by arbitrator — Material evidence — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*) *—County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 89 (3).

At the time of his death the statutory tenant of a dwelling-house had living with him a son and a stepdaughter. Each was qualified to succeed to the tenancy and each wanted to do so. In an action by the son for possession he put in evidence a document prepared by a solicitor and signed by his father expressing the wish that the son should be given the tenancy. The claims having been referred by the county court judge to the registrar of his court as arbitrator, the registrar awarded the tenancy to the stepdaughter. He stated in his award that he was not satisfied that the document purporting to express the wish of the father had not been signed "under the "suggestion and perhaps pressure of the son." In fact there had been no suggestion by anyone that the document did not represent the freely expressed desire of the father. The county court judge having upheld the award of the registrar, the son appealed, contending, inter alia, that there was an apparent error on the face of the award and that it should be set aside:—

Held, that when a court had to consider which member of a family should have a tenancy under section 12 (1) (*g*) of the Rent Restriction Act of 1920 it must consider all the circumstances of the case; that when the factors on either side left the matter very evenly balanced the deceased tenant's wishes become the decisive factor; and that the registrar having wrongly excluded what was material and admissible evidence his award must be set aside and the reference to him revoked.

Williams v. *Wallis and Cox* [1914] 2 K.B. 478 applied.

APPEAL from Judge Hodgson sitting at Wandsworth County Court.

Percy Trayfoot had been for over 40 years the tenant of a dwelling-house, No. 125, Lower Mortlake Road, Richmond, Surrey, and when he died on December 20, 1955, at the age of 81, he was a statutory tenant under the Rent Restriction Acts. For some years there had lived with him his own son, the plaintiff,

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William Percy Stephen Trayfoot, then aged 41, his step-daughter Mrs. Alice Lock, aged 55, the daughter of his second wife by her first husband, and her husband, Mr. Lock. On the death of the tenant both son and step-daughter, who were qualified to do so, wished to succeed to the tenancy under section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Failing agreement the son and Lock, on behalf of his wife, applied to the landlord's agent for the tenancy, and on January 4, 1956, the agent stated that he was giving the tenancy to the son as next-of-kin. Lock made no protest and the agent wrote on the rent-book, which he handed to the son, "Mr. W. P. S. Trayfoot "succeeded to the statutory tenancy of the late Mr. P. Trayfoot, "who died on December 26, 1955." Thereafter, the son paid the rent to the landlord's agent and gave the step-daughter a separate rent-book, charging her 10s. a week for the accommodation of herself and her husband in the house.

By his will the father had given his household furniture, goods, etc., to the son. He had also signed a document dated June 11, 1955, prepared by a solicitor and addressed to the agent, intimating his wish that the tenancy should pass to the son.

Some few months after his father's death the son, wishing to marry, brought the present action in the Wandsworth County Court for possession, seeking to eject the step-daughter. By consent of the parties the judge referred the action to the registrar of the court as an arbitrator under section 89 of the County Courts Act, 1934. The registrar came to the conclusion that there was no agreement between the son and step-daughter as to the tenancy and decided that the step-daughter ought to have the tenancy. In his award he apparently rejected as evidence the document expressing the wishes of the father, stating that he was far from satisfied that it represented a freely expressed desire, or that it was not signed under the suggestion, perhaps pressure, of the son.

The son applied to the county court judge to set aside the award alleging that it was erroneous in law because the registrar misdirected himself on the question whether there was an agreement or not, and, secondly, because he had rejected the document signed by the father stating that he wished the tenancy to pass to the son.

The county court judge refused to set the award aside. The plaintiff now appealed, contending, inter alia, that there was an apparent error on the face of the award and it should therefore be revoked and the case sent back to the judge.

R. A. Gatehouse for the plaintiff.
Donald Sumner for the defendant.

The following cases were referred to in argument: *In re King & Duveen* [1]; *Parsons* v. *Brixham Fishing Smack Insurance Co.* [2];

[1] [1913] 2 K.B. 32; 108 L.T. 844. [2] (1918) 118 L.T. 600.

Absalom v. *Great Western (London) Garden Village*[3]; *British Launderers' Research Association* v. *Central Middlesex Assessment Committee*[4]; and *Williams* v. *Wallis and Cox.*[5]

DENNING L.J. stated the facts and continued: The son applied to the county court judge to set aside that award because (he said) it was erroneous in point of law on two grounds. One ground was that the registrar misdirected himself on the question whether there was an agreement or not. The other ground was that the registrar had excluded the document of June 11, 1955, which the father had signed, in which he said it was his wish that the tenancy should pass to the son. The county court judge refused to set the award aside, and there is an appeal to this court.

Upon the first matter, I find it difficult to say that the registrar misdirected himself in law. He had regard to the fact that Lock had not protested when the agent awarded the tenancy to the son: he also took into account the fact that the defendant accepted responsibility for 10s. a week towards the rent: "But" (he said) "in my opinion there never was an agreement." His finding, I think, comes to this: the defendant did not know the legal position at all; the agent had said that the son was entitled to the tenancy, being the next-of-kin; and the step-daughter and her husband had submitted to that position. They did not really agree to it, but they took the agent's word for it. I should have thought that if there had been a long period of acquiescence the registrar ought to have inferred an agreement, but such a short time elapsed here that it cannot be said that the registrar necessarily misdirected himself in law in regard to this matter.

The second point is, I think, a difficult one. The document of June 11, 1955, which the old man signed, was, I think, a very relevant matter for the registrar to consider. When the court has to consider which member of a family ought to have a tenancy under this section, it must consider all the circumstances of the case. For instance, in this case the court must give proper weight to the fact that the son is the blood relation and that the step-daughter is not. On the other hand, in her favour there is the meritorious fact that the step-daughter had "kept "house" for the household for many years. Those factors on either side leave the matter very evenly balanced. In those circumstances the decisive factor seems to me to be the deceased tenant's wishes. Such wishes may not always be an overriding consideration, but they may in some cases, and this is one. The father had lived in the house for all these years. It was his tenancy. He had by his will given all the furniture to his son. He would presumably want the tenancy of the house also to go to the son. It was suggested that the document of June 11, 1955, was not admissible in evidence: but I think it was. The only

[3] [1933] A.C. 592; 49 T.L.R. 350.
[4] [1949] 1 All E.R. 21, 25.
[5] [1914] 2 K.B. 478, 485.

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way of finding out the father's wishes in a case of this kind is by admitting oral evidence or documentary evidence of his intention as declared by him in his lifetime.

This is what the registrar said about the document: "If I "were satisfied that the document signed by the deceased in "June, 1955, expressed the deceased's free desire, it would be a "matter I think I ought to consider, although I am by no means "sure about it. But I am far from satisfied that it represented "a freely expressed desire or that it was not signed under the "suggestion, perhaps pressure, of the plaintiff." For that reason he seems to have rejected it. I must say that there is nothing in the material before us to suggest it was not the freely expressed desire of the father. We were told by counsel in the case that there was no suggestion made by either lawyers or parties in the court below that this was not a free expression of the old man's desire. If it had been challenged in the court below, it would have been inquired into then, but it was not. I can find no justification here for the registrar's surmise that this was not a "freely expressed desire" or was signed under a suggestion or pressure by the son.

In those circumstances, it seems to me that the registrar has wrongly rejected this document. He has technically included it so as to look at it, but then in the next breath he has excluded it, because he said he would not pay any attention to it. In effect, he has excluded material evidence; and in accordance with *Williams* v. *Wallis and Cox*,[1] *per* Atkin J., that is a ground for setting aside the award of an arbitrator. Although the registrar gave a very careful award, he has, on this point, I fear, fallen into error. I think that this court should set aside the award (as the County Courts Act empowers us to do), and revoke the reference.

Romer L.J. I agree. I wondered a little myself for a while whether the observations which the registrar made in his judgment (to which my Lord has referred), with regard to the document which old Mr. Trayfoot signed six months before his death, were accurately set out in the copy of the registrar's judgment that we have, because there is no word in the evidence suggesting that that document was procured "under the "suggestion, perhaps pressure, of the plaintiff," or that it in any way failed to represent the "freely expressed desire" of Mr. Trayfoot. I wondered whether for that reason the registrar might have had some other meaning in mind when he made those observations. But we are told that this was a written and reserved judgment, so that one can only conclude that it means what it says. Reading it in that way, I entirely agree with what my Lord has said: that the effect of it was to exclude this document wholly as a relevant consideration for the purpose for

[1] [1914] 2 K.B. 478, 485.

which it was put in. I therefore feel that there is no alternative to our sending this matter back to be dealt with in the way my Lord has indicated, much as I think it is a pity that it should have to go back. I agree with the order that my Lord has suggested.

PARKER L.J. I have reluctantly come to the same conclusion, and for the reasons given by my Lords: accordingly, there is nothing that I desire to add.

Appeal allowed.
Order set aside and reference revoked.
Case remitted to judge.

Solicitors: *S. M. Gibson, Richmond; M. A. E. Cresswell.*

A. W. G.

[COURT OF CRIMINAL APPEAL.]

* PRACTICE NOTE (FORM OF OATH).

1957
Jan. 21.

Lord Goddard C.J., Cassels and Lynskey JJ.

Criminal law—Practice—Jury—New form of oath.

LORD GODDARD C.J. We wish to call the attention of courts of quarter sessions to a new form of jury oath now in use at the Central Criminal Court and which will probably soon be used on all the circuits. Experience at the Central Criminal Court where so many jurors have to be sworn during the year and indeed at other courts has shown that jurors frequently find a difficulty in reading aloud the present form of oath, probably mainly due to the juxtaposition of the words "will well" in the phrase "will well and truly try." There is no statutory form of oath and any formula may be used which sufficiently prescribes the obligation imposed. The judges have approved the revised form which was suggested by the Recorder of London and which has been found to remove any difficulty. It is: "I "swear by Almighty God that I will faithfully try the several "issues joined between Our Sovereign Lady the Queen and the "prisoner at the bar and give a true verdict according to the "evidence." While we have no power to direct quarter sessions to adopt this form, we commend it to their consideration as uniformity in these matters is desirable.

P. P.

[COURT OF APPEAL.]

C. A.

1956
Oct. 22.

Denning, Hodson and Morris L.JJ.

*NEUCHATEL ASPHALTE CO. LTD. *v.* BARNETT.

[Plaint No. M.O. 524.]

Contract—Construction—Repugnancy—Work and labour—Payment—Disputes over manner in which work carried out—Statement of balance owing sent to defendant—Cheque for less than balance claimed sent by defendant to company with words "In full and "final settlement of account" on back—Cheque signed and indorsed by company secretary—Main object of transaction—Whether defendant liable for balance claimed.

Accord and Satisfaction—Question of fact.

A company with its head office in London contracted through their Birmingham office to do certain work for the defendant at a cost of £259. Disputes arose over the way the work had been done. The defendant, who had paid £125 on account, continued to complain by letter, and when the statement of the balance of the account claimed—£134—was sent to him, he wrote to the London office, protesting over the failure to deal with his complaints, and stating: "I am therefore enclosing my further cheque for £75 in respect of this work." On the back of the enclosed cheque he typed the words "In full and final settlement "of account. Signed . . . Dated . . ." and sent it to the London office without enclosing the statement of account. The secretary of the company signed and dated the cheque in the spaces provided over the company's rubber stamp and passed it through the company's account, and it was in due course returned to the defendant. Meanwhile the defendant's complaints were referred by the London office to the Birmingham office, which offered a compromise on the items in dispute and claimed the balance outstanding. The defendant relied on the indorsed cheque in his possession as constituting a final receipt relieving him from all further liability:—

Held, that there was evidence on which the county court judge could find, as he had done, that it could not reasonably be supposed that there was an intention on the part of the company to agree to accept the cheque for £75 in full and final satisfaction of their claim for £134. The main object and intention, as disclosed by the other circumstances of the case and particularly by the letter of the defendant accompanying that cheque, was that the payment of the £75 should be a payment on account.

APPEAL on a preliminary point of law from Judge Norris, sitting at Wolverhampton County Court.

In September, 1955, the defendant, Barnett, employed the plaintiff company, Neuchatel Asphalte Co. Ltd., to put a new surface on the drive of his house, to set the kerbstones, and to do other work, at a total cost of £250. While the work was being done, the company erected a retaining wall for which they sought to charge another £9, so that the total bill for the work was £259. The defendant objected to the extra £9 for the retaining wall. He also had some queries on the work itself, such as some slight settlement in one part and some broken kerbstones.

When the company demanded payment of the £259, the defendant, on October 26, 1955, sent a cheque for £125 together with a covering letter in which he said: "Pending my receipt of "your reply to outstanding queries in connexion with the work "carried out at the above I enclose herewith cheque for £125 "on account, for which your receipt in due course will be "appreciated." That payment left £134 outstanding.

The queries were discussed, and had not been resolved, when the company in December sent a statement from their London office for the outstanding amount, £134. The defendant (who had been dealing with the Birmingham office of the company) wrote in reply on December 13, 1955, to the company's office in London: "I return herewith your statement and would ask you "to refer this to Mr. Park [the Birmingham manager] who is "aware of allowances to be made. Will you please attend to "this matter without further delay as I am of course unable to "remit until outstanding matters are finalized?" The London office accordingly referred the matter to the Birmingham manager. But before the Birmingham manager had dealt with it, the defendant sent a letter and cheque to the company. The letter was dated December 21, 1955, addressd to the company in London and read as follows: "With further reference to account, "in spite of repeated requests for allowance to which I am "entitled, you have failed to advise me in this matter. I am "therefore enclosing my further cheque for £75 in respect of this "work."

With the letter the defendant enclosed his cheque payable to the company for £75, and on the back of the cheque he had typed these words: "In full and final settlement of account. "Signed —. Dated —." When the company received that cheque the secretary indorsed it by the rubber stamp of the Neuchatel Asphalte Co. over a 2d. stamp signed by the secretary in the place which the defendant had provided, so that underneath the words "In full and final settlement of account" was the name of the Neuchatel Asphalte Co. and the signature of the secretary. On January 2, 1956, the Birmingham manager having looked into the complaints, wrote to the defendant about them, and suggested that the company might give him a credit note of £4 10s. against the amount that was outstanding. But by that time the defendant had got the cheque back from his bank, and he replied, saying: "my cheque . . . dated Decem- "ber 21 for the amount of £75 was in 'full and final settlement "'of your account' and was indorsed accordingly and accepted "by you. It is unfortunate that you neglected to deal with my "complaints to my satisfaction and the matter must therefore "now be considered as concluded."

When the plaintiffs' solicitors were apprised of the facts and were told that the secretary of the company had signed a receipt on the back of the cheque for £75, in the manner stated above, they wrote to the defendant, stating that they had been instructed

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by the company in connexion with their claim for the balance of their account. They wrote further: "We have read the "correspondence which has passed between yourself and our "clients with reference to the cheque for £75 sent by you in "December last, which you contend was in full and final settle- "ment of our clients' account, and it is clear that our clients "did not accept it on this basis, but as a payment on "account. . . ."

The plaintiffs thereupon brought an action to recover the balance alleged to be owing to them. At the hearing in the county court on June 22, 1956, the parties agreed that though there was a dispute on the merits, the judge should deal with the issue as to further liability raised on the pleadings as a preliminary point and the evidence called was confined to that matter. The manager of the Birmingham office gave evidence that there was a dispute as to whether the complaints of the defendant were justified, and if they were, the amount involved would be not more than £5 or £6, so that the amount by which the defendant had written down the bill exceeded by a very large sum the area of dispute. The secretary to the company who was attached to the London headquarters, was not called on to give evidence. But the county court judge, having considered the correspondence referred to by the plaintiffs' solicitors, and in particular the letter of December 21, sent to the London office with the cheque, inferred that the secretary, when he signed and stamped the cheque in the way he had done on behalf of the company, was under a mistake because he did not know the state of the account. The judge said: "There was nothing said "about the receipt on the back of the cheque in that letter, "and I think that the letter indicates that no agreement had "been come to as to the final sum which was to be paid by the "defendant under this contract. He says: 'In spite of repeated "'requests for allowance you have failed to advise me in this "'matter,' and so he sends the cheque which is very much "smaller than it could possibly be if it was sent in full satisfac- "tion of the account. I am quite satisfied that in reducing this "account by £59 odd he was reducing the amount far below any "allowance that he was likely to obtain and any allowance for "all the claims for which he had been making an appeal. And "that is the state of affairs when he sends the cheque with this "covering letter. The cheque gets into the hands of the com- "pany's secretary in London who puts a 2d. stamp on and signs "the form of receipt on the back. I do not know what was in the "mind of the secretary when he did that, and he has not been "called; but if he had looked at the account I do not think he "could, as a businessman, have signed the cheque without "making inquiries of Mr. Park about this sum of £59. I do not "think he can have looked at the account. I think he just signed "the cheque and passed it on to put to the account. He is "accepting the cheque in full satisfaction of all outstanding

"claims on the defendant. I think that this suggests he was not "conscious that it was reducing the account of £59 odd. I do "not think he ever intended to do such a thing and in those "circumstances, though I am not at all confident that I am "right about this, I think I am doing justice in the matter. "I do not think I am satisfied that the secretary of the com-"pany did accept this cheque for £75 in full discharge of the "account"; and he gave judgment for the company.

The defendant appealed.

K. W. Mellor for the defendant.
H. J. Garrard for the company.

Day v. *McLea*[1] and *Tanton* v. *Jervis*[2] were referred to in the course of the argument.

DENNING L.J. stated the facts as set out above, and said that the cheque for £75 sent with the covering letter of December 21 was clearly not nearly enough to meet the company's bill, for they claimed that £134 was due. The defendant had made some complaints, but even if they were all justified, there would still be over £100 due, and no one could, therefore, possibly think that £75 was enough. Anyone reading the defendant's letter of December 21 would reasonably think that the £75 was a payment on account and nothing more. No doubt the defendant had hoped, by putting those words on the back of the cheque, that the company would sign that cheque as an indorsement; and they had done so. The defendant now contended that thereupon the whole matter was settled, and that he was quit of any further liability. His Lordship continued: The question for consideration is whether the company, having signed on the back of this cheque under the words "In full and final settlement of "account," can nevertheless bring this action for the balance? The company's secretary was not called to explain how he came to sign this, and it has been argued before us that, in the absence of any evidence by him that he made a mistake, the company must be held bound by their signature.

I fully agree that the indorsement cannot be set aside on the ground of mistake. It was to all outward appearances a concluded transaction. If the secretary did make a mistake—as, for instance, if he did not read the words "in full and final "settlement"—it was a mistake of his own making of which the defendant knew nothing, and the indorsement must stand as it is written.. The whole question is, what is the proper interpretation of the transaction as it stands on the correspondence?

If the covering letter of December 21, 1955, is read by itself, it plainly imports that the cheque for £75 is sent only on account and not in full and final settlement. The surrounding circumstances bear this out. Over £100 was due, and no one

[1] (1889) 22 Q.B.D. 610; 5 T.L.R. 379.
[2] (1873) 43 J.P. 784.

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would reasonably suppose that £75 would settle the debt. The main object and intention of the transaction was, therefore, the payment of £75 on account. But when we turn to the back of the cheque we find the words "in full and final settlement of "account." Those words are inconsistent with the main object and intention of the transaction as disclosed by all the other circumstances of the case. What then is to be done? It is a well settled rule of construction that if one party puts forward a printed form of words for signature by the other, and it is afterwards found that those words are inconsistent with the main object and intention of the transaction as disclosed by the terms specially agreed, the court will limit or reject the printed words so as to insure that the main object of the transaction is achieved.

We recently had occasion to invoke this rule in a case when an estate agent sought to get commission on a transaction "subject to contract." We do not allow printed forms to be made a trap for the unwary. So here words of this kind on the back of a cheque cannot be made a trap for the unwary: and this is so, even though they are typed and not printed. In the particular circumstances of this case, the words "full and final "settlement" can and should be rejected.

Another way of reaching the same result is to say—as the judge did—that in the circumstances the secretary cannot have intended to accept the cheque as a final release of the defendant's indebtedness. But as the secretary did not give evidence, this only means that in the circumstances it cannot reasonably be supposed that the secretary did agree to accept the cheque "in "full and final settlement." And why cannot this be reasonably supposed? Only because the words are inconsistent with the main object and intention of the transaction as disclosed by all the circumstances. So it all comes back to the same thing. I would dismiss the appeal accordingly.

Hodson L.J. I agree. The only question is, was there any evidence on which the county court judge was entitled to come to the conclusion that there was no agreement between the parties that the cheque for £75 in this case should be accepted in full satisfaction of the plaintiffs' claim, the plaintiffs' claim being for a sum £59 greater?

[His Lordship stated the facts with regard to the plaintiffs' solicitors, and the evidence given in the county court, and continued:] The letter of December 21 is at any rate consistent with, if not only consistent with, a payment on account. [His Lordship read the extract from the county court judgment set out above, and continued:] The secretary was not called as a witness. Mr. Mellor, for the defendant, says that the county court judge is not entitled in those circumstances to form any conclusion at all as to the state of mind of the secretary, as to whether he had any intention other than that expressed on the back of the cheque.

namely, accepting the cheque in full satisfaction, because the secretary was not called.

I think that there is great force in that submission, but I am still of opinion that the county court judge was entitled to arrive at that conclusion on the facts of the case, looking at the surrounding circumstances, which are unusual: first of all, a man writing to a company whose head office was in London without sending the account, and asking for a reduction of £59 in his bill when a very much smaller sum was in dispute; making no reference in his covering letter to the fact that the cheque was to be accepted in full satisfaction of any claim which the company might have on him—and in writing to the London office in that way when the whole of the correspondence had been with the Birmingham office.

I ought perhaps, in fairness to the defendant, to refer to those letters, because he did write to the London office on December 13, when he first received the statement and asked them to refer to the local manager, who was aware of the allowances to be made; and, having apparently received no communication from anybody on behalf of the company, he wrote again on December 21 to the London office: [His Lordship read the letter (supra) and continued:] The "further cheque for £75" was a clear reference to the fact that in his earlier letter, namely, in October, 1955, he had sent £125 expressed to be on account. It appears to be quite clear that the Birmingham office knew nothing about the payment of this cheque at that time, because on January 2, the Birmingham manager wrote a letter to the defendant in which he thanked him for the letter of the 13th, when the statement was returned by the defendant to the company with a request to refer it to the Birmingham manager. The latter thanked him for his letter of the 13th which had been passed to the writer for his comments—referred to him by the London office. It is quite clear from the contents of that letter that at that time the Birmingham manager knew nothing of the fact that meanwhile this cheque of December 21 had been paid in, having been receipted in the way described, by the London office. That information was at once given to the Birmingham office by the defendant by a letter of January 3; but it seems to me to be a reasonable inference to draw from the surrounding circumstances of this case that in construing those words "In full and final settlement of account," on the back of the cheque, the judge was entitled to come to the conclusion that there was no intention on the part of this company to accept this cheque in full satisfaction of the full outstanding claim. I agree, therefore, that this appeal fails.

MORRIS L.J. I am of the same opinion. In my judgment, there was evidence on which the judge could find that the company never intended to agree to take the sum of £75 in full satisfaction of their claim.

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In *Day* v. *McLea*[1] Bowen L.J. said[2]: "It seems to me, as "a matter of principle as well as of authority, that the question "whether there is an accord and satisfaction must be one of "fact. If a person sends a sum of money on the terms that "it is to be taken, if at all, in satisfaction of a larger claim; and "if the money is kept, it is a question of fact as to the terms "upon which it is so kept. Accord and satisfaction imply an "agreement to take the money in satisfaction of the claim in "respect of which it is sent. If accord is a question of agree-"ment, there must be either two minds agreeing or one of the "two persons acting in such a way as to induce the other to "think that the money is taken in satisfaction of the claim, and "to cause him to act upon that view. In either case it is a "question of fact."

It seems to me here that there were three features of the evidence before the judge which entitled him to come to the conclusion that he reached. I need only refer to them very briefly.

In the first place, I think that the contents of the letter of December 21 furnish material. There is nothing at all said in that letter about the words which are on the back of the cheque. That letter suggests and indeed indicates that no agreement had been come to up to that moment. If, therefore, the defendant was putting forward a proposal that there should be an end of the matter on the basis that the plaintiffs gave up £59 of their claim, it seems to me that he should have made some express reference to that proposal. There was nothing to put the recipient of this letter on express notice that this was a proposal in that form, and no mention made in the body of the letter of the words that were on the back of the cheque. It was left for somebody looking at the cheque to realize their intended significance.

Secondly, I think that the finding of the judge as to the amount which was in dispute provides evidence on which he was entitled to come to his conclusion. The judge said: "I am "quite satisfied that in reducing this account by £59 odd he" (i.e. the defendant) "was reducing the amount far below any "allowance that he was likely to obtain and any allowance for "all the claims for which he had been making an appeal." It seems to me that that is a second piece of evidence which shows that the judge could come to the conclusion that the plaintiffs never intended to give up £59 at this time.

Thirdly, it seems to me that the sequence of the letters provides additional evidence. The defendant had written his letter of December 13 to London sending the statement and asking that the matter be referred to the Birmingham manager, who, he said, was aware of the allowances to be made. That letter was sent to the Birmingham manager; he replied on January 2 and dealt with the question of allowances and made a

[1] (1889) 22 Q.B.D. 610. [2] Ibid. 613.

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suggestion that £4 10s. might be credited. That, of course, shows that he was considering the matter on behalf of the company after the date when the secretary had signed this cheque and after the date when the secretary had presumably sent the letter of December 13 to Birmingham; and all that is additional material showing that the company could not have intended to agree to remit £59 of their claim.

But, as this is an appeal from the decision of a county court judge, it seems to me that the question is whether there was evidence entitling him to arrive at his conclusion of fact, and for those three reasons that I have indicated it seems to me there was ample evidence enabling him to come to his conclusion. I therefore agree that the appeal fails.

Appeal dismissed.

Solicitors: *Henry Hilbery & Son for Thorne, Beckett & Co., Wolverhampton; Bischoff & Co.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

*REGINA *v.* DARLINGTON COUNTY BOROUGH JUVENILE COURT. *Ex parte* WEST HARTLEPOOL CORPORATION.

1957
Jan. 22.
Lord Goddard C.J., Cassels and Lynskey JJ.

Children and Young Persons—Care of—Order committing child to care of local authority—Need for order to state that consent of local authority obtained—Children and Young Persons Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 12), *s.* 76, *as amended by Children Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *s.* 5 (1).

Where an order is made under section 76 of the Children and Young Persons Act, 1933, committing a child to the care of the local authority and a probation order or supervision order is in force as respects the child, the order should state that the consent of the local authority had been obtained to the making of the order.

APPLICATION for an order of certiorari.

The applicants, the West Hartlepool Corporation, applied for certiorari to quash an order made by the Darlington Juvenile Court on April 18, 1956, committing Irene Turner, a child, to the care of the local authority of West Hartlepool until she attained the age of 18 years. The grounds on which the relief was sought was that the juvenile court had no jurisdiction to make the order in that the local authority of West Hartlepool did not consent to the order as required by section 76 of the Children and Young Persons Act, 1933, as amended by the Children Act, 1948, s. 5,[1]

[1] Children and Young Persons Act, 1933, s. 76, as amended by the Children Act, 1948, s. 5 (1): "(1) ". . . where a probation order or "supervision order is in force as "respects a child or young person, or "the court proposes to make such an "order at the same time as an order "for committal to the care of the local "authority, the last-mentioned order "shall not be made unless the local "authority consent to the making "thereof."

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there being in force at the time of the making of the order a supervision order dated February 15, 1956, and that the order of April 18 was bad in law. The facts are set out in the judgment of Lord Goddard C.J.

W. B. Harris for the applicants.

The justices did not appear and were not represented.

No cases were cited in argument.

Lord Goddard C.J. Mr. Harris moves for an order of certiorari to bring up and quash an order dated April 18, 1956, made by the Juvenile Court of the County Borough of Darlington committing Irene Turner, a child within the meaning of the Children Act, 1948, to the care of the local authority of West Hartlepool until she attains the age of 18 years.

The point is this: The child had been originally brought before the Darlington justices and a fit person order committing her to the care of the Darlington Borough Council had been made. That was because the parents had been found guilty of an offence against the child under section 1 of the Children and Young Persons Act, 1933. Subsequently, the father of the child applied for that order to be revoked on the ground that he could properly look after the child and was willing to perform his duties as a parent. The justices were willing to give him a chance of showing that he could look after the child properly and on February 15, 1956, they revoked the fit person order, but made a supervision order under which a probation officer was appointed to supervise the child. Meanwhile, the parents and the child removed to West Hartlepool. The child was brought by the probation officer under the supervision order before the Darlington justices because she was of opinion, and the justices agreed, that once again a fit person order ought to be made, and on April 18, 1956, the justices made an order committing the child to the care of the West Hartlepool local authority.

The point taken is that the West Hartlepool authority had not given consent to that course. [His Lordship read section 76 of the Act of 1933 as amended by section 5 of the Act of 1948 and continued:] In point of fact the chairman of the Darlington justices, for reasons with which I quite sympathize—no one is blaming the justices in this case—thought that the West Hartlepool authority had given consent, but in fact they never had, and that is a ground for saying that the justices had no power to make the order they did. The matter is clinched I think because, in my opinion, the order which they did make is defective on its face because it asserts that a supervision order had been made in respect of this child and then goes on to commit the child to the care of the West Hartlepool authority but does not recite in the order, as it ought to have done, that the consent of West Hartlepool had been obtained. It is necessary that an order of

this sort should set out on its face sufficient to show that the justices had jurisdiction to make the order they did, just exactly in the same way, if I may take another instance, that in a bastardy order the justices have to set out that the evidence of the mother was corroborated in a material respect because they have only power to make the order if it has been, and the order must show everything that is necessary to give the justices jurisdiction.

That is really the only important thing in this case. The justices no doubt were fully aware of the provisions of the Act, but made a mistake in thinking that consent had been given when in fact it had not, but this order is bad on its face because it recites that a supervision order had been made in respect of this child and does not go on when committing the child to the care of the local authority to recite that the local authority had consented. For these reasons the order must go.

CASSELS J. I agree.

LYNSKEY J. I agree.

Order of certiorari.

Solicitors: *Lewin, Gregory, Mead & Sons for Eric J. Waggott, West Hartlepool.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* HAVANT JUSTICES. *Ex parte* JACOBS.

1957
Jan. 23, 30.

Lord Goddard C.J., Cassels and Lynskey JJ.

Criminal Law—Sentence—Probation order—Court of summary jurisdiction—Breach by probationer—New probation order made while former order not discharged—Total period of probation more than three years—Power of court to make new order—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 5 (1), 6 (3), *Sch. I, para.* 3, *proviso.*

By section 6 (3) of the Criminal Justice Act, 1948, a court before whom a probationer is brought for failure to comply with an existing probation order "may without prejudice to the continuance "of the probation order, impose on him a fine not exceeding £10 or, ". . . make an order . . . requiring him to attend at an attendance "centre, or may—(*a*) if the probation order was made by a court "of summary jurisdiction, deal with the probationer, for the offence "in respect of which the probation order was made, in any manner "in which the court could deal with him if it had just convicted "him of that offence; . . ."

A girl of 20 appeared before a magistrates' court for having failed to comply with a condition in a two-year probation order made five months previously by another court on conviction of larceny. The justices, acting under section 6 (3) (*a*) of the Act of 1948, made a fresh probation order putting the girl on probation for a further period of three years. On an application for an order

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of certiorari to quash the justices' order on the ground that they had no power to make it as (a) the previous order had not been discharged, and (b) the effect of the new order would be to extend the period of probation for the girl's original offence to more than three years, contrary to section 3 (1) of the Act:—

Held, (1) that where the court acted under paragraph (*a*) of section 6 (3) the provisions in subsection (3) as to the continuance of the existing probation order did not apply; and therefore the court could, without regard to the existing order, if it considered it expedient, make a fresh probation order for a period of not more than three years. That order would in future control the probationer, and the previous order, though not formally discharged, would then be ineffective.

(2) That the prohibition as to the extension of a probation order for more than three years contained in the proviso to paragraph 3 of Schedule I to the Act had no application to the justices' order as the proviso was solely concerned with the amendment of an existing order; accordingly, the justices had the power to make the order and the application failed.

Application for order of certiorari.

The following statement of facts is taken from the judgment. On December 8, 1955, Audrey Helena Baker, a girl of 19 years of age, was convicted at the magistrates' court at Poole, Dorset, for the larceny of money and put on probation for two years with the condition that she should reside at a hostel in North London. On February 20, 1956, the girl was brought before a metropolitan magistrate at the North London magistrates' court for a breach of that probation order and, in addition to giving an absolute discharge for the breach the magistrate amended the order by substituting residence at St. Barbara's approved school in the county of Hampshire for residence at the hostel in London. As a consequence of the amendment as to residence the magistrates' court at Havant became the supervising court for the purposes of the sections in the Criminal Justice Act, 1948, dealing with probation orders and the girl, having committed a further breach of the order, was brought before the magistrates' court at Havant on May 4, 1956, and that court made a new probation order for a period of three years. The girl subsequently committed a breach of that order, and on June 7, 1956, was committed to quarter sessions under section 20 (3) of the Act of 1948. Quarter sessions sentenced her to Borstal training.

In this application the girl's mother, Doris Ethel Jacobs, moved for an order of certiorari to bring up and quash the probation order made by the Havant justices on May 4, 1956, on the grounds (a) that the justices had no power to make a new probation order in respect only of a breach of a previous probation order without discharging the previous order; (b) that the justices had no power to make a probation order for three years in respect of an offence for which a person had already been on probation for five months thereby extending the period of probation for that one offence to a time greater than three years, contrary to section 3 of the Criminal Justice Act, 1948.

The justice who presided at the sitting of the court on May 4, 1956, when the order complained of was made, stated in an affidavit, inter alia, that the justices rejected variation of the previous order as variation was not suitable, and in any event there was in fact no application for variation; that they considered that they were entitled to make a new order by the provisions of section 6 (3) (*a*) of the Criminal Justice Act, 1948; and that in view of the information before them a period of three years from the making of the order was desirable.

Ingram Poole and *A. R. Tyrrell* for the applicant.
D. A. Grant for the justices.

No cases were cited in argument.

At the conclusion of the argument Lord Goddard C.J. said that the application would be dismissed and that the judgment would be put into writing.

Cur. adv. vult.

Jan. 30. LORD GODDARD C.J., reading the judgment of the court, stated the facts as set out above and continued: The ground upon which this motion was made was that the justices at Havant had no power to make the probation order of May 4, 1956, because it was said that as the original probation order had never been discharged the effect of the new order would be that the girl would be under probation for a period exceeding three years. We were informed that the question raised on this motion is one which has caused justices and their clerks some doubt and that it has been the subject of discussion in legal journals, and, accordingly, in dismissing the application at the close of the argument we said that we would put our reasons for so doing in writing, and now proceed to give them.

By section 3 of the Criminal Justice Act, 1948, it is provided: "(1) Where a court by or before which a person is convicted of "an offence . . . is of opinion that having regard to the circum-"stances, including the nature of the offence and the character "of the offender, it is expedient to do so, the court may, instead "of sentencing him, make a probation order . . . requiring him "to be under the supervision of a probation officer for a period to "be specified in the order of not less than one year nor more "than three years."

By section 5 (1) the provisions of the First Schedule to the Act shall have effect in relation to the discharge and amendment of probation orders, and by paragraph 1 of that Schedule it is provided: "The court by which a probation order was made "may, upon application made by the probation officer or by the "probationer, discharge the order." That is the only specific provision in the Act with regard to the discharge of a probation order. Paragraph 2 of the First Schedule contains provisions as

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to the amendment of an order and gives power to the supervising court to make amendments but also, contained in paragraph 3, is a proviso that the court shall not amend a probation order by reducing the probation period, or by extending that period beyond the end of three years from the date of the original order.

Section 6 (1) provides that if during the term of probation the probationer has failed to comply with any of the requirements of the order he may be summoned to appear before the court, including the supervising court. Section 6 (3) provides: "If it is "proved to the satisfaction of the court . . . that the probationer "has failed to comply with any of the requirements of the "probation order, that court may without prejudice to the con-"tinuance of the probation order, impose on him a fine not "exceeding £10 or, in a case to which section 19 of this Act "applies, make an order under that section requiring him to "attend at an attendance centre, or may—(*a*) if the probation "order was made by a court of summary jurisdiction, deal with "the probationer, for the offence in respect of which the probation "order was made, in any manner in which the court could deal "with him if it had just convicted him of that offence."

The offence in respect of which the probation order was made was the larceny committed on December 8, 1955, and it is quite clear that had the supervising court, that is to say, the Havant justices, dealt with the probationer for that offence one of the manners in which they could have dealt with her on the conviction would have been to have made a probation order under section 3 (1). Accordingly, in the opinion of the court it follows that the justices at Havant were enabled by this section to make the probation order that they did. They could not discharge the original probation order. That could only be discharged by the court at Poole, the court that made the order, and only on the application of the probation officer or the probationer, and no such application was made by either.

Now it will be observed that section 6 (3) enables the court before whom a probationer is brought for failure to comply with the order to impose a fine not exceeding £10, or to make an order requiring him to attend at an attendance centre without prejudice to the continuance of the probation order. That last provision as to the continuance of the probation order does not apply if the justices act under the provisions of paragraph (*a*) and decide to deal with him in any manner in which they could have dealt with him if they had just convicted him of the original offence. They are not required, therefore, to have regard to the fact that a previous probation order is in existence, except in so far as they have to find whether there has been a breach of that order; and, in the opinion of the court, it follows that, once the supervising court intend to deal with the case otherwise than by imposing a fine of £10 or making an attendance centre order, the effect is that the previous probation order can no longer have effect. It is clear that for a breach of an order justices can sentence the

probationer to prison. The probation order could have no effect during the sentence of imprisonment. It is also clear that the supervising court could send the probationer forward to quarter sessions, as was ultimately done in this case, with a view to a Borstal sentence, and if the original court making the order was a court of assize or of quarter sessions could themselves sentence to imprisonment or Borstal. Having that power, if the court is of opinion that it is expedient to make a probation order instead of sending the offender to prison or to Borstal, we can see no reason why they should not make a probation order for not more than three years. It will be this order that will control the probationer, and the former order, though not formally discharged, will be ineffective. The proviso to paragraph 3 of the First Schedule does not really cause any difficulty because that only prohibits a court that is asked by the probation officer or by the probationer to amend an existing order from extending the period of that order beyond the term of three years.

For these reasons we are of opinion that the justices had power to make the order that they did, and that this application fails.

Application dismissed.

Solicitors: *Barnes & Butler for J. W. Miller & Son, Poole; Theodore Goddard & Co. for G. Andrew Wheatley, Winchester.*

E. M. W.

[PROBATE, ETC., DIVISION.]

* LEVY *v.* LEVY.

1957
Jan. 16.

Lord Merriman P. and Collingwood J.

PRACTICE NOTE.

Husband and Wife—Justices—Appeal to Divisional Court—Service of documents relating to appeal—Infant respondent—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940/*L.*27), *r.* 64.

APPEAL from order of metropolitan magistrate.

Upon the hearing of an appeal from a decision of the metropolitan magistrate sitting at the Thames Magistrates' Court on July 2, 1956, dismissing a wife's complaint of desertion, the attention of the court was drawn to the fact that both parties to the proceedings were infants and that the documents relating to the appeal had not been served upon the father or guardian of the respondent husband as required (unless otherwise directed) by rule 64 of the Matrimonial Causes Rules, 1950,[1] but upon the respondent husband himself.

[1] Matrimonial Causes Rules, 1950, r. 64 (3): "Where in any cause to "which these Rules apply any document is required to be served and "the person on whom service is to be "effected is an infant, the document

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Counsel for the husband submitted that, in the circumstances of the case, service upon the husband should be treated as good service notwithstanding the fact that he was an infant. The husband gave oral evidence upon oath that he had been served personally with the relevant documents and that his father had applied for and obtained a civil aid certificate on his behalf. The civil aid certificate granted legal aid to the husband as respondent in connexion with proceedings "to defend (through his "father and next friend David Levy) an appeal to the Divisional "Court . . ."

Jack Sarch for the wife.
A. F. Waley for the husband.

COLLINGWOOD J., in the course of his judgment, referred to *Gore-Booth* v. *Gore-Booth* [1] and *Stanga* v. *Stanga* [2] and emphasized that the mandatory nature of rule 64 of the Matrimonial Causes Rules, 1950, was equally applicable to appeals to the Divisional Court.

The particular circumstances of the present case were, however, such as to justify the court in acquiescing in the request of counsel for the husband that the service, in fact effected, upon the infant husband should be deemed to be good service.

LORD MERRIMAN P. concurred.

Solicitors: *W. G. R. Saunders; Messrs. Sampson & Co.*

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"shall, unless otherwise directed, be "served on the father or guardian of "the infant or, if he has no father "or guardian, upon the person with "whom he resides or under whose care "he is, and service so effected shall "be deemed good service on the "infant, so however that a registrar "may order that service effected or to "be effected on the infant shall be "deemed good service."

[1] [1954] P. 1; [1953] 3 W.L.R. 602; [1953] 2 All E.R. 1000.

[2] [1954] P. 10; [1953] 3 W.L.R. 609; [1954] 2 All E.R. 16.

[COURT OF APPEAL.]

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Oct. 22;
Nov. 13.

Denning,
Hodson and
Morris L.JJ.

*OSCAR CHESS LTD. *v.* WILLIAMS.

[Plaint No. M. 6399.]

Sale of Goods—Warranty—Collateral warranty—Innocent misrepresentation—Motor-car—Car described as "1948 model" taken in part exchange for new car—Current price for 1948 model allowed—Registration book showing 1948 as date of first registration—Car later found to be 1939 model—Fundamental mistake by both parties.

In 1955 the defendant entered into a hire-purchase transaction through the plaintiff car dealers to acquire a new car, the car dealers agreeing through their salesman to take in part exchange a

second-hand 10-horse-power Morris car acquired by the defendant's mother for £300 in 1954. The registration book of the Morris car showed it as having been first registered in 1948, with five changes of ownership between 1948 and 1954. The salesman, who was personally familiar with the particular Morris car, after ascertaining from a trade reference book the current price for a 1948 Morris of that model, allowed £290 for it; and the hire-purchase transaction was concluded on that basis. An invoice addressed to the defendant and recording the completed transaction described the car as a "1948 Morris 10 saloon." Eight months later the car dealers found out from the manufacturers that the Morris was a 1939 model; the outward appearance of that model had not been altered between 1939 and 1948. The current price for a second-hand 1939 model would have been £175.

The car dealers thereupon brought an action to recover from the defendant as damages £115, the difference in value between a 1939 and a 1948 Morris, claiming that it was an express condition of the contract, or alternatively a warranty, that the Morris car was a 1948 model. At the hearing the salesman stated that, at the time of the transaction, the defendant had offered a 1948 10-horse-power Morris in part exchange and had produced the registration book. The defendant did not give evidence. The county court judge held that the assumption that the car was a 1948 model was a fundamental condition of the contract, breach of which, in view of the lapse of time, entitled the car dealers to damages. On appeal by the defendant:—

Held (Morris L.J. dissenting), that there was no evidence to support the conclusion that the affirmation (that the car was a 1948 model) made by the defendant at the time of the transaction was intended to be a term of the contract; it was a mere innocent misrepresentation. As both parties had contracted on the basis of a fundamental mistake, the car dealers could have rescinded the contract if they had discovered the mistake earlier, but they could not now rely on an innocent misrepresentation as a warranty on which to found a claim for damages.

Heilbut, Symons & Co. v. *Buckleton* [1913] A.C. 30 and *Routledge* v. *McKay* [1954] 1 W.L.R. 615; [1954] 1 All E.R. 855 applied.

Per Denning L.J. It is important not to confuse the ordinary meaning of "warranty" as meaning a binding promise with the technical meaning which it has acquired of being a subsidiary term of a contract.

Per Morris L.J. The definite and unqualified statement by the defendant that the Morris was a 1948 model, corroborated by the registration book, related to a vitally important matter; it described the subject-matter of the contract being made, and was adopted by the parties as the foundation of the contract made and was the basis of their agreement as to the price to be credited to the defendant. It was, and was intended to be, a condition of the contract. *Routledge* v. *McKay* (supra) is distinguishable.

APPEAL from Judge Rowe Harding sitting at Neath and Port Talbot County Court.

In March, 1954, the mother of the defendant Williams acquired a second-hand Morris car, on the footing that it was a 1948 model, at a price of £300. The transaction was put through on hire-purchase from a hire-purchase company. The registration book showed that it was first registered on April 13, 1948, with five changes of ownership between 1948 and 1954.

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During the next fourteen months the car was used a good deal by her son, the defendant, and he often gave lifts to one Ladd, a motor salesman, employed by the plaintiffs, Oscar Chess Ltd., known as the Motor House, Port Talbot, as Ladd lived only a few doors away from the defendant.

In May, 1955, the defendant told Ladd that he wanted to get a new Hillman Minx for £650 and offered the Morris in part exchange. The defendant described the Morris car as a 1948 10-horse-power Morris, and he produced the registration book for it. Ladd checked up in it the date 1948 as the date of first registration. He looked up Glass's Guide—a book which gives current prices for second-hand cars according to the year of manufacture—and said that he would make an allowance of £290 for the Morris.

The transaction went through accordingly. Oscar Chess Ltd., the Motor House, sold the new Hillman Minx for £650 to a finance company who let it on hire-purchase terms to Williams. Oscar Chess Ltd. took the Morris in part exchange, but, to do so, they had first to pay the outstanding £50 to the hire-purchase company. They charged that sum to the defendant. They then took the Morris, allowing £290 for it, which they credited to the finance company which bought the Hillman. An invoice addressed to the defendant recording the complete transaction described the car for which the allowance of £290 had been made as a "1948 "Morris 10 saloon."

Eight months later Oscar Chess Ltd. discovered that the Morris was not made in 1948, as they had thought, but in 1939. They discovered this by taking the chassis number and engine number and sending those numbers to Morris Motors Ltd., who looked up their card index and found that the car left the factory on February 3, 1939, the style and finish of Morris cars not having been changed between 1939 and 1948, with the result that outwardly a 1948 model looked the same as a 1939 model, though the price was very different. If Oscar Chess Ltd. had known that it was a 1939 model the price they would have given for it would have been only £175 instead of £290.

In those circumstances they brought an action to recover from the defendant as damages the sum of £115, the difference in value between a 1939 Morris and a 1948 Morris. They claimed that it was an express term of the contract that the Morris car was a 1948 model, and that the term was a condition or in the alternative a warranty, and that in the events which had happened they were entitled to damages for breach of warranty.

The evidence before the county court judge at the hearing on July 17, 1956, as to what had been said on this point was as follows: Ladd, the motor salesman, said in examination in chief: "He" [the defendant] "offered me a 1948 ten-horse-power "Morris in part exchange. He produced the registration book." Ladd said in cross-examination: "I had often had lifts in the "defendant's car. I thought it looked like a 1948 model. I

"checked up in the registration book." Ladd's evidence was accepted. The defendant did not go into the witness-box to contradict it. On those facts it was submitted for the plaintiffs that the defendant's representation that the car was a 1948 model was an essential term of the contract, namely, a condition. Alternatively, it was submitted that the representation was a warranty, intended as such. The judge found that it was a condition. He said that the allowance of £290 was made by Ladd "on the assumption that the Morris was a 1948 model, that this "assumption was fundamental to the contract, a condition "which, if not satisfied, would have caused him to rescind the "contract if he had known it to be unsatisfied before the property "in the Morris car passed to his principals"; and he awarded £115 to the plaintiffs and did not consider the alternative claim on warranty.

The defendant appealed.

Breuan Reece for the defendant.
Norman Francis for the plaintiffs.

The following cases were referred to in the course of the argument: *Routledge* v. *McKay* [1]; *Heilbut, Symons & Co.* v. *Buckleton* [2]; *De Lassalle* v. *Guildford* [3]; *Couchman* v. *Hill.* [4]

Cur. adv. vult.

Nov. 13. The following judgments were read.

DENNING L.J. stated the facts set out above, and said that in describing the car as a 1948 Morris the defendant was perfectly innocent; he honestly believed it was a 1948 model; and so no doubt did the previous sellers. Someone in 1948 must have fraudulently altered the log-book, but he could not now be traced. His Lordship continued: I entirely agree with the judge that both parties assumed that the Morris was a 1948 model and that this assumption was fundamental to the contract. But this does not prove that the representation was a term of the contract. The assumption was based by both of them on the date given in the registration book as the date of first registration. They both believed it was a 1948 model whereas it was only a 1939 one. They were both mistaken and their mistake was of fundamental importance.

The effect of such a mistake is this: It does not make the contract a nullity from the beginning, but it does in some circumstances enable the contract to be set aside in equity. If the buyer had come promptly, he might have succeeded in getting the whole transaction set aside in equity on the ground of this

[1] [1954] 1 W.L.R. 615; [1954] 1 All E.R. 855.
[2] [1913] A.C. 30.
[3] [1901] 2 K.B. 215; 17 T.L.R. 384.
[4] [1947] K.B. 554; 63 T.L.R. 81; [1947] 1 All E.R. 103.

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mistake: see *Solle* v. *Butcher*[1]; but he did not do so and it is now too late for him to do it: see *Leaf* v. *International Galleries*.[2] His only remedy is in damages, and to recover these he must prove a warranty.

In saying that he must prove a warranty, I use the word "warranty" in its ordinary English meaning to denote a binding promise. Everyone knows what a man means when he says "I guarantee it" or "I warrant it" or "I give you my word "on it." He means that he binds himself to it. That is the meaning it has borne in English law for 300 years from the leading case of *Chandelor* v. *Lopus*[3] onwards. During the last 50 years, however, some lawyers have come to use the word "warranty" in another sense. They use it to denote a subsidiary term in a contract as distinct from a vital term which they call a "condition." In so doing they depart from the ordinary meaning, not only of the word "warranty" but also of the word "condition." There is no harm in their doing this, so long as they confine this technical use to its proper sphere, namely to distinguish between a vital term, the breach of which gives the right to treat the contract as at an end, and a subsidiary term which does not. But the trouble comes when one person uses the word "warranty" in its ordinary meaning and another uses it in its technical meaning. When Holt C.J., in *Crosse* v. *Gardner*[4] and *Medina* v. *Stoughton*,[5] made his famous ruling that an affirmation at the time of a sale is a warranty, provided it appears on evidence to be so intended, he used the word "warranty" in its ordinary English meaning of a binding promise: and when Lord Haldane L.C. and Lord Moulton in 1913 in *Heilbut, Symons & Co.* v. *Buckleton*,[6] adopted his ruling, they used it likewise in its ordinary meaning. These different uses of the word seem to have been the source of confusion in the present case. The judge did not ask himself, "Was the "representation (that it was a 1948 Morris) intended to be a "warranty?" He asked himself, "Was it fundamental to the "contract?" He answered it by saying that it was fundamental; and therefore it was a condition and not a warranty. By concentrating on whether it was fundamental, he seems to me to have missed the crucial point in the case which is whether it was a term of the contract at all. The crucial question is: was it a binding promise or only an innocent misrepresentation? The technical distinction between a "condition" and a "warranty" is quite immaterial in this case, because it is far too late for the buyer to reject the car. He can at best only claim damages. The material distinction here is between a statement which is a term of the contract and a statement which is only an innocent misrepresentation. This distinction is best expressed by the

[1] [1950] 1 K.B. 671; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.
[2] [1950] 2 K.B. 86; 66 T.L.R. (Pt. 1) 1031; [1950] 1 All E.R. 693.
[3] (1603) Cro.Jac. 4.
[4] (1689) Carth. 90, as glossed by Buller J. in *Pasley* v. *Freeman* (1789) 3 Term Rep. 51, 57.
[5] (1699) 1 Salk. 210.
[6] [1913] A.C. 30, 38, 50, 51.

ruling of Lord Holt: Was it intended as a warranty or not? using the word warranty there in its ordinary English meaning: because it gives the exact shade of meaning that is required. It is something to which a man must be taken to bind himself.

In applying Lord Holt's test, however, some misunderstanding has arisen by the use of the word "intended." It is sometimes supposed that the tribunal must look into the minds of the parties to see what they themselves intended. That is a mistake. Lord Moulton made it quite clear that[6] "The intention of the parties can only be deduced from the totality of the evidence." The question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice. And this, when the facts are not in dispute, is a question of law. That is shown by *Heilbut, Symons & Co.* v. *Buckleton*[7] itself, where the House of Lords upset the finding by a jury of a warranty.

It is instructive to take some recent instances to show how the courts have approached this question. When the seller states a fact which is or should be within his own knowledge and of which the buyer is ignorant, intending that the buyer should act on it, and he does so, it is easy to infer a warranty: see *Couchman* v. *Hill*,[8] where the farmer stated that the heifer was unserved, and *Harling* v. *Eddy*,[9] where he stated that there was nothing wrong with her. So also if he makes a promise about something which is or should be within his own control: see *Birch* v. *Paramount Estates Ltd.*,[10] decided on October 2, 1956, in this court, where the seller stated that the house would be as good as the show house. But if the seller, when he states a fact, makes it clear that he has no knowledge of his own but has got his information elsewhere, and is merely passing it on, it is not so easy to imply a warranty. Such a case was *Routledge* v. *McKay*,[11] where the seller "stated that it was a 1942 model "and pointed to the corroboration found in the book," and it was held that there was no warranty.

Turning now to the present case, much depends on the precise words that were used. If the seller says "I believe it is a 1948 "Morris. Here is the registration book to prove it," there is clearly no warranty. It is a statement of belief, not a contractual promise. But if the seller says "I guarantee that it is a 1948 "Morris. This is borne out by the registration book, but you "need not rely solely on that. I give you my own guarantee that "it is," there is clearly a warranty. The seller is making himself contractually responsible, even though the registration book is wrong.

[6] [1913] A.C. 30, 38, 50, 51.
[7] [1913] A.C. 30.
[8] [1947] K.B. 554; 63 T.L.R. 81; [1947] 1 All E.R. 103.
[9] [1951] 2 K.B. 739; [1951] 2 T.L.R. 245; [1951] 2 All E.R. 212.
[10] Unreported: Oct. 2, 1956 (C.A.).
[11] [1954] 1 W.L.R. 615, 636; [1954] 1 All E.R. 855.

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In this case much reliance was placed by the judge on the fact that the buyer looked up Glass's Guide and paid £290 on the footing that it was a 1948 model: but that fact seems to me to be neutral. Both sides believed the car to have been made in 1948 and in that belief the buyer paid £290. That belief can be just as firmly based on the buyer's own inspection of the log-book as on a contractual warranty by the seller.

Once that fact is put on one side I ask myself: What is the proper inference from the known facts? It must have been obvious to both that the seller had himself no personal knowledge of the year when the car was made. He only became owner after a great number of changes. He must have been relying on the registration book. It is unlikely that such a person would warrant the year of manufacture. The most he would do would be to state his belief, and then produce the registration book in verification of it. In these circumstances the intelligent bystander would, I suggest, say that the seller did not intend to bind himself so as to warrant that it was a 1948 model. If the seller was asked to pledge himself to it, he would at once have said "I cannot do that. I have only the log-book to go by, the "same as you."

The judge seems to have thought that there was a difference between written contracts and oral contracts. He thought that the reason why the buyer failed in *Heilbut, Symons & Co.* v. *Buckleton*[12] and *Routledge* v. *McKay*[13] was because the sales were afterwards recorded in writing, and the written contracts contained no reference to the representation. I agree that that was an important factor in those cases. If an oral representation is afterwards recorded in writing, it is good evidence that it was intended as a warranty. If it is not put into writing, it is evidence against a warranty being intended. But it is by no means decisive. There have been many cases where the courts have found an oral warranty collateral to a written contract such as *Birch* v. *Paramount Estates*.[14] But when the purchase is not recorded in writing at all it must not be supposed that every representation made in the course of the dealing is to be treated as a warranty. The question then is still: Was it intended as a warranty? In the leading case of *Chandelor* v. *Lopus*[15] in 1603 a man by word of mouth sold a precious stone for £100 affirming it to be a bezar stone whereas it was not. The declaration averred that the seller *affirmed* it to be a bezar stone, but did not aver that he *warranted* it to be so. The declaration was held to be ill because "the bare affirmation that it was a bezar "stone, without warranting it to be so, is no cause of action." That has been the law from that day to this and it was emphatically reaffirmed by the House of Lords in *Heilbut, Symons & Co.* v. *Buckleton*.[16]

[12] [1913] A.C. 30.
[13] [1954] 1 W.L.R. 615.
[14] Unreported: Oct. 2, 1956 (C.A.).
[15] Cro.Jac. 4.
[16] [1913] A.C. 30, 38, 50.

One final word: It seems to me clear that the motor-dealers who bought the car relied on the year stated in the log-book. If they had wished to make sure of it, they could have checked it then and there, by taking the engine number and chassis number and writing to the makers. They did not do so at the time, but only eight months later. They are experts, and, not having made that check at the time, I do not think they should now be allowed to recover against the innocent seller who produced to them all the evidence he had, namely, the registration book. I agree that it is hard on the dealers to have paid more than the car is worth: but it would be equally hard on the seller to make him pay the difference. He would never have bought the Hillman at all unless he had got the allowance of £290 for the Morris. The best course in all these cases would be to "shunt" the difference down the train of innocent sellers until one reaches the rogue who perpetrated the fraud: but he can rarely be traced, or if he can, he rarely has the money to pay the damages. So one is left to decide between a number of innocent people who is to bear the loss. That can only be done by applying the law about representations and warranties as we know it: and that is what I have tried to do. If the rogue can be traced, he can be sued by whomsoever has suffered the loss: but if he cannot be traced, the loss must lie where it falls. It should not be inflicted on innocent sellers, who sold the car many months, perhaps many years before, and have forgotten all about it and have conducted their affairs on the basis that the transaction was concluded. Such a seller would not be able to recollect after all this length of time the exact words he used, such as whether he said "I "believe it is a 1948 model," or "I warrant it is a 1948 model." The right course is to let the buyer set aside the transaction if he finds out the mistake quickly and comes promptly before other interests have irretrievably intervened; otherwise the loss must lie where it falls: and that is, I think, the course prescribed by law. I would allow this appeal accordingly.

HODSON L.J. The question is whether the statement made by the defendant that his 10-horse-power Morris car was a 1948 car was a term of the contract by which he handed over the car in part exchange for a new Hillman car or was merely an innocent misrepresentation.

The question is usually stated as being whether words are to be interpreted as giving rise to a warranty. The House of Lords in *Heilbut, Symons & Co.* v. *Buckleton*,[17] adopted the enunciation of the true principle of law as laid down by Lord Holt C.J. in 1688: "An affirmation at the time of the sale is a warranty "provided it appears on evidence to be so intended."[18]

Where, as here, the words of the affirmation are established the question of intention remains to be determined.

[17] [1913] A.C. 30. [18] Carth. 90.

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Lord Haldane, in *Heilbut's* case,[19] expressed the opinion that, as neither the circumstances of the conversation nor its words were in dispute, the question of warranty or representation was purely one of law. Lord Moulton[20] thought that the question of intention was one for a jury and said that the intention of the parties could only be deduced from the totality of the evidence.

Treating the question of intention as one of fact proper for the determination of the county court judge, one is driven to inquire whether there was here any evidence that the statement in question went beyond an innocent misrepresentation, bearing in mind the warning contained in Lord Moulton's speech against[21] "attempts to extend the doctrine of warranty beyond "its just limits and find that a warranty existed in cases where "there was nothing more than an innocent misrepresentation."

I am of opinion that there was no evidence to support the conclusion that the statement that the Morris car was a 1948 car was a term of the contract. The registration book, showing that the car was first registered in 1948, was produced by the defendant to the plaintiffs' representative, a motor salesman, who was familiar with the car having often had lifts in it, thought it looked like a 1948 car, and checked up on the registration book.

The defendant was stating an opinion on a matter of which he had no special knowledge or on which the buyer might be expected also to have an opinion and to exercise his judgment.

This is not a decisive test, as was pointed out by Lord Moulton (in *Heilbut's* case[22]), but it is a feature which he said may be a criterion of value in guiding a jury in coming to a decision whether or not a warranty was intended.

There is in my opinion nothing in this case to set against the criterion to which I have referred. That is to say, there is nothing to indicate that the statement as to the date of the car amounted to a promise or guarantee that the information given was accurate.

The question is similar to that which came before this court in *Routledge* v. *McKay*.[23] There a Douglas motor-cycle combination of more ancient date was sold on a representation that it was a 1942 combination. The information was, as here, derived from the registration book. The members of the court unanimously agreed that applying the law as laid down by *Heilbut, Symons & Co.* v. *Buckleton*[24] there was no evidence that the statement amounted to a warranty. The county court judge distinguished *Routledge* v. *McKay*[25] from the present case because there was there a written memorandum of the contract, before which words were used by one party inducing the opposite party to enter into the written contract. He also distinguished *Heilbut, Symons & Co.* v. *Buckleton*[26] on the same ground. So

[19] [1913] A.C. 30, 36.
[20] Ibid. 50–51.
[21] Ibid. 49.
[22] Ibid. 50.
[23] [1954] 1 W.L.R. 615.
[24] [1913] A.C. 30.
[25] [1954] 1 W.L.R. 615.
[26] [1913] A.C. 30.

far as the latter case is concerned, on a reading of the facts it seems to me that the contract in that case was concluded at the time when the representation was made, although, since the transfer of shares was involved, formal brokers' contracts were afterwards drawn up.

So far as *Routledge* v. *McKay* [27] is concerned I have read the judgments in the case with some care and I cannot find that the court based its conclusion on the distinction between words used on an occasion before the final conclusion of the contract and words used on the same occasion or incorporated in the same document, although the point was argued that having regard to the language of the written memorandum any earlier warranty was excluded. In any event I find such a distinction a fine one and one which I should be reluctant to draw unless compelled to do so.

In all essential matters I am of opinion that this case is on all fours with *Routledge* v. *McKay* [27] and, following the authority of the House of Lords in *Heilbut, Symons & Co.* v. *Buckleton*,[28] I reach a similar conclusion in this case. I would allow the appeal.

MORRIS L.J. stated the facts and said that without any fault on their side the plaintiffs had paid the defendant £115 too much. It might have been expected that the defendant would in those circumstances have reimbursed them, unless there were difficulties that prevented him from doing so. But he did not recoup them and they accordingly brought this action. His Lordship continued: The statement that the defendant made was that the Morris car was a 1948 model. This was a definite and unqualified statement. It was of this nature because the defendant did not doubt it. It was not a mere expression of tentative or qualified belief. At the hearing it was proved that it was a 1939 model. The defendant did not give evidence. The plaintiffs did not in any way suggest that the defendant had not honestly believed what he had said, and the plaintiffs very fairly admitted that the defendant would not have embarked on the new transaction had he not been able to get £290 for his Morris car.

The defendant handed over the registration book of the Morris car, which stated that it was first registered in 1948. In the absence of evidence it must remain a matter of speculation as to why the registration book referable to a 1939 car should record that the first registration was in 1948. It is possible that a 1939 car was first registered in 1948, but this seems very unlikely. In correspondence it was stated on behalf of the defendant that the car had been bought by the defendant's mother in March, 1954. She paid £300 for it—being £10 more than the amount allowed to her son for it 14 months later. Her name is recorded in the book. It is, I think, only reasonable for a purchaser of a

[27] [1954] 1 W.L.R. 615. [28] [1913] A.C. 30.

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car who received a registration book which showed a first registration in 1948 to have believed that the car was a 1948 car.

There was evidence which the judge accepted that the "styling" of a 10-horse-power Morris car had not changed between 1939 and 1948 "so that mere inspection of the car even "by a man with knowledge of motor-cars would not have indi-"cated that the car in question was of earlier manufacture than "1948."

The case can be approached and has at all times been approached on the basis that all concerned honestly believed that the car was a 1948 car. The plaintiffs' representative had often had lifts in the defendant's car and thought that it looked like a 1948 model. It cannot be denied therefore that he fully accepted and acted on the statement made to him that the car was a 1948 model. Furthermore, he was handed the registration book and from that he checked that the car was a 1948 model. In strictness the book only showed that the date of first registration was in 1948, but any dealer in cars would, I think, regard that as confirmation of what he had been told. There was nothing at all to put him on notice that the car was a 1939 model and indeed it is not suggested that there was. He believed that the car was a 1948 model and it was because he so believed that he agreed the allowance in the sum of £290. Had he not so believed he would never have allowed £290. Everything therefore points to the importance of the statement that the car was a 1948 model: the statement was amply corroborated when the registration book was handed over for the plaintiffs' representative to see. The judge held that the defendant knew that the plaintiffs' representative proceeded to calculate what allowance he would make for the car on the basis that it was a 1948 car.

The only point taken on behalf of the defendant was that the statement that was made did not form a part of the contract. The judge rejected this. He held that it was not only a term but an essential term. In my judgment he was correct. The statement that the car was a 1948 car was not a mere representation in respect of the subject-matter of the contract: the statement was adopted as the foundation of the contract that they made. The promise to pay £290 for that particular car (a figure arrived at by reference to the value of 1948 cars) was the counterpart of a term of the contract that that particular car was a 1948 model.

The judge held that if the plaintiffs had discovered after the making of the contract but before property in the car had passed that it was a 1939 car, they could have refused to go on with the transaction: that they could have refused for the reason that it was a condition of the contract that the car was a 1948 model. The judge has expressed himself as follows: "Although it "appeared that the plaintiffs' agent had often had a lift in the "defendant's car (more strictly the car let on hire-purchase "terms to the defendant's mother) the actual transaction, on

"the evidence, appeared to me to be a sale by description of the "car, described as a 1948 10-horse-power Morris car, as part of "the larger and somewhat more complex transaction of letting "a new Hillman Minx to the defendant on hire-purchase terms, "making him an allowance of £290, the value to the plaintiffs of "the said 10-horse-power Morris car, on the assumption that it "was a 1948 model.

"Ladd satisfied me that this assumption was fundamental to "the contract, a condition which, if not satisfied, would have "caused him to rescind the contract if he had known it to be "unsatisfied before the property in the Morris car passed to his "principals. The defendant did not elect to give evidence, but "Ladd told me that, for the purpose of calculating the allowance "he would give the defendant, he used Glass's Guide, a well-"known reference book published monthly in the motor trade, "giving the average second-hand price paid by dealers for cars "according to the year of manufacture. I have no doubt that "the defendant knew that Ladd was calculating the allowance "he would make for the car on the basis that it was a 1948 car, "and it was never suggested in cross-examination that he did "not. There was no suggestion that the defendant's statement "that the car was a 1948 model was made otherwise than in "good faith, but so far as Ladd was concerned, that statement "was fundamental, according to his evidence, and apart from "Mr. Benjamin's cross-examination to elicit that the defendant "had given Ladd lifts in the car, it was not suggested that Ladd "did otherwise than rely on the defendant's statement as to the "year of manufacture, corroborated by the evidence of the "registration book, and the documents of the previous hire-"purchase transaction relating to the same vehicle." The plaintiffs do not allege that there was any collateral oral warranty. They submit that the statement of the defendant was not something detached from the contract, but was a part of the contract and was in legal terminology a condition. In my judgment it was a stipulation of the contract which was a condition. But by the time that the plaintiffs ascertained that the car was a 1939 car it was too late for them to take any other course than to treat the breach of condition as a breach of warranty: see Sale of Goods Act, 1893, s. 11.

On this basis the judge held that the plaintiffs were relegated to a right to claim damages, which he assessed at £115, being the difference between the value the car would have had if it had been a 1948 car and its actual true value, which he found was £175.

In deciding the case the judge applied his mind to the tests laid down in *Heilbut, Symons & Co.* v. *Buckleton*.[29] In his speech in that case Lord Moulton[30] spoke of the importance of maintaining in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation and made it clear that

[29] [1913] A.C. 30. [30] Ibid. 49.

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it would be wrong to say that merely because a representation is made in the course of a dealing and before completion of a bargain the representation amounts to a warranty. He approved the statement of Holt C.J. that an affirmation at the time of a sale is a warranty provided that it appears on the evidence to have been so intended. The intention of the parties is to be deduced from the totality of the evidence.

In coming to his conclusion that what the defendant said about the car being a 1948 model was in this case a part of the contract the judge distinguished *Routledge* v. *McKay*,[31] which was one in which the principles laid down in *Heilbut, Symons & Co.* v. *Buckleton*[32] were applied to the facts of that case. There was a sale of a motor-cycle by the fifth party to the fourth party and a later claim for damages for breach of a warranty that the cycle was a 1942 model. There was a first meeting between the parties. In answer to a question the fifth party said that the cycle was a 1942 model and pointed to the corroboration of that statement found in the registration book. There was a second meeting when the two parties signed a written contract. That contract made no mention of the cycle being a 1942 model. It was in fact a 1930 model. As to the written contract it was held[33] that prima facie it recorded what the parties intended to agree when the actual transaction of sale took place and as a matter of construction that it would be extremely difficult to say that such an agreement was consistent with a warranty being given at the same time and so as to be intended to form a part of the bargain then made. There was no statement as to the age of the cycle made at the time of the written contract. It was therefore held that there was no warranty given as part of the actual bargain. It was then considered whether the statement previously made during the first meeting was a representation or was a warranty, and it was held that the statement then made (at a time when there was no agreement between the parties) was not contractual and that nothing more was intended than a mere representation.

Lord Evershed M.R. said[34]: "This document"—that was a reference to the written agreement—"represents prima facie "the record of what the parties intended to agree when the actual "transaction took place. Mr. Watson has contended that the "terms of it necessarily exclude any warranty—that is to say, "any collateral bargain, either contemporary or earlier in date. "I am not sure that I would go as far with Mr. Watson in that "respect. But I think that, as a matter of construction, it would "be extremely difficult to say that such an agreement was con-"sistent with a warranty being given at the same time and so "as to be intended to form a part of the bargain then made. I "think, with Mr. Watson, that the last words 'It is understood "'that when the £30 is paid . . . this transaction is closed' would "make such a contention exceedingly difficult. But I will

[31] [1954] 1 W.L.R. 615.
[32] [1913] A.C. 30.
[33] [1954] 1 W.L.R. 615, 621–622.
[34] Ibid. 621.

"assume that the warranty here was not a warranty given when "this bargain was struck, but was a warranty which had been "given on the earlier date, on which date alone, according to the "evidence, any representation about the date of the Douglas was "made at all.

"Now if the earlier representation is to be a warranty, then "it has got to be contractual in form. In other words, so far "as I can see, once the existence of a warranty as part of the "actual bargain is excluded, it must be a separate contract; and "the difficulty, and I think the overwhelming difficulty, which "faces the fourth party here is that when the representation was "made there was then no bargain, and it is therefore, in my view, "impossible to say that it could have been collateral to some "other contract. But even apart from that, it seems to me that, "on the evidence, there is nothing to support the conclusion, as "a matter of law and bearing in mind Lord Moulton's observa-"tions, that in answering the question posed about the date of "this Douglas there was anything more intended than a mere "representation."

The judge in the present case considered that case and correctly distinguished it from the present one. In the present case there was not (as in *Routledge's* case [35]) an antecedent statement and then a later written contract which omitted any incorporation of or reference to the statement. *Routledge's* case [35] is distinguishable on three grounds. In the present case there was a statement made at the time of the transaction; there was no written contract; and in so far as there was a document brought into existence, the document consisted of an invoice addressed to the defendant which recorded the complete transaction and which expressly described the car for which an allowance of £290 was being made as a "1948 Morris 10 Saloon." The statement made which described the Morris car was therefore an integral part of the contract. It was, I consider, a condition of the contract, on which the plaintiffs contracted: compare *Bannerman* v. *White*.[36] In *Couchman* v. *Hill* [37] a statement was made that a heifer was "unserved." There was in that case a discussion as to whether the description "unserved" constituted a warranty or a condition. In his judgment (with which the other members of the court concurred) Scott L.J. said [38]: "as a matter of law, I think "every item in a description which constitutes a substantial "ingredient in the 'identity' of the thing sold is a condition, "although every such condition can be waived by the purchaser, "who thereupon becomes entitled to treat it as a warranty and "recover damages. I think there was here an unqualified oral "condition, the breach of which the plaintiff was entitled to treat "as a breach of warranty and recover the damages claimed."

In the present case on a consideration of the evidence that he heard, the judge came to the conclusion that the statement which

[35] [1954] 1 W.L.R. 615.
[36] (1861) 10 C.B.N.S. 844.
[37] [1947] K.B. 554.
[38] Ibid. 559.

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he held to have been made by the defendant at the time of the making of the contract was a statement made contractually. It seems to me that the totality of the evidence points to that view. The statement related to a vitally important matter: it described the subject-matter of the contract then being made and the statement directed the parties to, and was the basis of, their agreement as to the price to be paid or credited to the defendant. In the language of Scott L.J.,[38] it seems to me that the statement made by the defendant was "an item in the description" of what was being sold and that it constituted a substantial ingredient in the identity of the thing sold.

It is with diffidence that I arrive at a conclusion differing from that of my Lords, but I cannot see that the judge in any way misdirected himself or misapplied any principle of law, and I see no reason for disturbing his conclusion.

Appeal allowed.
Leave to appeal to the House of Lords refused.

Solicitors: *Helder Roberts & Co. for Ivor Evans & Benjamin, Swansea; A. King-Davies & Son, Maesteg.*

M. M. H.

[38] [1947] K.B. 554, 559.

[COURT OF APPEAL.]

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Nov. 29.
Denning, Hodson and Morris L.JJ.

* FRIBANCE *v.* FRIBANCE (NO. 2).

Husband and Wife—Property—Proceedings under Married Women's Property Act, 1882, *s.* 17—*House purchased for home—Proportions of payment of price—Decree nisi—Wife's claim to share in house—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

Parties who married in 1933 became in 1940 tenants of the ground floor of a dwelling-house, at which time they had two children. On the husband joining the Royal Air Force it was agreed that he should retain all his pay and allowances, except for the compulsory allotment to the wife, and save what he could, while the wife should go to work to support the family. On demobilization in 1946 the husband had some £260 in savings and gratuity, part of which was spent for the benefit of the family. Thereafter he handed the bulk of his earnings to his wife, who continued to work and support the household with her earnings.

In 1950 the leasehold of the matrimonial home was acquired in the husband's name for £950, of which £800 was raised on mortgage; £130, the remains of his savings, was contributed by the husband, and £20 was contributed by the wife from the surrender of an insurance policy. In 1952 differences arose between the parties, which led to a suit for divorce by the wife, who before decree absolute applied under section 17 of the Married Women's Property Act, 1882, for an order to determine the interests of the parties in the house. The registrar held that the wife's interest

was limited to £20. On appeal, Karminski J. held that the parties held in equal shares. On appeal:—

Held, that the conduct of the parties over the years indicated that their spendings or savings were regarded as having been made for the common benefit, so that the wife was entitled to a half interest in the house.

Rimmer v. *Rimmer* [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863 applied.

Decision of Karminski J. affirmed.

APPEAL from Karminski J.

The facts are stated in the judgment of Denning L.J.

Dimitry Tolstoy for the husband.

H. S. Ruttle for the wife.

The cases cited in argument are referred to in the judgments.

DENNING L.J. This is an application under section 17 of the Married Women's Property Act, 1882, to determine the title to the matrimonial home. The parties married in 1933 and were divorced in 1955. The summons was issued before decree absolute, so the court has jurisdiction to deal with the case. They have two children, one born in 1934 and the other in 1937.

The matrimonial home is at No. 27, Gondar Gardens, London. The couple, with their two children, went there in 1940 as tenants of rooms on the ground floor. The husband went into the Air Force and made the ordinary compulsory allotment to his wife. In 1941 a question arose as to a further allotment. The husband wrote to his wife about it, and it was arranged between them by their letters that the wife should go out to work to help keep the household going, whereas the husband could save the extra money which he got by the further allotment. He said that he would save it for their future so that it could be used for the welfare of the family thereafter. In 1942 the wife went out to work and she has been out to work ever since. She used all her earnings for family purposes, dressing the children and so on, whilst the husband saved what he could. In 1946 the husband was demobilized and at that time his savings, with his gratuity, came to £260. (He says that only £12 of that sum came from the allotment which he saved in pursuance of the letters.) Out of the savings they went for a holiday. Afterwards he got work as a car driver and earned £7 or £8 a week and gave his wife about £6 a week out of it. She continued to go out to work and used her earnings for the benefit of the household. Together they bought furniture for the home. By the year 1950 the husband's savings were reduced to £130, but the wife had some savings in the shape of insurance policies.

In 1950 an opportunity arose to buy the leasehold of the house in which they were living. The lease had 40 years to run. They bought it for £950, of which £150 was paid in cash and £800 was left on mortgage. A policy of insurance was taken out

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to cover the mortgage repayments. It was a good business arrangement for this couple. They were living on the ground floor themselves. The top two floors were let to other tenants. The rents from those tenants would cover most of the outgoings. The rest of the outgoings came out of the husband's earnings but it was no more than the old rent they had had to pay for their rooms. They were therefore in a position to acquire the leasehold at no extra cost to themselves, except for the first £150 which they had to find.

In order to get the £150, the husband contributed the £130 which he had left of his savings and the wife realized £20 on one of the insurance policies. The leasehold was acquired in the husband's name, and all went smoothly until the year 1952, when the couple fell out. The solicitors for the wife wrote to the husband about the financial position between them, and at that time they claimed on her behalf no share in the house but only the £20. They said: "We are also instructed to claim from you "the sum of £20 being the amount which our client provided "towards the purchase of the house." No solution was reached. Eventually in 1955 the wife filed a petition for divorce on the ground of the husband's cruelty, and on May 10, 1955, she obtained a decree nisi. Before it was made absolute, she took out a summons to determine the title to the house and furniture. They are both living there still, but occupy separate rooms. In the course of the proceedings it was agreed that the furniture belongs to them both jointly in equal shares, but the question is, to whom does the house belong? The registrar held that it belonged to the husband and that the wife was only entitled to the £20 which she paid towards it. The wife appealed to Karminski J., and he held that the house belonged to them both jointly in equal shares. He thought that the case came within the decision of this court in *Rimmer* v. *Rimmer*.[1] The husband appeals to this court and asks us to restore the order of the registrar.

Mr. Tolstoy has argued forcibly that the house belonged to the husband. The husband, he said, bought the lease and took it in his own name, the leasehold interest was vested in him, he paid for it out of his own savings and earnings, save only for the £20 contributed by the wife. Mr. Tolstoy said that the wife had no right to the house or any share in it unless she could show a contract by the husband with her or a gift by him to her or a trust by him for her in regard to it. In support of this proposition he relied on the well-known case of "savings "from housekeeping," *Blackwell* v. *Blackwell*,[2] *In re Sims' Question*,[3] and *Hoddinott* v. *Hoddinott*.[4] Then, in order to refute any suggestion of a contract, gift or trust enforceable at law, he relied on *Balfour* v. *Balfour*.[5]

[1] [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863.
[2] [1943] 2 All E.R. 579.
[3] [1946] 2 All E.R. 138.
[4] [1949] 2 K.B. 406; 65 T.L.R. 266.
[5] [1919] 2 K.B. 571; 35 T.L.R. 609.

I do not think that line of argument is valid today. A wife is not to be put to proof of a contract or gift as if she were a stranger. Romer L.J. made that clear in *Rimmer* v. *Rimmer* [6] when he said that "cases between husband and wife ought not "to be governed by the same strict considerations, both at law "and in equity, as are commonly applied to the ascertainment "of the respective rights of strangers." I fully agree with that observation and I think it is the correct way of approaching these cases at the present day.

I put, therefore, the question of contract, gift, or trust on one side, and apply the law as laid down in *Rimmer* v. *Rimmer* [7] and *Cobb* v. *Cobb*,[8] which I take to be this: If it is clear that the property, when it was acquired, was intended to belong to one or other absolutely, as in the case of investments, or that they intended to hold it in definite shares, as sometimes happens when they run a business, then effect must be given to their intention; and in that case the title so ascertained is not to be altered by subsequent events unless there has been an agreement to vary it. In many cases, however, the intention of the parties is not clear, for the simple reason that they never formed an intention: so the court has to attribute an intention to them. This is particularly the case with the family assets, by which I mean the things intended to be a continuing provision for them during their joint lives, such as the matrimonial home and the furniture in it. When these are acquired by their joint efforts during the marriage, the parties do not give a thought to future separation. They do not contemplate divorce. They contemplate living in the house and using the furniture together for the rest of their lives. They buy the house and furniture out of their available resources without worrying too much as to whom it belongs. The reason is plain. So long as they are living together, it does not matter which of them does the saving and which does the paying, or which of them goes out to work or which looks after the home, so long as the things they buy are used for their joint benefit. In the present case it so happened that the wife went out to work and used her earnings to help run the household and buy the children's clothes, whilst the husband saved. It might very well have been the other way round. The husband might have allotted to the wife enough money to cover all the housekeeping and the children's clothes, and the wife might have saved her earnings. The title to the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happened to allocate their earnings and their expenditure. The whole of their resources were expended for their joint benefit—either in food and clothes and living expenses for which there was nothing to see or in the house and furniture which are family assets—and the product should belong to them jointly. It belongs to them in equal shares. I agree

[6] [1953] 1 Q.B. 63, 76.
[7] Ibid.
[8] [1955] 1 W.L.R. 731; [1955] 2 All E.R. 696.

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with Mr. Tolstoy that the title to the property must remain the same, whether the question arises under section 17 before divorce, or in other proceedings after divorce, or under a will: but I think that in each case the principles laid down in *Rimmer* v. *Rimmer*[9] apply. I think the judge correctly applied those principles here, and I would dismiss the appeal.

HODSON L.J. I agree. I think that the judgment of Karminski J. was right, and that this appeal should be dismissed. It is impossible in these cases to arrive at an exact result, because it was pointed out as long ago as 1919, in the leading case of *Balfour* v. *Balfour*,[10] that a husband and wife when they are living together do not normally endeavour to regulate their domestic affairs by entering into legal contracts with one another: it is only when they separate that disputes arise and the problem as to the ownership of property becomes one which is almost insoluble. In those cases the court is really driven, I think—as the court has been driven in this case—to arrive at the best conclusion that it can on the evidence, namely, that the property is to be regarded as owned equally.

MORRIS L.J. I have found this case an extremely difficult one, and I think that very powerful submissions have been made on both sides. The task of the court has been to ascertain whether the wife had any title to the property, which admittedly was only in the name of the husband. In *Rimmer* v. *Rimmer*,[11] Evershed M.R. pointed out that in every case of this kind the decision must depend upon its own particular facts. It is so often the case that arrangements are made at times when parties are not contemplating having any dispute as to what is the precise legal basis of an arrangement made. Evershed M.R., in his judgment in *Rimmer* v. *Rimmer*, said[12]: "Where the court "is satisfied that both the parties have a beneficial interest, and "a substantial beneficial interest, and where it is not possible or "right to assume some more precise calculation of their shares, "equality, I think, almost necessarily follows." Mr. Tolstoy relies upon that passage, and on other passages, and submits that the court must in the first place be satisfied that the parties have a beneficial interest; and I think that must be so. It is clear from other passages in the judgments in *Rimmer* v. *Rimmer* and in other cases that if the court can ascertain the exact position, then section 17 does not give any power to vary what the parties did themselves decide upon. Denning L.J., in his judgment in *Rimmer* v. *Rimmer*,[13] said: "In cases when it is "clear that the beneficial interest in the matrimonial home, or "in the furniture, belongs to one or other absolutely, or it is "clear that they intended to hold it in definite shares, the court

[9] [1953] 1 Q.B. 63.
[10] [1919] 2 K.B. 571.
[11] [1953] 1 Q.B. 63.
[12] Ibid. 72.
[13] Ibid. 73.

"will give effect to their intention." In *Cobb* v. *Cobb* Romer L.J. said this[14]: "I know of no power that the court has under "section 17 to vary agreed or established titles to property. It "has power to ascertain the respective rights of husband and "wife to disputed property, and frequently has to do so on very "little material; but where, as here, the original rights to "property are established by the evidence, and those rights have "not been varied by subsequent agreement, the court cannot, in "my opinion, under section 17 vary those rights merely because "it thinks that in the light of subsequent events the original "agreement was unfair."

It seems to me, therefore, that one must approach this case by considering, on the evidence, in the first place, whether it is shown that the husband and wife were both beneficially interested in this property that the husband took. It seems to me that it is at that stage that this case presents great difficulties, the registrar, in a powerful judgment, having formed one conclusion, and the judge having formed a different conclusion. It seems to me that both the husband and the wife were behaving extremely commendably at the times that are in question. It was a happy marriage: there was no thought then of any divorce or separation, and the parties were not adjusting their arrangements with any thought that they would at a later stage be the subject of critical examination in a court of law. The husband was serving. He appears to have been a careful man, doing his best to save, and he thought of his wife and his family and of the future. That is the very setting that makes it so difficult for a court at a much later period to be able to decide what was the legal effect of what then took place.

After the unhappy differences arose, a letter was written—in 1952, some years before the petition for divorce was filed—by solicitors on behalf of the wife in which they said: "We are also "instructed to claim from you the sum of £20 being the amount "which our client provided towards the purchase of the house." In reply to that, what was said was: "With regard to the £20— "this was voluntarily given on the understanding that when we "sold the house, this sum would be returned." Mr. Tolstoy naturally refers to those letters and submits that that is valuable evidence before the court as to what the wife thought. I do not think that these letters can be carried very far, because some of these matters depend upon the application of the law to the facts. But for what it is worth that is the way in which, on behalf of the wife, the matter was being stated.

I think that I have said enough to show why this case has troubled me very considerably. Doing my best to balance the considerations, I have on the whole come to the conclusion that

[14] [1955] 1 W.L.R. 731, 736.

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the decision of the judge can be supported. My reason for arriving finally, after considerable hesitation, at that view is that I think that it fairly reflects what the two parties in their evidence have indicated was the relationship or the agreement between them at the proper time. It is clear that the husband himself wrote a letter and suggested that there might be more for the wife but that he could save it—that is to say, save the amount. It is said now that he was referring only to an additional allowance and that that allowance was a very small amount. It is said that the wife in her affidavit specifically says that the arrangement was to save the amount of that allowance. But she did not know that it was only an amount of 3d. a day; and it seems to me that the whole spirit of the thing was that the husband was saying: "I could now give you some more, but "would you like me to save it for the period after the war?", and that the wife acceded to that. As I have said, in my judgment, both husband and wife were behaving with very commendable forethought and wisdom at that time. I think, therefore, that the judge was justified in coming to the conclusion that he reached and the way in which the matter appealed to him. He said: "I believe the true position is that the wife said she could "keep herself and the children on the compulsory allotment and "by earning and the husband said he would save for after the "war. Provision for the future was of a most general kind." She did work during the war. She continued working after the war, and that did undoubtedly enable the husband to save both during the war and after the war. I think, therefore, that the approach of the judge was justified. The result of that is that when the discussion took place, although the wife may not have worked it out her mind, the position was that the house, though taken in the husband's name, was taken beneficially for both of them. Then comes the application of what is laid down in *Rimmer* v. *Rimmer*,[15] and the result then follows in the way my Lords have outlined it.

I have added these words because I have been considerably troubled by this case; and I have endeavoured to indicate why it is that, after much hesitation, I concur in the result proposed.

Appeal dismissed.

Solicitors: *Hillearys; Edwin Coe & Calder Woods.*

F. R. D.

[15] [1953] 1 Q.B. 63.

[CHANCERY DIVISION.]

* *In re* DAWSON'S WILL TRUSTS.

1956
Dec. 13, 14, 21.

Vaisey J.

NATIONAL PROVINCIAL BANK LTD. *v.* NATIONAL COUNCIL OF THE Y.M.C.A. INCORPORATED AND OTHERS.

[1956 D. 460.]

Will—Construction—"Duty, free of"—"Such a sum as will with the "moneys I have already given . . . amount to [named sum]"—Moneys given inter vivos liable to estate duty—Proper amount of legacy.

Charity—Cy-près doctrine—Bequest to non-existent association—Bequest for general purposes of named charity—Informal amalgamation with another charity having similar objects—Whether lapse.

The testator, who died on May 31, 1955, by his will dated February 12, 1955, appointed a bank to be executor and trustee thereof and by clause 5 he gave a number of pecuniary legacies expressed to be "free of duty" including one "to the bank upon "the trusts of [a named trust] such a sum as will with the moneys "I have already given to the bank upon the same trusts amount "to £27,000." At the date of the testator's will the trust in question had not come into being, but a trust deed dated March 29, 1955, was made between the testator therein called the founder, of the one part and the bank of the other part, which after reciting that the testator had paid a sum of £100 and might thereafter pay or bequeath other sums or assets to the bank, went on to set out the purpose and objects of the trust. On the same day, the testator paid £6,000, (which included the aforementioned £100) to the bank to be held on the trusts of the trust deed and two days before his death, he transferred certain assets to the value of £15,072 6s. 6d. to the bank to be held upon the same trusts, a total of £21,072 6s. 6d.

Estate duty on the testator's estate was payable at the rate of 40 per cent. and £8,468 3s. 5d. became payable in respect of the gifts inter vivos to the bank.

On the question whether the legacy to the trust was that sum which would make up to £27,000 the assets subject to the trust deed before estate duty had been paid out of them or after it had been paid, that is, whether the legacy was of £5,927 13s. 6d. or £14,395 16s. 11d.:—

Held, that the proper amount of the legacy was the larger sum, as (a) it was to be inferred from the general scheme of the will that the testator desired the trust which he had founded to be put into possession of a clear sum of £27,000 and not any smaller sum; and (b) the words "free of duty" at the beginning of clause 5 of the will indicated an intention that no deductions or reductions for duty were to be made.

In re Beddington [1900] 1 Ch. 771; 16 T.L.R. 291, applied but doubted.

By clause 6 of his will the testator gave his residuary estate to the bank "Upon trust . . . as to one . . . fourth part thereof "for the general purposes of the Church Association of 13–14 "Buckingham Street Strand London W.C.2" to be applied for

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DAWSON'S WILL TRUSTS, *In re.* NATIONAL PROVINCIAL BANK LTD. *v.* NATIONAL COUNCIL OF THE Y.M.C.A. INCORPORATED.

the exclusive use and benefit of the work of that association in the city of Leeds. The Church Association was an unincorporated body whose purposes were charitable, namely, to maintain Protestant principles and to combat ritualism in the Church of England. Until June, 1950, its offices were at the address mentioned in the will. In 1950 the Church Association amalgamated informally with the National Church League (Incorporated) which had similar objects and the resultant body was called "Church Society." This body had never occupied the premises in Buckingham Street and carried on elsewhere, possibly with other activities, the work formerly carried on by the Church Association and the National Church League (Incorporated). The branch of the Church Association in Leeds had been closed in or about 1950.

On the question whether the gift of a share of residue to the Church Association failed:—

Held, that Church Society (whose objects were charitable) was entitled to the share in question since either (a) it was the Church Association under a new name, or (b) although its objects were not shown to be identical with those of the Church Association (and though a gift merely to that body, in contradistinction to a gift for its general purposes, might have failed), nevertheless since the general purposes of Church Society were identifiable charitable purposes, the gift ought to be applied by Church Society for those purposes by way of scheme or otherwise.

In re Joy (1888) 5 T.L.R. 117; 60 L.T. 175; *In re Pritt* (1915) 85 L.J.Ch. 166; 31 T.L.R. 299; *In re Rymer* [1895] 1 Ch. 19 considered.

ADJOURNED SUMMONS.

The testator, Ernest Dawson, by his will dated February 12, 1955, appointed the plaintiff, the National Provincial Bank, to be the executor and trustee thereof. By clause 5 of his will he gave "The following pecuniary legacies (free of duty) namely "... *To* the bank upon the trusts of the Ernest and Minnie "Dawson Cancer Trust such a sum as will with the moneys I "have already given to the bank upon the same trusts amount "to £27,000."

Clause 6 was in these terms: "I give devise and bequeath all "my real and personal estate not hereby otherwise disposed of "unto the bank upon trust to sell call in and convert the same or "such part thereof as shall not consist of money into money and "after payment out of the proceeds of such sale calling in and "conversion and of my ready money (to pay) my debts funeral "and testamentary expenses and the legacies bequeathed by "this my will and the duties thereon and to stand possessed "of the residue thereof Upon Trust as to one fourth part thereof "for the National Council of the Young Men's Christian "Association Incorporated of 112 Great Russell Street London "W.C.1 as to one other fourth part thereof for the Young "Women's Christian Association of Great Britain of Great Russell "Street aforesaid as to one other fourth part thereof for the "general purposes of the Church Association of 13–14 Bucking-"ham Street Strand London W.C.2 and as to the remaining one "fourth part thereof for the Salvation Army of 101 Queen Victoria "Street London E.C.4 and I direct that the shares of residue

"hereby bequeathed shall be applied for the exclusive use and "benefit of the work of the said three associations and of the "Salvation Army in the City of Leeds. I declare that the receipt "of the treasurer of the said associations and of the Salvation "Army shall be a full discharge to the bank."

The plaintiff issued the present summons for the determination of the following questions: (1) whether: in the events which had happened and upon the true construction of the above-mentioned will of the deceased the legacy given by clause 5 thereof to the bank on the trusts of The Ernest and Minnie Dawson Cancer Trust of such sum as would, with the moneys the deceased had already given to the bank on the same trusts [namely £21,072 6s. 6d.] amount to £27,000, was a legacy of (a) £14,395 16s. 11d.; (b) £5,927 13s. 6d.; or (c) some other and if so what amount; (2) whether the gift in clause 6 of the will of one-fourth part of the residue for the general purposes of the Church Association of 13–14, Buckingham Street, Strand, London, W.C.2, took effect in favour of the defendant, "Church "Society," or whether the said gift failed and passed as on intestacy, or whether it ought to be administered cy-près.

The facts are stated in the judgment.

Nigel Warren for the plaintiff, the bank.

J. G. Monroe for the first, second and fourth defendants, residuary legatees.

K. J. T. Elphinstone for the third defendant, Church Society.

John Monckton for the fifth defendant, one of the testator's next-of-kin.

H. R. Williams (*Denys Buckley* with him) for the sixth defendant, the Attorney-General.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

Dec. 21. VAISEY J. The testator in this case, Ernest Dawson, made his will on February 12, 1955, and died on May 31, 1955. The plaintiff, the National Provincial Bank Ltd., in the will and in this judgment referred to as the bank, was appointed executor and trustee by the will and proved it on August 13, 1955.

The present summons raises two quite distinct and separate questions on the construction of the said will. [His Lordship read clauses 5 and 6 of the will and continued:]

The questions raised by the summons are, first, whether the before-mentioned legacy to the bank on the trusts of The Ernest and Minnie Dawson Cancer Trust is a legacy of a sum required to make up to £27,000 the moneys already given to the bank upon the same trusts (a) without regard to, or (b) after allowing for the depletion of such moneys by the estate duty which

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became payable thereout under sections 2 (1) (*c*) and (3) of the Finance Act, 1894, by reason of such gifts having been made less than one year before the testator's death. And, secondly, whether the gift "for the general purposes of the Church "Association" takes effect in favour of the defendant society sued as the Church Society or fails or ought to be administered cy-près.

On the first of those questions the relevant facts are as follows. At the date of the testator's will The Ernest and Minnie Dawson Cancer Trust had not then come into being, but by trust deed dated March 29, 1955, and made between the testator, therein called the founder, of the one part and the bank of the other part, after reciting that the testator had paid a sum of £100 and might thereafter pay or bequeath other sums or assets to the bank to the intent that the fund should be dedicated "to the prevention and cure of cancer by promoting "and encouraging general medical practitioners of Lancashire "and Yorkshire to take a special interest in its diagnosis causes "prevention and treatment," he proceeded to constitute a trust with the bank as trustee known as The Ernest and Minnie Dawson Cancer Trust the objects whereof were stated in paragraph 5 of the trust deed as follows. The capital and income of the trust fund should be used "to prevent treat and (so far "as possible) cure cancer" and that the said objects should be pursued by giving prizes "to such selected practitioners as "from time to time make the most vauable contribution to the "early diagnosis prevention and treatment of cancer and to "knowledge of its causes." It is further declared by paragraph 7: "If at any time a resolution of the panel" therein defined "shall declare that a cure for cancer has been found or that for "any other reason whatsoever it is no longer practicable to "carry out the object of the trust by the means hereinbefore "specified the bank shall transfer the trust fund or the unused "balance thereof . . . to such of the following charities as may "then be in existence and if more than one in equal shares." The testator then enumerated the same four institutions and organisations as are named as residuary legatees by his said will to be applied to the exclusive purposes of their work in the city of Leeds.

On March 29, 1955, the testator paid £6,000 (which included the £100 mentioned in the deed) to the bank to be held on the trusts of the trust deed and on May 29, 1955, two days before his death, he transferred certain assets to the bank of the value of £15,072 6s. 6d., those funds to be held on the trusts aforesaid. Therefore, at the testator's death property to the amount of £21,072 6s. 6d. was in possession of the bank as trustee of the trust deed. It may be stated that the rate of duty on the testator's estate was 40 per cent. and because the gifts to the bank under the trust deed were made within the statutory period before the testator's death estate duty become payable on the

gifts made to the amount of £8,468 3s. 5d. which has been paid to the Revenue by the bank.

The question is whether the bank as trustees of the trust deed are entitled in respect of and before payment of the legacies to retain the sum required to make up the sum of £21,072 6s. 6d. to £27,000, or to make up the remainder of the sum of £21,072 6s. 6d. after deducting therefrom the sum of £8,468 3s. 5d. In other words, is the legacy £14,395 16s. 11d. or only £5,927 13s. 6d.? I have come to the conclusion that the proper amount of the legacy is the larger sum of £14,395 16s. 11d.

My reasons for coming to the conclusion I have mentioned are as follows. First, I think that it must be inferred from the general scheme of the will that the testator wanted the trust which he had founded to be put into possession of a clear sum of £27,000 and not any smaller sum. Secondly, I think that the words "free of duty" at the beginning of clause 5 of the will indicate an intention that no deductions or reductions for duty were to be made. Those words as they stand are otiose and inoperative, except in so far as they may be read as indicative of such an intention as I have mentioned. Shortly, I think that the case is in principle covered by the decision of Byrne J. in *In re Beddington*,[1] in which the headnote is as follows: "A "testator, within one year of his death, spent £4,000 on the "purchase of a house, which he settled on one of his daughters, "and contributed £4,320 towards the purchase of another house "for another daughter; the court having decided that these "gifts must be considered as an ademption pro tanto of the "daughters' shares in the testator's residuary estate, which "must be brought into account:—*Held*, that the amount for "which the daughters were accountable was the sums so "advanced, less the amount they were liable to pay for estate "duty by reason of the death of the testator within one year "of the gift." That decision was approved and followed by Sargant J. in *In re Crocker*,[2] and I think I also ought to follow it though I share to some extent the doubts of Sargant J. as to its correctness.

Coming to the second point which raises the question concerning the gift "for the general purposes of the Church "Association of 13–14 Buckingham Street Strand London "W.C.2" followed by the proviso that the subject-matter of the gift is to be applied for the exclusive use and benefit of the work of the Church Association in the City of Leeds, I have to rely for what I know of the Church Association on the affidavits of the Reverend Thomas Hewitt who was a member of the Church Association during the period of its unincorporated existence down to its alleged "amalgamation" in 1950 with another body known as the National Church League (Incorporated)

[1] [1900] 1 Ch. 771; 16 T.L.R. 291.

[2] [1916] 1 Ch. 25.

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to which I will refer as "N.C.L." Such amalgamation is said to have resulted in the formation of a body known as "Church Society," the defendant in these proceedings sued as "the Church Society." It appears that the Church Association was an unincorporated body of persons formed at a meeting held in London in November, 1867, at which meeting a certain declaration was read and approved and the objects and constitution of the association adopted. Stated generally, the Church Association was formed to maintain the principles which are generally described as protestant principles and to combat what is known as ritualism in the Church of England. In 1909 a company called the Church Association Trust was formed to act as trustee for the Church Association. It was a company limited by guarantee and it had vested in it all the property of the Church Association. For many years down to June, 1950, the offices of the Church Association were at 13–14, Buckingham Street, the address mentioned in the will. The leases of those premises were vested in the Church Association Trust in trust for the association. The N.C.L. was a company incorporated on April 13, 1926, also limited by guarantee. Its objects are said to have been similar to those of the Church Association.

In 1949 and 1950 negotiations took place between the Church Association and the N.C.L. for the amalgamation of the two bodies into a single organisation which is called "Church Society." This amalgamation was carried out without any order of the court or any reference to the Charity Commission. It was indeed a purely informal operation. As to this see *In re Campden Charities*,[3] and compare *In re Lucas*.[4]

The Church Association Trust proceeded to change its name to the Church Society Trust and continued in existence as a trustee holding company for the amalgamated body, and on June 14, 1950, at the annual general meeting of the Church Association the amalgamation was irregularly brought into effect in the somewhat informal manner in which the affairs of the Church Association seem to have been handled from its inception. The premises in Buckingham Street have never been occupied by Church Society which carries on elsewhere, possibly with other activities, the work formerly carried on by the Church Association and the N.C.L. From the rather vague terms of Mr. Hewitt's affidavit I think that Church Society may well be the Church Association under a new name and entitled to succeed in its claim under the principle of *In re Joy*[5] and *In re Pritt*.[6]

It seems clear that the former Church Association had a branch in Leeds which appears to have been closed about seven years ago. So far as I am aware, Church Society act in accordance

[3] (1881) 18 Ch.D. 310.

[4] [1948] Ch. 424; 64 T.L.R. 343; [1948] 2 All E.R. 22.

[5] (1888) 60 L.T. 175; 5 T.L.R. 117.

[6] (1915) 85 L.J.Ch. 166; 31 T.L.R. 299.

with the principles of the Church Association and promulgate what I hope I may call without offence the Low Church tenets with which the Church Association for many years has been identified. It cannot be doubted, I think, that its purposes are charitable in the legal sense of the word and I think that the charitable purposes for which this share was given are identifiable charitable purposes. I am not sure that they are identical with all the purposes of Church Society. If this had been a gift to the Church Association and not a gift "for its general purposes" I might have been compelled to hold that the gift failed altogether: compare *In re Rymer.*[7]

It was urged that at the date of the testator's will the Church Association had ceased to exist and had no general purposes and was carrying on no work in the city of Leeds. Such an argument would carry a good deal of weight but for *In re Lucas*[8] and *In re Withall.*[9] I think that all I can do at present is to exclude the next-of-kin as was done in *In re Hutchinson's Will Trusts.*[10]

It may be that Church Society ought to prepare a scheme for the approval of the court or the Charity Commissioners, unless indeed the Attorney-General be willing that the share should be handed over to Church Society to be applied for such of its purposes as are identical with the purposes of the Church Association at the time of its so-called amalgamation with the N.C.L. in 1950.

I will stay all further proceedings against the first, second, fourth and fifth defendants. I will adjourn the summons to chambers.

Declaration accordingly.

Solicitors: *A. F. & R. W. Tweedie* for *Cook, Fowler & Outhet, Scarborough; H. B. Nisbet & Co.; Wainwright & Co.; Biddle, Thorne, Welsford & Barnes for Willey Hargrave & Co., Leeds; Treasury Solicitor.*

J. A. G.

[7] [1895] 1 Ch. 19.
[8] [1948] Ch. 424.
[9] [1932] 2 Ch. 236.
[10] [1953] Ch. 387, 394; [1953] 2 W.L.R. 872; [1953] 1 All E.R. 996.

[QUEEN'S BENCH DIVISION.]

* COMMISSIONERS OF CUSTOMS AND EXCISE *v.* I.F.S. IRISH FULLY FASHIONED STOCKINGS LTD.

1956 *Dec.* 13.

Ashworth J.

Practice and Procedure—Writ—Service on foreign company—Action by Commissioners of Customs and Excise for order of condemnation—Notice of claim by London solicitors acting on behalf of foreign company — Writ later served on solicitors by Commissioners —

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

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Solicitors no longer acting—Whether valid service—Customs and Excise Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 44), *Sched.* 7, *paras.* 3, 4—*R.S.C., Ord.* 13, *r.* 2.

Revenue—Customs and Excise.

The Commissioners of Customs and Excise, having seized a consignment of stockings, served notice of the seizure, pursuant to Schedule 7 to the Customs and Excise Act, 1952, upon the defendant company, whose registered office was in Dublin. In reply a firm of London solicitors acting for the company wrote to the commissioners on August 26, 1955, giving notice under Schedule 7, paragraph 3, that it was claimed that the goods were not liable to forfeiture, and stating, pursuant to paragraph 4 of that Schedule, that they were authorized to accept service of process and to act on the company's behalf. The Commissioners issued a specially indorsed writ claiming an order of condemnation, and sent it with a copy to the solicitors, who returned them with a letter stating they were unable to obtain confirmation of their instructions to accept service. No prior notice of change of solicitors had been given to the Commissioners. The Commissioners, wishing to proceed in default of appearance, filed an affidavit of service under R.S.C., Ord. 13, r. 2, alleging service by sending the original and copy writ to the London solicitors. The master ruled that no proper service had been effected:—

Held, that, in the absence of any notification from the company as to change of solicitors, service upon the solicitors specified in the notice of August 26, 1955, was sufficient service, as by paragraph 4 of the Seventh Schedule to the Act of 1952 service of process upon a solicitor so specified was deemed to be proper service upon the claimant.

Appeal from Master Burnand.

The defendants were a company incorporated in the Republic of Ireland with their registered office in Dublin. After notice of seizure had been served on them by the Commissioners for Customs and Excise in respect of a consignment of stockings, a firm of London solicitors wrote to the Commissioners on August 26, 1955, giving notice of claim under Schedule 7, paragraph 3, to the Customs and Excise Act, 1952, and further stated, as required by paragraph 4, that they were authorized to accept service of process on the company's behalf. On July 2, 1956, the Commissioners issued a specially indorsed writ claiming an order of condemnation of the goods and served it with a copy by sending it to the solicitors. The solicitors returned the writ and the copy with a letter informing the Commissioners that they had been unable to obtain confirmation of their instructions to accept service of the writ. The Commissioners, proceeding in default of appearance, filed an affidavit of service pursuant to Order 13, rule 2, alleging service by sending the writ and a copy to the London solicitors. The affidavit was referred to Master Burnand, who held that no proper service had been effected, and ordered service on the company in the Republic of Ireland. The Commissioners appealed and Ashworth J. adjourned the summons into open court for judgment.

Rodger Winn appeared for the Commissioners.

ASHWORTH J. This matter comes before me by way of appeal from a ruling given by Master Burnand, who had before him an affidavit by James Arthur David Heal purporting (and, as will appear, in my view correctly purporting) to verify service of a writ upon the defendants. Order 13, rule 2, of the Rules of the Supreme Court provides: "Where any defendant fails to appear "to a writ of summons, and the plaintiff is desirous of proceeding "upon default of appearance . . . he shall, before taking such "proceedings upon default, file an affidavit of service." This affidavit of service was filed and was considered by the master. He took the view indorsed upon that affidavit: "As the defendants "have withdrawn their instructions from Herbert Smith & Co., "to accept service, it is necessary to serve the defendants in the "Republic of Ireland," which is where their registered office is.

Before setting out the reasons for my disagreeing with the master, I should state briefly the facts of the case. The writ was issued on July 2, 1956. The plaintiffs are the Commissioners of Customs and Excise and the defendants are a company whose registered office is situate in Dublin. The statement of claim indorsed on the writ claims an order of condemnation in respect of a large quantity of stockings. The stockings arrived in this country in January, 1955, and were seized by officers of the plaintiffs, and in pursuance of the Seventh Schedule to the Customs and Excise Act, 1952, notice was given of the seizure. In response to that notice, on August 26, 1955, Herbert Smith & Co., solicitors, wrote to the plaintiffs, or their officer in Birmingham, referring to the notice of seizure dated July 28, addressed to a company in London. The letter proceeds: "We are acting "on behalf of the present defendants of whose interest in this "seizure you are already aware. On their instructions we hereby "give you notice under paragraph 3 of the Seventh Schedule to "the Act of 1952 that they claim that the said goods are not "liable to forfeiture. Kindly note that we are authorized to "accept service of process and to act on our clients' behalf."

Notice of the plaintiffs' intention to take proceedings was evidently given at some date in June, 1956, because on July 2, 1956, Heal, on behalf of the plaintiffs, wrote to Herbert Smith & Co.: "Further to my letter of June 19, the writ herein has now "been issued and I enclose the specially indorsed original writ "plus a copy for service and a copy of the schedule referred to "in paragraph 3 of the statement of claim. Please will you be "good enough to indorse your acceptance of the service on the "original writ and return it to me, acknowledging at the same "time the receipt of the other documents." On the following day Herbert Smith & Co. replied to the effect that the gentleman dealing with the matter was on holiday. On his return from holiday a letter, dated August 17, was sent by Herbert Smith & Co. to the solicitor acting for the plaintiffs, stating: "We refer "to our letter of July 7 and regret the delay in dealing with this "matter. We regret we are unable to obtain confirmation of our

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"instructions to accept service herein, and we therefore have no "alternative but to return to you the original and copy writ and "the schedule." The plaintiffs, by their solicitor, replied on August 22 making a further effort to persuade Herbert Smith & Co. to accept service, but they were unsuccessful, and the matter, in effect, reached deadlock. Heal has sworn an affidavit in which he says that he spoke by telephone to a partner in the firm of solicitors, who told him that the defendant company had ceased trading.

The plaintiffs are anxious to proceed and obtain an order of condemnation. They take the view (with which I agree) that in the circumstances of this case the Seventh Schedule compels them to take proceedings. The reason for that view is that paragraph 6 of the Seventh Schedule provides: "Where notice of "claim in respect of any thing is duly given in accordance with "the foregoing provisions of this Schedule, the Commissioners "shall take proceedings for the condemnation of that thing by "the court, and if the court finds that the thing was at the "time of seizure liable to forfeiture the court shall condemn it "as forfeited." In my view it is plain beyond dispute that in this case a notice of claim in respect of the stockings was given; and secondly, that notice was duly given in accordance with the foregoing provisions of the Schedule because it sets out the name and address of the claimants and, inasmuch as the claimants (the present defendants) were resident outside the United Kingdom, the notice duly specified the name and address of a solicitor in the United Kingdom who was authorized to accept service of process and to act on behalf of the claimants. That notice was, in my view, the letter of August 26, 1955, from Herbert Smith & Co., and, having received it, the plaintiffs were compelled under paragraph 6 to take proceedings.

It so happens that some nine months later, when they take proceedings, Herbert Smith & Co. are no longer in a position to accept service of the writ. None the less, no notice of change of solicitor has been given by the claimants, nor is it suggested that Herbert Smith & Co. have dissolved partnership and ceased to exist as a firm. What the position would be in either of those events, or in other circumstances which are not before me, I think it preferable not to discuss. In the present case the firm of solicitors who were specified in the notice are in existence, and it seems to me that the provisions of the Seventh Schedule are such as to render service upon those solicitors not only good service but the only proper service in the absence of any other notification from the claimants.

The words on which Mr. Rodger Winn relies are those at the end of paragraph 4: "service of process upon a solicitor so "specified shall be deemed to be proper service upon the "claimant." For my part, I attach importance to the use of the expression "deemed to be proper service." As in so many cases, those words are apt to deal with a situation in which it

might possibly be argued that the service was not proper, but the words provide that service in the particular form shall be deemed to be proper and so put beyond the reach of argument the effect of service which has been carried out in compliance with the provisions of that paragraph of the Schedule.

I was referred to Order 11, rule 1, and I share the view taken by the present plaintiffs that there is nothing in that rule which would justify a court in permitting service of this writ out of the jurisdiction in purported pursuance of that Order 11. There may well be substance in the point that was brought to my notice, namely, that the wording of paragraph 4 of the Seventh Schedule to the Act of 1952 has been chosen with care by a draftsman who was conscious of the fact that unless he inserted some such provision it might not be possible to effect proper or adequate service upon a claimant outside the jurisdiction, at any rate without amending Order 11.

I can summarize my view in a sentence, and it is this: the plaintiffs, in the circumstances, were bound to take proceedings; the Schedule provides what shall be deemed to be proper service; they have carried out the requirements laid down in the Schedule which show what is needed before proper service shall be deemed to have occurred. In the circumstances I propose to direct that the affidavit of service of J. A. D. Heal sworn on November 30, 1956, is a sufficient affidavit of service for the purposes of Order 13, rule 2.

Appeal allowed.

Solicitor: *The Solicitor for Customs and Excise.*

[COURT OF APPEAL.]

C. A.

1957
Jan. 25.

Lord Evershed M.R., Jenkins and Ormerod L.JJ.

**In re* FLOWER'S SETTLEMENT TRUSTS. FLOWER AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

[1955 F. No. 796.]

Settlement — Construction — Acceleration — Uncertainty — Trust during settlor's lifetime void — Whether interests in remainder accelerated or resulting trust to settlor.

Revenue — Estate duty — Property chargeable — Property passing on death—Settlement—Trust during settlor's lifetime void—Whether resulting trust to settlor—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1.

By a settlement made in 1936 a settlor gave discretionary powers to his trustees to apply the income of the trust funds during his lifetime to a wide variety of purposes which excluded from the possible objects himself, his wife and his children. Other trusts including a life interest for his widow were to take effect "after the death of the settlor." The trusts expressed to take

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effect during the lifetime of the settlor were void for uncertainty and the question arose whether on the death of the settlor there was a passing of the trust property attracting estate duty (because on the failure of the trusts during the lifetime of the settlor there had been a resulting trust to him) or whether there was on the death no liability to duty (because on failure of the prior trusts the interests of the remaindermen had been accelerated):—

Held, that there was a passing of the trust property on the death of the settlor which attracted estate duty. The language of the settlement gave no indication that an acceleration should take place in events such as had happened, but indicated reasonably plainly that the trusts in remainder were to take effect on the death of the settlor in the literal sense and nothing else.

Semble. The principle of acceleration applicable to the construction of wills applies also to settlements but it is more difficult to show that acceleration is intended in the case of a settlement.

Lainson v. *Lainson* (1854) 5 De G.M. & G. 754; *In re Hodge* [1943] Ch. 300; 59 T.L.R. 373; [1943] 2 All E.R. 304 applied.

Decision of Upjohn J. affirmed.

APPEAL from Upjohn J.

By a settlement, dated April 13, 1936, and made between Sir Archibald Dennis Flower (hereinafter called "the settlor") of the first part, and the settlor, his wife, Dame Florence Flower, and his three children, Fordham Flower, John Keane Flower and Evadne Lloyd (then Longsdon), the trustees of the other part, the settlor directed his trustees to stand possessed of the trust property (which included 4,000 ordinary shares of £1 each in Flower and Sons Ltd.) on trusts, which so far as material were as follows:

"(2) The trustees shall out of the income of the trust funds "pay and discharge the costs and expenses of and incidental to "the preparation and completion of these presents and the vesting "of the said shares and subject thereto shall stand possessed of "the trust funds during the life of the settlor to use apply and "pay the income of the trust funds for the charitable and benevo-"lent purposes as follows:—In each year during the life of the "settlor to pay and apply the income of the trust funds for such "charitable and benevolent purposes as the trustees may from "time to time direct with power within the statutory limits to "accumulate any income not so paid or applied and to pay and "apply such accumulations for the like purposes as those for "which the income of the trust funds were applicable. Provided "always and it is agreed and declared that the objects of the "above trust are not confined to purposes which according to law "may be held to be charitable purposes but shall include purposes "of a benevolent and/or public character for the benefit of insti-"tutions and individual persons and for subscriptions and gifts "to objects whether of a national political or local character and "that such advances and payments may be either by way of "absolute gift or by way of loan and either with or without "security and either with or without payment of any interest with

" power for the trustees to enter into contracts for the payment " of subscriptions or gifts for any term of years but determinable " on the death of the settlor. Provided always that no such " application or payment shall be made which shall directly or " indirectly benefit the settlor or any of the trustees.

" (3) After the death of the settlor the trustees shall hold the " trust funds:—(i) Upon trust to pay the net annual income " thereof to the said Florence Flower for her life and (ii) On the " death of the survivor of them the settlor and the said Florence " Flower to hold the capital of the trust funds and any undis- " tributed income thereof In trust for the said Fordham Flower " John Keane Flower and Evadne Longsdon in equal shares."

There followed a series of provisions introduced by the words: " It is hereby agreed and declared as follows." By paragraph 1 of these (which in the Court of Appeal Jenkins L.J. said might have some bearing on the relevance to undistributed income in the preceding paragraph 3 (ii)): " There shall be no apportion- " ments at the date hereof or at the date of the death of the said " Florence Flower as between capital and income of dividends " interest or other income but all such dividends interest or other " income paid or received after the date hereof or after the date " of the death of the said Florence Flower as the case may be " whether wholly or partially accruing before the date hereof or " the date of the death of the said Florence Flower as the case " may be shall be regarded and distributed as if wholly arising or " accruing after the date hereof or after the death of the said " Florence Flower as the case may be." Dame Florence Flower died on January 15, 1946, and the settlor died on November 22, 1950.

On May 12, 1955, the then trustees of the settlement, the three children of the settlor, who were also the beneficiaries, took out a summons asking, inter alia, whether, on the true construction of the settlement, the trust fund with accumulations passed on the death of the settlor and became liable to estate duty under section 1 of the Finance Act, 1894. Upjohn J., in the course of his judgment said: " Both sides agree that it is a matter of " presumed intention and invite me to speculate as to what the " testator would have intended had he been told that para- " graph 2 was in fact quite invalid, but I do not know what he " would have desired to do. I do not know whether, with a " view, possibly, to avoiding estate duty, he would have said, " ' Let there be an acceleration,' or whether he would have said, " ' I will myself accept the income and declare new trusts con- " ' fined to strictly charitable purposes.' That seems to me to " be a matter of speculation which does not assist the question. " In my judgment, it may well be easy, when you have a gift to " A. for life and a gift after the death of A. to assume that the " words ' after the death of A.' are mere words of limitation and " the gift which follows is merely subject to the benefit which " has been given to A. I find it more difficult to read after the

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"words 'after the death of the settlor' as being equivalent to "'subject to the foregoing trusts.' In the first place, the settlor "has not used those words. Secondly, it is important to note "that the foregoing trusts have nothing to do with the benefit "of the settlor; indeed, he is incapable of benefiting under para-"graph 2, assuming it to have been a valid clause. Upon the "whole, though it is a difficult and doubtful matter, I think I "must give a literal construction to the language which the "testator has used." Accordingly, he held that there was a resulting trust; paragraph 3 only came into operation after the death of the settlor and, therefore, estate duty was exigible on the capital of the trust funds and on the accumulations in the hands of the trustees. The trustees appealed.

At the date of the settlor's death the value of the assets transferred by the settlor to his trustees was given for probate purposes as about £22,000, and in addition there were accumulations amounting to about £10,000 which for the most part had been distributed during the settlor's lifetime. The fund was, therefore, substantial in itself but the question of duty was made of even greater importance to the parties because, if there was a passing on the death of the settlor, the fund would be aggregated for purposes of duty with the rest of his very substantial estate.

Geoffrey Cross Q.C. and *G. L. Dawson* for the trustees.

John Pennycuick Q.C. and *E. Blanshard Stamp* for the commissioners.

In addition to the cases referred to in the judgments, the following were referred to in argument: *Jull* v. *Jacobs* [1]; *In re Townsend's Estate* [2]; *Berry* v. *Geen.* [3]

Lord Evershed M.R. I will ask Jenkins L.J. to deliver the first judgment.

Jenkins L.J., having stated the facts substantially as set out above, continued: It will have been observed that the trust declared during the life of the settlor comprised a discretionary power given to the trustees to apply the income of the fund to an extremely wide and varied range of objects not confined to charitable purposes nor even to benevolent purposes, for the first proviso to paragraph 2 expressly provided "that the objects of "the above trust are not confined to purposes which according "to law may be held to be charitable purposes but shall include "purposes of a benevolent and/or public character," and so on. I will not read the words again, but the potential objects cover a very wide field.

[1] (1876) 3 Ch.D. 703.
[2] (1886) 34 Ch.D. 357; 3 T.L.R. 204.
[3] [1938] A.C. 575; sub nom. *In re Blake*, 54 T.L.R. 703; [1938] 2 All E.R. 362.

It is common ground that the discretionary trust declared to take effect during the life of the settlor in these extremely wide terms was and is void for uncertainty, so that no effective disposition was made of the income of the fund during the settlor's life. In that state of affairs it is contended by Mr. Cross for the appellants that on the principle recognized in a long line of cases the result of the invalidity of the trusts declared during the settlor's lifetime was to bring about an acceleration of the interests of the persons taking in remainder. The effect of that, as I understand it, would be that forthwith upon the execution of the settlement Dame Florence Flower, the widow, became tenant for life in possession of the fund with remainder to the three children in equal shares. If that were so, it is common ground that no estate duty could be exigible on the death of Sir Archibald under the provisions of section 1 of the Finance Act, 1894, or otherwise.

On the other hand it is contended on the part of the Crown by Mr. Pennycuick that the invalidity of the trusts declared in respect of the income during the settlor's life brought about a resulting trust in favour of the settlor and consequently that at the time of his death he had a beneficial interest in possession for the period of his life in the fund. If that argument is well founded, it is common ground that estate duty must have been exigible on his death by virtue of a passing under section 1 of the Finance Act, 1894.

Mr. Cross referred us to several of the numerous cases bearing upon this topic. The principle, I think, is well settled, at all events in relation to wills, that where there is a gift to some person for life, and a vested gift in remainder expressed to take effect on the death of the first taker, the gift in remainder is construed as a gift taking effect on the death of the first taker or on any earlier failure or determination of his interest, with the result that if the gift to the first taker fails—as, for example, because he witnessed the will—or if the gift to the first taker does not take effect because it is disclaimed, then the person entitled in remainder will take immediately upon the failure or determination of the prior interest, and will not be kept waiting until the death of the first taker.

It has long been settled that this principle applies not only to realty (in respect of which I think it was first introduced) but equally in respect of personalty; and although all the authorities to which we have been referred have been concerned with wills, Mr. Cross submits—and I do not think that Mr. Pennycuick disputes—that there is no reason for applying any different rule to a settlement inter vivos. As to that I would say that I am disposed to agree that the principle must be broadly the same; but I cannot help feeling that it may well be more difficult, in the case of a settlement, to collect the intention necessary to bring the doctrine of acceleration into play.

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Of the authorities I need refer only to *Lainson* v. *Lainson*,[1] and secondly to *In re Hodge*.[2] In *Lainson* v. *Lainson*[3] the first paragraph of the headnote is in these terms: "The words 'from "'and immediately after his decease' following a limitation for "life, in general point out the order of limitation merely. Where "therefore a testator revoked a limitation for life, which was "followed by those words introducing subsequent limitations: "*Held* that the remainders were accelerated."

Turner L.J. said[4]: "The question in this case is, not whether "an intention is to be collected in favour of the testator's son "and heir (who requires no intention in his favour); but whether "there is an intention in favour of the grandson. The question "may be considered in two points of view; first, as regards the "will; secondly, as regards the codicil. By the will, the estate "is given upon trust for the testator's son for life; and, from and "immediately after his decease, upon trust for his first and other "sons in tail. These words may have one of two imports, either "that the grandson was to take nothing till after the death of "his father, or else merely to show the order of the limitations, "through which the estate was to pass. I take the cases cited "to establish the proposition, that, *prima facie*, these words are "to be understood as denoting the order of succession of the "limitations. Is there then anything in the will to lead to a "different conclusion? I can see nothing."

It is to be observed that the Lord Justice said that prima facie these words are to be understood as denoting the order of succession of the limitations. But earlier in the passage I have quoted he said: "The question in this case is, not whether an intention "is to be collected in favour of the testator's son and heir (who "requires no intention in his favour); but whether there is an "intention in favour of the grandson." By that I think he meant that the testator must be taken prima facie to have intended the heir to take any interest not effectively disposed of, so that the question was whether that intention was displaced by this particular provision. Mr. Pennycuick submits that, similarly in the case of a settlement, prima facie anything not disposed of by the express terms of the settlement reverts to the settlor under a resulting trust, so that where acceleration is alleged the question is whether an intention to produce acceleration in lieu of a resulting trust is manifested by the language of the instrument.

In re Hodge[5] was a decision of Simonds J., and the headnote reads: "A testatrix by her will directed that annuities should be "paid to two annuitants subject to a life interest in the residuary "income, the first payments to be made three months after "the death of the tenant for life. The tenant for life having "disclaimed his life interest: *Held*, that the annuities were

[1] (1854) 5 De G.M. & G. 754.
[2] [1943] Ch. 300; 59 T.L.R. 373; [1943] 2 All E.R. 304.
[3] 5 De G.M. & G. 754.
[4] Ibid. 756.
[5] [1943] Ch. 300.

"accelerated so as to take effect as from the death of the "testatrix."

Simonds J. in his judgment said [6]: "The principle of accelera- "tion was first established in regard to remainders in real estate, "and probably the origin is to be found in the technicalities of "real property law. However that may be, the principle became "extended to interests in personalty, and, although counsel have "not found any authority where it has been applied except in the "case of what may be called a residuary interest, I see no reason "why it should not be appropriate in the case of any interest, "whether partial, such as an annuity, or residuary. The prin- "ciple is the same. An interest is postponed that a prior interest "may be enjoyed. If that prior interest is determined, whether "by the death of a prior beneficiary or for any other cause, the "reason for postponement disappears and there is no reason why "there should not be acceleration. Accordingly, when I find an "annuity expressed to be subject to a life interest and that the "tenant for life has disclaimed his life interest, I come to the "conclusion that the annuity is to be accelerated, for it is just "as if the direction for the payment of the annuity was 'subject "'to the interests of the tenant for life which may be determined "'either by his death or for some other reason.'"

The question then is whether, having regard to that principle, the intention necessary to produce acceleration in the present case is to be collected from the terms of the settlement. The judge was of opinion that no such intention could be collected from the language used with any sufficient degree of certainty. He took the view that in these circumstances his proper course was to follow the literal meaning of the language used; and taking that course he found that there was no ground for holding that the interests in remainder were accelerated so as to take effect during the lifetime of the settlor.

In my view the judge was clearly right. The point is a short one which does not admit of much elaboration in argument; but in my opinion there is no sufficient reason here for holding that the interests in remainder were accelerated. On the contrary, it seems to me that when the settlement is examined such indications as there are point in the other direction. One may observe first that the trustees, in whom the purported discretionary power of distributing income was vested, were in fact the settlor himself, his wife and the three children. One begins, therefore, with this, that what the settlor had immediately in view was a trust operating during his life under which the income of the fund could be applied for a wide variety of purposes excluding himself and his wife and children at the joint discretion of those persons in their capacity as trustees; and he made by the settlement no further or other disposition of the fund during his life save by conferring on the trustees—that is to say, himself and his family —these discretionary powers of disposal.

[6] [1943] Ch. 300, 301.

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Next I would observe that the trusts in this document are declared in two separate and distinct branches. First, by paragraph 2 it is provided that the trustees shall stand possessed of the trust funds during the life of the settlor "to use apply and "pay the income" thereof, and so forth; and secondly in paragraph 3: "After the death of the settlor the trustees shall hold "the trust funds" upon trusts stated. It is not a case where the trusts during the life of the settlor and after his death are expressed in a continuous series without a break. On the contrary, the two sets of trusts are declared quite separately, which does to some extent suggest that they are to be regarded as independent of each other.

Next it is to be observed that to bring the doctrine of acceleration into operation something must be found here equivalent to the gift of a vested remainder to a person expressed to take effect on the death of the first taker. Here it seems to me that Mr. Cross's argument really meets with insuperable difficulties. This is not a case in which a fund is given to A for life, and from and after the death of A to B, that being the simplest example of a proper case for the application of the doctrine. It is a disposition of the fund during the life of the settlor for objects which do not include the settlor.

Therefore it is not possible to bring the doctrine into play by treating the trusts in remainder as taking effect on the death of the settlor, or the earlier failure or determination of his interest, because the settlor in truth had no beneficial interest at all. It would be necessary to recast the language used so as to make the gift a gift limited to take effect on the death of the settlor, or the prior failure or determination of the trusts limited to take effect during his lifetime. That seems to me to involve an extension of the doctrine which to my mind would be wholly unwarranted.

Next one finds references to the death of the settlor which, I think, make it reasonably plain that the event referred to is the death of the settlor in the literal sense, and nothing else. For example, one finds towards the end of the first proviso to paragraph 2 the words "with power for the trustees to enter into "contracts for the payments of subscriptions or gifts for any "term of years but determinable on the death of the settlor." That, I would say, means the actual death of the settlor.

Then one has in paragraph 3 the words: "After the death of "the settlor" introducing the trusts in remainder, and that, I should have thought, was in contradistinction to the separate fasciculus of trusts declared by paragraph 2 during the life of the settlor. Then again in sub-paragraph (ii) of paragraph 3 one finds: "On the death of the survivor of them the settlor and the "said Florence Flower." That, I should have thought, again must be the actual death of the longest liver of the two of them.

These considerations lead me to the conclusion that the judge was right in holding that there was no acceleration in this case.

The language of the settlement, read literally, seems to me to be wholly consistent with that view. There is here no evidence of intention, such as might be looked at by way of surrounding circumstances, to spell an intention that an acceleration should take place in events, such as those that have happened, out of the language used. If the surrounding circumstances are looked at, it seems to me in the highest degree improbable that the settlor (if the matter had been brought to his notice) would have intended acceleration to take place in favour of the persons interested in remainder so as to give the income of the entire fund immediately to his wife with remainder of the capital and income to his children. It appears to me to be plain from the character of the disposition made that the settlor's intention was that during his life neither he nor his wife nor his children should have any beneficial interest in the fund, but the fund was to be subject to a discretionary power jointly exercisable by him and them as trustees to apply the fund for, broadly speaking, charitable and benevolent purposes such as a man in the position of the settlor would ordinarily feel himself and his family under a moral duty to support. The fund was to be held at the discretion of the trustees for the application of the income during his life for purposes such as those, with no idea whatever in his mind of giving his wife or his children any beneficial interest until after his death. It seems to me that it would have been an extraordinary departure from anything that the settlor could have intended for his wife to come into immediate possession of the income of the trust fund.

As I said earlier the point is a short one. For the reasons I have endeavoured to express I think that Mr. Cross's submission fails, and I conclude by saying this. As I have already mentioned, Mr. Cross referred us to a number of cases, but was not able to find an authority in which it has been held or even argued that acceleration could take place in the case of a settlement inter vivos in the form of the settlement now under consideration. It appears to me that it would be a large and unwarrantable extension of the doctrine so to apply it in the present case.

For these reasons, in my view the judge came to a right conclusion, and I would dismiss the appeal.

ORMEROD L.J. I agree, and I have nothing to add.

LORD EVERSHED M.R. I also agree with the reasons which my brother has given, and with the judgment of Upjohn J.

Appeal dismissed.

Solicitors: *Stanley & Co. for R. Evans Parr & Co., Birmingham; Solicitor of Inland Revenue.*

E. D.

[QUEEN'S BENCH DIVISION.]

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Jan. 17, 18.

Lord Goddard C.J., Cassels and Lynskey JJ.

* REGINA *v.* BATTERSEA, WANDSWORTH, MITCHAM AND WIMBLEDON RENT TRIBUNAL. *Ex parte* AMBALAL PARIKH.

Landlord and Tenant—Rent tribunal—Furnished premises—Lodger—Reference by paying guest or lodger—Jurisdiction of tribunal—Exclusive occupation of one room as a residence—Landlord's right of access at all times—Whether tribunal has jurisdiction to entertain reference—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2 (1).

By section 2 (1) of the Furnished Houses (Rent Control) Act, 1946: "Where a contract has . . . been entered into whereby one "person . . . grants to another person . . . the right to occupy as "a residence a house or part of a house . . . in consideration of a "rent which includes payment for the use of furniture or for "services, whether or not, in the case of such a contract with "regard to part of a house, the lessee is entitled, in addition to "exclusive occupation thereof, to the use in common with any "other person of other rooms or accommodation in the house, it "shall be lawful for either party to the contract or for the local "authority to refer the contract to the tribunal for the district." The applicant entered into an agreement with one F. by which F. and her two children occupied a furnished room in the applicant's house together with the right to use other rooms. By the agreement F., who was referred to as a paying guest, was given a key to the door of the room, but the applicant retained the right of access to the room "at all times." F. made a reference to the rent tribunal for the district which reduced the rent and granted her three months' security of tenure. On a motion for an order of certiorari to quash the determination of the tribunal on the ground that it had no jurisdiction to entertain a reference in the case of a paying guest or lodger:—

Held, (1) that section 2 (1) of the Act of 1946 gives rent tribunals jurisdiction over contracts which grant the right of occupation of a house or part of a house as a residence, provided that in the case of part of a house such occupation is exclusive, and it is not necessary for there to be a letting of possession. If lodgers or paying guests have exclusive possession of part of a house as a residence they are within the provisions of the Act in respect of that part.

(2) That the reservation to the landlord of a right of access "at all times" did not of itself destroy the right granted by the contract to exclusive occupation of the room as a residence since the landlord had no right to occupy the room as a residence for herself or to put anyone else in the room.

Dictum of Lord Goddard C.J. in *Helman* v. *Horsham and Worthing Area Assessment Committee* [1949] 1 K.B. 62, 69; 64 T.L.R. 486; [1948] 2 All E.R. 588 applied.

APPLICATION for order of certiorari.

The applicant, Mrs. Ambalal Parikh, of 93, Englewood Road, London, S.W. 12, entered into an agreement with Mrs. Mavis

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

Flynn for the latter's occupation of a furnished room on the upper floor of the house. By the agreement, which was in the form of a letter from Mrs. Flynn to the applicant, it was agreed that, subject to references, Mrs. Flynn was to be accommodated as a paying guest at an inclusive weekly charge of £2 10s. 0d. She was to have the right of using other rooms in the house, including the bathroom, kitchen and dining room. It was provided that the applicant was to have access to the room "at all times" and Mrs. Flynn was given keys to the room and the front door. Notice, in writing or verbally, was to be one week on either side. Mrs. Flynn referred the contract to the Battersea, Wandsworth, Mitcham and Wimbledon Rent Tribunal. It was contended on the applicant's behalf that as Mrs. Flynn was a paying guest or lodger and as she had no exclusive occupation of the room, since the applicant had right of access at all times, the tribunal had no jurisdiction to entertain the reference.

R. A. R. Stroyan for the applicant.
Rodger Winn for the Rent Tribunal.

The following cases were cited in argument in addition to that cited in the judgment: *Cory* v. *Bristow* [1]; *Allan* v. *The Overseers of Liverpool.*[2]

LORD GODDARD C.J. In this case the applicant moves for an order of certiorari to bring up and quash a determination of the Battersea, Wandsworth, Mitcham and Wimbledon Rent Tribunal, to whom an application was made by one Mrs. Flynn, who was occupying a room in a house kept by the applicant.

The ground of the application is that the tribunal had no jurisdiction to entertain this application because Mrs. Flynn was what may be described as a lodger or boarder or paying guest and had no exclusive occupation of any room in the house.

The section we have to construe is section 2 of the Furnished Houses (Rent Control) Act, 1946, the long title of which is: "To "make provision with respect to the rent of houses or parts "thereof let at a rent which includes payment for the use of "furniture or for services." Section 2 (1) provides: "Where a "contract has, whether before or after the passing of this Act, "been entered into whereby one person (hereinafter referred to "as the 'lessor') grants to another person (hereinafter referred "to as the 'lessee') the right to occupy as a residence a house "or part of a house situated in a district in which this Act is in "force in consideration of a rent which includes payment for the "use of furniture or for services, whether or not, in the case of "such a contract with regard to part of a house, the lessee is "entitled, in addition to exclusive occupation thereof, to the "use in common with any other person of other rooms or accom-"modation in the house, it shall be lawful for either party to the

[1] (1877) 2 App.Cas. 262.

[2] (1874) L.R. 9 Q.B. 180, 191.

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"contract or for the local authority to refer the contract to the "tribunal for the district." Then there is a provision as to furniture or the rendering of services, and those services or furniture must form a substantial part of the consideration for which the place is let. That, of course, comes from the principal Acts and refers to the time when landlords used to try to avoid the provisions of the Act by leaving in the house a little linoleum, and so on.

By section 12 (3): "Nothing in this Act shall apply to a house "or part of a house let at a rent which includes payment in "respect of board: Provided that a house or part of a house "shall not be deemed to be let at such a rent unless the value "of such board to the lessee forms a substantial proportion of "the whole rent." That would allow the Act to apply if a person was taken in for the purpose of boarding, but, although the rent was £3 or £4, the board provided was merely a sandwich or the furniture was trivial in character or amount.

There was an agreement between the parties in this case, and the agreement is in the form of a letter. The applicant has been advised on this matter, and the following form has been drafted for her: "Dear Mrs. Parikh: I (Full name in block letters), "Mavis Flynn formerly residing at 26, Queen's Road, Wimble-"don, and at present employed as waitress with (Full name and "address of employers) Westbury's Restaurant, Balham Hill, to "whom a reference may be made as to my character and suit-"ability, am thankful to you for accommodating me as your "paying guest in a room on upper floor, furnished at an all-"inclusive charge of £2 10s. 0d. per week payable in advance "every Thursday or latest Friday morning on weekly basis; I "have two children"—then she gives the names and ages respectively—"who will stay with me and be in nursery during "my working hours. You will at all times have access to my "room and be entitled to ask me to leave the premises with a "week's notice in writing or verbal; similarly I shall give you a "week's notice in writing or verbal while paying you the weekly "charges on Thursday or Friday if I wish to leave the premises. "I shall be bound to keep the premises clean and tidy and to "live as a friendly neighbour with all concerned and will in no "way disturb the happy atmosphere of your house by my "conduct. I acknowledge receipt of the keys and furnished "belongings entrusted to me which I shall return to you intact "and good order or make good the loss if any to your property "and for this I shall keep and maintain with you at least a "deposit of £2 10s. 0d. at my earliest and obtain from you a "receipt for the same. Again thanking you. Yours sincerely, "M. Flynn."

Of course, if the landlady thinks that by the use of certain words she can avoid the provisions of this Act, she is mistaken. It is obvious that this document has been drafted for her in the view that if she calls a person a paying guest it may have some

effect on the legal relationship between them so far as these Acts are concerned, and these expressions of gratitude are put in I suppose with the idea that that also will have some effect; but what we have to look at is the effect of the document in law and not the particular expressions these parties may use.

Some years ago, in *Helman* v. *Horsham and Worthing Area Assessment Committee*,[1] which was a rating case, I expressed this opinion: "A weekly rent is a thing which you find not only "in weekly lettings but it is very common, of course, for lodgers "to pay so much a week. Unfurnished lodgings are perfectly "well known; lodgings are not always furnished. In this case "the rooms in fact come within the Furnished Houses (Rent "Control) Act, 1946; that is not conclusive in any way, because "both lodgings and tenancies come within that Act." That was from one point of view merely an obiter dictum because we were dealing there with rating. That passage was mentioned by the present Master of the Rolls when the case went to the Court of Appeal,[2] and he did not express any decided opinion upon it.

We have been told by Mr. Winn, though this is not conclusive either way, that these tribunals have been in the habit of treating lodgers' agreements as being referable to them under the terms of this Act. It must depend in most cases upon the terms under which the lodger, to use a convenient expression, is living, that is to say, what the terms of the agreement are between the person received into the house and the owner of the house. But I adhere to the view I expressed in *Helman's* case[3] that as a general rule lodgers can and do come within this Act, but that of course must be on the footing that they have exclusive occupation of some part of the house. I cannot altogether agree with Mr. Winn's contention; I think he put it a little too high. He said that all one had to do was to look at the first words of the Act, "Where a contract has, whether before or after the "passing of this Act, been entered into . . .", then the Act applies. But this section is providing for the case where a person has exclusive occupation of some room or some part of the house and is using the other part of the house in common with the other occupants living in the house. If it is the sort of case in which a floor of the house with conveniences, that is, bathroom, lavatories and kitchen, are used, of course no question arises; but this Act is dealing with the position where the tenant, in addition to exclusive occupation, is entitled to use in common with any other person other rooms and accommodation in the house. In this case, as it seems to be conceded, Mrs. Flynn had the right to use other rooms. The children had breakfast, for instance, in the dining room, and I suppose Mrs. Flynn had the use of the bathroom and kitchen. We have to see whether she had in addition exclusive occupation of the room. It is said here

[1] [1949] 1 K.B. 62, 69; 64 T.L.R. 486; [1948] 2 All E.R. 588.

[2] [1949] 2 K.B. 335; 65 T.L.R. 291; [1949] 1 All E.R. 776.

[3] [1949] 1 K.B. 62.

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that she has not exclusive occupation because the landlady is given access. I cannot think that the landlady by putting in words to say that she is to have access to the room has done enough to defeat the Act or say that Mrs. Flynn has not exclusive occupation. She is given a key and can lock the door. It may be that the landlady can enter if she has another key, but I think the test is whether Mrs. Flynn has the exclusive right to use this room as a residence. The landlady has not the right under these circumstances, having let this room as a residence, herself to come in and occupy it nor has she a right to put somebody else into that room. I think this lady has here an exclusive right to use that room as a residence, and for that short reason I think that the tribunal had power to entertain the application and this motion fails.

CASSELS J. I agree. I would only add this, that I do not think a paying guest is accurately described when that paying guest has to do all her own work in connexion with the accommodation she has and the only thing she is provided with is a little food.

LYNSKEY J. I agree. I only desire to add that we are construing here a particular section of a particular Act—that is all we are concerned with—and the use of the words in their context. Section 2 (1) provides: "Where a contract has, whether before "or after the passing of this Act, been entered into whereby one "person (hereinafter referred to as the 'lessor') grants to another "person (hereinafter referred to as the 'lessee') the right to "occupy as a residence a house or part of a house . . ." What has to be done by the contract is to give a person a right to occupy a house or part of a house as a residence. There is nothing in the Act which requires that there shall be a lease or letting of possession. It is a right to occupy, which is a different matter and a different right. A right to occupy normally arises under a licence and not under an agreement of tenancy or agreement for a lease. The subsection continues: "situated in a district in which this "Act is in force in consideration of a rent which includes payment "for the use of furniture or for services, whether or not, in the "case of such a contract with regard to part of a house, the lessee "is entitled, in addition to exclusive occupation thereof, to the use "in common with any other person of other rooms or accommoda-"tion in the house, it shall be lawful for either party to the "contract or for the local authority to refer the contract to the "tribunal for the district."

It seems to me clear on that wording that we have to find first of all before the section applies a contract; secondly, a contract giving the person with whom it is made the right to occupy a house or part of a house; thirdly, to occupy that part of a house as a residence; and fourthly, there must be an exclusive occupation of that part of the house if that right of occupation

is given in addition to a right to use other parts. It seems to me that exclusive occupation is exclusive occupation as a residence, and the fact that there is reserved to the landlord a right of access from time to time does not of itself destroy that right to exclusive occupation as a residence when the landlord has handed over the furniture and handed over the keys. It amounts to no more than the right of a landlord to have access for the purposes of repair, and so on. But whether that be the true meaning of the agreement or not, it is a curious fact that when the rent tribunal form is filled up by the present applicant it reads: "Address of "premises let as paying guest, 93, Englewood Road, S.W.12. "(2) Name of lessee (paying guest), Mrs. M. Flynn . . . If part "only of the house is let to the lessee as paying guest (a) number "and description of rooms occupied or used exclusively by the "lessee," and that is given as "One room on upper floor with "use of bath, kitchen and garden." It seems to me on that basis that the applicant herself is describing the premises as being let exclusively, namely, the particular room; and in those circumstances my view of the proper construction of this section is reinforced by the applicant's own view of what the position was between her and her lessee as described by the Act. In my view this application must be refused.

Application dismissed.

Solicitors: *Pollards; Solicitor, Ministry of Health.*

[COURT OF APPEAL.]

*EDWARDS *v.* WEST HERTS GROUP HOSPITAL MANAGEMENT COMMITTEE.

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Jan. 31.
Hodson, Morris and Sellers L.JJ.

[Plaint No. M. 499.]

Master and Servant—Theft of servant's goods—Liability of master—Resident house physician—Claim against hospital authorities for loss by theft of personal effects—Whether relation of parties that of boarding-house keeper and boarder or master and servant.

Contract—Implied term—Contract of service. Boarding house. Negligence (Hospital).

The plaintiff was employed by the defendants as a house physician at a hospital on the terms that he had to live in a staff hostel adjoining the hospital, that his salary was £425 per annum, from which £125 was to be deducted for board and lodgings. After a number of his belongings had been stolen from his room, the plaintiff brought an action alleging that the defendants had failed to take reasonable care of his room and effects. The county court judge dismissed the action. On appeal:—

Held, that the relationship between the parties was not that of boarding-house keeper and boarder but of master and servant, and that a master was under no duty to take reasonable care to prevent the theft of his servant's effects.

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Deyong v. *Shenburn* [1946] K.B. 227; 62 T.L.R. 193; [1946] 1 All E.R. 226 and *Tinsley* v. *Dudley* [1951] 2 K.B. 18; [1951] 1 T.L.R. 315; [1951] 1 All E.R. 252 applied.

APPEAL from Judge Granville-Smith, sitting at Watford County Court.

The facts are stated in the judgment of Hodson L.J.

Neville Faulks for the plaintiff.

J. P. Widgery for the defendants.

Cases cited in argument not referred to in the judgments: *Priestley* v. *Fowler* [1]; *Olley* v. *Marlborough Court Ltd.* [2]; *Caldecutt* v. *Piesse* [3]; *Paterson* v. *Norris* [4]; *Stansbie* v. *Troman.* [5]

HODSON L.J. This is an appeal from an order of Judge Granville-Smith made at the Watford County Court on September 24, 1956. The appeal is by the plaintiff, who is a doctor, and at the material time he was employed by the defendants, the West Herts Group Hospital Management Committee, as a resident house physician, or, as he was otherwise described, as a house officer. He was employed by the committee at the hospital, and one of the terms of his employment was that he should live at a hostel provided by the defendants. We have not any specific evidence as to the exact lay-out of the premises; but it is conceded that the hostel was near the hospital, although not part of the hospital, and that the plaintiff (amongst others) lived in it. How large a place it was, or how many other doctors were there, we do not know from the evidence.

We have seen a circular, which emanates presumably from the Ministry of Health, concerning the negotiations between the Whitley Councils for the Health Services (Great Britain) and the British Medical Association setting out the terms and conditions of service of medical staff which cover this case. The contract accordingly was that this man was to get £425 a year and that a deduction of £125 per annum was to be made in respect of board and lodging and other services, so that from one point of view the plaintiff's salary was £425. From another point of view his total salary was £300, plus board and lodging valued at £125. That was the position of the plaintiff.

He took up his duties in July of 1955. He had a room at the hostel, and on December 17, 1955, he came in at two o'clock in the morning and found that a number of articles of personal clothing, and so on, had been stolen. There is no finding of fact, and no one knows exactly the circumstances in which they were stolen—whether anyone got in from outside, or whether some dishonest person stole the things in his room from inside.

[1] (1837) 3 M. & W. 1.

[2] [1949] 1 K.B. 532; 65 T.L.R. 95; [1949] 1 All E.R. 127.

[3] (1932) 49 T.L.R. 26.

[4] (1914) 30 T.L.R. 393.

[5] [1948] 2 K.B. 48; 64 T.L.R. 226; [1948] 1 All E.R. 599.

But he has claimed for their loss, and in the event of his claim being justified the sum has been fixed by the county court judge at £70. He bases his claim on two grounds. He says that the defendant hospital committee owed to him a duty "that they "their servants or agents would take reasonable care" of his bedroom and of his clothes and personal effects, and of the key to the door. That is the first way in which he puts his claim. In the alternative it was, he said, an implied term of his contract of employment that the hospital committee should do what I have previously said the plaintiff claimed they were liable to do apart from the contract.

The particulars of negligence pleaded are to this effect: That the defendants allowed the back door of the hostel to remain open; that they failed to employ a porter or caretaker other than between certain limited hours in the day; that they required the plaintiff to leave his bedroom door key in the lock; that they failed to take any care of the key left for their use or to have any system by which, after the bedroom had been cleaned, the door was locked and the key kept in a safe place. There is then an allegation that they failed to take any steps to prevent unauthorized persons from entering the hostel and the plaintiff's bedroom.

The defendants' answer to this is a very short one indeed. It is that they deny that they owe any duty of care to the plaintiff at all. The proposition of law for which they contend (and which was accepted by the county court judge) was that the general principle is that there is no duty upon the occupier of premises to safeguard against theft of the chattels by a third party who comes upon the premises. If you have a visitor to your house and he loses something, you are not liable in law; and that applies, generally speaking, as a rule of law to the occupier of premises.

There is a recent case in which the general position is dealt with by this court in particular by the judgment of Jenkins L.J. in the case of *Tinsley* v. *Dudley*.[1] Jenkins L.J. said this: "There is no warrant at all on the authorities, so far as I know, "for holding that an invitor, where the invitation extends to the "goods as well as the person of the invitee, thereby by implica-"tion of law assumes a liability to protect the invitee and his "goods, not merely from physical dangers arising from defects "in the premises, but from the risk of the goods being stolen by "some third party. That implied liability, so far as I know, "is one unknown to the law."

That is the general position, and the exceptions to that general position are, according to the argument of Mr. Widgery for the hospital committee, very limited in number. Innkeepers are dealt with specially for particular reasons, and there are exceptions in the case of guest-houses or boarding-houses where people carry on the business for gain of taking in guests. In

[1] [1951] 2 K.B. 18, 31; [1951] 1 T.L.R. 315; [1951] 1 All E.R. 252.

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those cases there is, I think, on the authorities a duty upon the boarding-house keeper to take some care of the goods of his guests. There has been a certain variation in the views taken by judges on this topic in the past; but the matter appears to have been expressed very clearly in *Dansey* v. *Richardson*[2] as long ago as 1854 when a court of five judges dealt with this matter in quite general terms. Erle J. said, for example, that he thought[3]: "The main principle was, that the defendant's duty "was performed"—the defendant being a boarding-house keeper —"if she took such care of the house and things in it as a "prudent owner would take." Wightman J. said[4]: "I can find "no authority for holding that a boarding-house keeper is a "bailee of the goods of his guest at all, or that he is bound to "take more care about the goods of his guest, which are no "further given into his care than by being in his house with the "guest, than he, as a prudent owner, would take with respect "to his own." Coleridge J. expressed an opinion on the same lines, and Lord Campbell C.J. said[5]: "The defendant did "receive the plaintiff with her goods, on the terms of providing "her with rooms, furniture, meat, drink, servants' attendance "and other necessaries, and of taking due and reasonable care "of her goods while they were in the said house and plaintiff "remained such guest therein; that is, such due and reasonable "care as a boarding-house keeper ought to take of the goods of "a guest."

That I think may be taken to be the general position without entering into a discussion as to whether the duty varies having regard to the circumstances of particular cases. I think that it is unnecessary to do that because in my judgment the duties which are relevant in what I may call the boarding-house cases cannot possibly be said to arise here. In this case the position was not that the hospital committee were carrying on a boarding-house in keeping this hostel for the benefit of the hospital staff any more than if the staff were resident in the hospital building itself and getting their food and lodging free. The fact that the value of the food and lodging was quantified at the sum of £125 to my mind makes no difference.

The position, therefore, is that this was simply a case of master and servant where the master was paying his servant partly in cash, and partly by giving him food and lodging, or its equivalent. The plaintiff in this case did not make any separate payment for this service; the money for the board and lodging was deducted from his pay. He received the net sum in the same way that the domestic servant who is kept free receives a net sum.

The duty of a master towards his servant in those circumstances is not devoid of authority. There is a decision of this

[2] (1854) 3 E. & B. 144.
[3] Ibid. 150.
[4] Ibid. 155.
[5] Ibid. 165.

court in *Deyong* v. *Shenburn*,[6] a case which was concerned with a contract entered into between the plaintiff and the defendant to act the dame in a pantomime for three weeks. The headnote says: "The rehearsals took place at a theatre and on the second "day the plaintiff had stolen from his dressing-room his overcoat, "as well as two shawls and a pair of shoes, forming part of his "theatrical equipment." In the county court the judge found: that the defendant had been negligent in failing to provide a lock on the dressing-room door and in having no one at the stage door during the morning of the particular day to prevent the entry of unauthorized persons; but he held that the defendant was not under a duty to protect the clothing from theft. The county court judge's decision in that case was upheld on the ground "that there was no duty on the defendant to take "reasonable care to protect the plaintiff's clothing from theft."

The argument in the Court of Appeal in that case proceeded on the basis that there was a duty resting on a master to use care to provide a safe system of working, to protect his servant from injury, and that that duty applied also as regards protection of property so far as it enabled the servant to do his work, and went so far as to extend to protection against theft. That contention was rejected, and in rejecting it du Parcq L.J. said[7]: "It may well be, though I do not so decide, that if through a "breach of the duty to provide a proper system of working a "workman is not only injured in his person but also suffers "damage to his clothing, the damage to the clothing can properly "be included in the damages. If through such a breach his "clothes are torn off his back and he suffers no personal injury, "he may be entitled to recover damages, but it does not in the "least follow that there is a duty on the employer of quite a "different nature to take steps to safeguard the workman while "in his employ against loss through the wrongful act of a third "person. That conclusion does not in the least follow, and it "cannot be made to follow by any process of reasoning that is "not plainly fallacious."

He went on to say: "Where then do we get the obligation? "There is no bailment"—I should interpose here that the case for the plaintiff was not here put upon the basis of bailment; there was no allegation that his property had been specifically handed over into the custody of the defendant Committee.

Continuing the judgment: "It is said that this is a case of "tort, and we were reminded of observations which are very "familiar to lawyers in *Heaven* v. *Pender*,[8] and *Donoghue* v. "*Stevenson*.[9] I do not think I need cite them in terms. There "are well-known words of Lord Atkin in *Donoghue* v. *Stevenson* "as to the duty towards one's neighbour.[10] . . . It has been pointed "out (and this only shows the difficulty of stating a general

[6] [1946] K.B. 227; 62 T.L.R. 193; [1946] 1 All E.R. 226.
[7] [1946] K.B. 232–233.
[8] (1883) 11 Q.B.D. 503.
[9] [1932] A.C. 562; 48 T.L.R. 494.
[10] [1932] A.C. 580.

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"proposition which is not too wide) that unless one somewhat "narrows the term of the proposition as it has been stated, one "would be including in it something which the law does not "support. It is not true to say that wherever a man finds him-"self in such a position that unless he does a certain act another "person may suffer, or that if he does something another person "will suffer, then it is his duty in the one case to be care-"ful to do the act and in the other case to be careful not to "do the act. Any such proposition is much too wide. There "has to be a breach of a duty which the law recognizes, and to "ascertain what the law recognizes regard must be had to the "decisions of the courts."

Now comes the passage which is directly in point in this case: "There has never been a decision that a master must, merely "because of the relationship which exists between master and "servant, take reasonable care for the safety of his servant's "belongings in the sense that he must take steps to ensure, so "far as he can, that no wicked person shall have an opportunity "of stealing the servant's goods. That is the duty contended for "here, and there is not a shred of authority to suggest that any "such duty exists or ever has existed. Probably decisions on "the point would be most likely to be found in cases between a "domestic servant and his or her master. Nobody has ever "suggested, and in my opinion it is clearly not the law, that if "the master of the house leaves the house unattended and "empty, or if he forgets to shut a window at night or properly "to secure it, or if the locks on the door have ceased to be secure, "and by reason of his lack of care a housebreaker enters and "steals, among other things, the goods of a domestic servant "living in the house, then the master is liable to his servant for "negligence."

In the present case the judge held (and I agree with him) that that language applies directly to the facts of this case and is not in any sense confined to persons who might be regarded as what are called domestic servants. If that is right, this claim must fail; and I confess, having regard to the diligent researches of counsel, it seems tolerably clear that there is no authority which in any way supports the plaintiff's claim. The only way in which the plaintiff, I think, could succeed in his claim would be if he were able to say—as indeed Mr. Faulks has sought to say—that there must be a term implied in the contract of employment that the master should take such care of his servant's goods as to enable him to avoid such a calamity—or to have, at any rate, a chance of avoiding it—as occurred in this case when the plaintiff's goods were stolen. On the facts as found in this case (and indeed as pleaded) there is, in my view, no room for such an implication. It would be going a very long way to contend that the intervention of a wicked person such as a thief should be insured against by masters who employ servants in whatever capacity in which servants may be employed. There would have

to be either a specific term in the contract to that effect, or circumstances from which a term must necessarily be implied before, in my judgment, such a result could be reached.

I think that the county court judge's decision was clearly right, and this appeal fails and must be dismissed.

MORRIS L.J. Before the plaintiff could succeed in this claim, he would have to establish that there was a duty owed to him of the nature that he alleges, and he would have to establish that there was a breach of that duty, and further that damage resulted to him because of that breach of duty.

The plaintiff in the action alleged that the defendants owed to him a duty which was formulated as follows: "A duty that "they their servants or agents would take reasonable care of the "plaintiff's said bedroom and of his said clothes and personal "effects therein and of the said key to the door thereof." The plaintiff said alternatively that such a duty arose by virtue of a term to be implied in his contract. But he put his case principally on the footing that the duty arose in the circumstances created by, and resulting from, his contract of employment.

The plaintiff was employed as a house officer, and it was a term of his contract that there had to be a deduction from his salary of £125 per annum in respect of board and lodging, and other services provided. It was a term of his contract that he was to be resident; indeed the title "house officer" so suggests. But there is no doubt, as is agreed, that the plaintiff was under obligation to reside in the hospital.

The question as to whether a term as alleged is to be implied into the contract has to be decided not by considering what might have been a reasonable term for the parties to agree, but by considering whether, if this matter had been put to the two parties, they would at once have said: "That, of course, is "understood." I cannot for one moment think that we could say that there would inevitably have been unanimity on the matter if it had been raised; and I agree entirely with the conclusion of the county court judge in regard to that part of the case.

But then it is said that there was a duty owed by the hospital management committee—a duty which resulted from the contract of employment that was entered into. It is said that they were really in a twofold position. It is said that they were employers of the plaintiff for the purpose of his profession, and that in addition they were lodging-house keepers, so far as regards his domestic life. It is said that they were lodging-house keepers in the sense that they were providing staff and food at a certain fee. The county court judge said that the fee, namely, £125 per annum, was not an economic amount.

No question of bailment arises in the case, and that has been made quite clear.

It therefore has to be considered how this duty as alleged can

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be said to arise. I cannot think that it can arise merely from any relationship of invitor and invitee. That was made plain by Jenkins L.J. in *Tinsley* v. *Dudley*,[11] where he said: "There is "no warrant at all on the authorities, so far as I know, for "holding that an invitor, where the invitation extends to the "goods as well as the person of the invitee, thereby by implica-"tion of law assumes a liability to protect the invitee and his "goods, not merely from physical dangers arising from defects in "the premises, but from the risk of the goods being stolen by "some third party."

Undoubtedly the plaintiff was a servant of the hospital management committee. Can therefore the alleged duty be said to arise merely from that relationship? I think that when the matter is so stated the answer to that question has been clearly given by du Parcq L.J. in *Deyong* v. *Shenburn*,[12] where he said: "There has never been a decision that a master must, merely "because of the relationship which exists between master and "servant, take reasonable care for the safety of his servant's "belongings in the sense that he must take steps to ensure, so "far as he can, that no wicked person shall have an opportunity "of stealing the servant's goods." The Lord Justice was treating the matter as clear and accepted law. "That is the "duty contended for here, and there is not a shred of authority "to suggest that any such duty exists or ever has existed."

It may be that one reason why no such duty existed was that in times past many employees and many servants became a part of the household of their employer: so too apprentices often became members of the household of the master. But the statement of du Parcq L.J. is quite clear and explicit, and no authority exists, as far as I know, to cast doubt upon it.

But then it is said: the hospital management committee were in the position of lodging-house keepers. If they were, the law relating to the duties of lodging-house keepers has been stated in the two authorities cited to us, *Dansey* v. *Richardson*[13] and *Scarborough* v. *Cosgrove*.[14] But it seems to me that it would be quite unreal here to say that this hospital management committee were in any sense lodging-house keepers. Although the plaintiff was living in a hostel just near the hospital, I think it is common ground that the case must be treated on the same footing as though the plaintiff had been sleeping and eating within the main part of the building, as for example in one wing of the main hospital building itself. He was a resident house officer, and he was presumably resident so that he could be available at nearly all times at very short notice. The fact that he was in a hostel just adjacent to the building makes no difference at all.

It appears to me that it would be contrary to the whole substance and reality of the matter to view the hospital management committee as being in the position of lodging-house

[11] [1951] 2 K.B. 18, 31.
[12] [1946] K.B. 227, 233.
[13] 3 E. & B. 144.
[14] [1905] 2 K.B. 805.

keepers. In *Scarborough* v. *Cosgrove* [15] Romer L.J. pointed out that, in the case of lodging-house keepers, they are carrying on a business. He said: "Seeing that the landlord carries on his "business of a boarding-house keeper for reward, I think he is "bound to carry on that business with reasonable care, having "regard to the nature and normal conduct of the business as "known to the guest, or as represented to the guest by him."

Upon whatever basis the duty owed by a lodging-house keeper as now laid down in the two cases arises, it seems to me it would be quite wrong to treat this hospital, and the hospital management committee, as being in a position in any way analogous to a lodging-house keeper. The position simply was that of master and servant with an obligation that the servant was to live in the hospital. That does not mean that someone in the position of the plaintiff here could be called a domestic servant, nor did the judge so state. He said: "I think he lives in as much as "though he lived in the hospital and were a domestic servant." In effect he does live in the hospital just as a domestic servant would live in, and he lives in because of the relationship of master and servant.

It seems to me, therefore, that on the authorities the judge came to a correct conclusion, and I see no reason to disturb it.

SELLERS L.J. The decision in this appeal must, as I see it, depend primarily on whether the county court judge is to be held to be correct in his finding that the plaintiff (the appellant in this court) as a resident house physician was living in the premises, or whether the submission should be accepted that he is to be regarded in the particular circumstances of this case as one who was in fact or in effect a lodger in a boarding-house.

The finding of the judge is quite clear. He has treated the adjacent or adjoining premises, where the plaintiff was required to live to perform his duties, as part of the hospital. The judge said: "I think he lives in as much as though he lived in the "hospital and were a domestic servant." That is stating not the capacity in which he works but the nature of his residence. It is, of course, well known that the object of having a house physician, who very often does or did live in the hospital premises, is for the purpose of having a resident doctor on the spot. With the demand on space it may well be that hospitals have provided some outside accommodation for the doctors instead of taking up part of the accommodation in the hospital premises.

That finding, as I see it, is not one which this court can disturb on any of the facts which have been disclosed. If that be right, then the authority which has already been cited—particularly the passage from the judgment of du Parcq L.J. in *Deyong* v. *Shenburn* [16]—establishes that the county court judge was correct in the conclusion to which he came that there was no

[15] [1905] 2 K.B. 815. [16] [1946] K.B. 227.

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duty owed by the defendants towards the doctor in respect of the theft of his goods whilst he was living in and whilst those goods were in the premises provided. If the other view had prevailed—that the residence was to be treated as a lodging-house, and the doctor as a guest there—authority would seem to show that some duty of care would arise in respect of the doctor's goods. Precisely what that duty would be would depend on the particular facts. The county court judge—although we were told he made a general statement that he would have found there was negligence—did not find expressly what the duty might be or what were the matters which amounted to negligence. In that case it would have been necessary to go further and say whether any breach of duty found was to be treated as a cause in any way of the loss for which the plaintiff claims. But as the case has developed, and as that issue does not arise, there is no necessity for the matter being investigated further.

In my judgment, the county court judge came to the right conclusion as to the position of the plaintiff in relation to the hospital and on the law relative thereto. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Hempsons; Sedgwick, Turner, Sworder & Wilson, Watford.*

F. R. D.

[COURT OF APPEAL.]

C. A.
1957
Jan. 14, 15.
Lord Evershed M.R., Denning and Romer L.JJ.

* WOOTTON *v.* CENTRAL LAND BOARD.

Costs—Lands Tribunal—Discretion—Tribunal's fee—Development value—Appeal from Central Land Board's determination—Direction of tribunal as to costs—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 58, 60—*Claims for Depreciation of Land Values Regulations,* 1948 (*S.I.* 1948, *No.* 902), *rr.* 12, 13—*Lands Tribunal Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 42), *ss.* 1, 3—*Lands Tribunal Rules,* 1949 (*S.I.* 1949, *No.* 2263 (*L.* 29)), *rr.* 42, 52.

Practice and Procedure—Costs—Lands Tribunal—Hearing fee.

The appellant owned an estate near Epsom Downs and in 1948 he obtained planning consent for its development as a garden city in accordance with a plan which had been prepared for him by an expert. He claimed under section 58 of the Town and Country Planning Act, 1947, the sum of £217,517 for development value. He contended before the Central Land Board that the development value must be ascertained on the basis of his plan of development. The board held that the plan was not a factor which should be taken into account and estimated the development value at so much per foot frontage on the roads, assessing it at £44,500. The appellant, pursuant to the provisions of the Lands

Tribunal Act, 1949,[1] appealed to the Lands Tribunal. The tribunal held that the board was wrong on its basis of assessment and that the appellant's contention was right. The tribunal assessed the development value at £102,500, holding that the appellant in framing his claim had not taken into account the delays and risks inherent in putting the plan into operation. The tribunal made no order as to costs. The result of that order was that the appellant had to bear the tribunal's hearing fee of £500 which under paragraph 52 of the Lands Tribunal Rules, 1949,[2] was payable by the appellant as claimant, without prejudice to his right to recover the amount from any other party by virtue of any order as to costs. The appellant appealed from the decision of the tribunal with regard to costs:—

Held, (1) that where a claimant disputed the development value fixed by the Central Land Board and took the question of the proper development value to the Lands Tribunal, pursuant to the provisions of the Lands Tribunal Act, 1949, the proceedings before the tribunal were an "appeal."

(2) That section 3 (5) of the Lands Tribunal Act, 1949, showed that the award of costs was in the discretion of the tribunal and that the power of the Court of Appeal to hear an appeal as to costs from an order of the tribunal was not limited by the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, and might be somewhat more open than an appeal as to costs from the High Court.

(3) That the tribunal failed judicially to exercise the discretion vested in it, since it, in directing itself, omitted to consider: (*a*) that the proceedings were in the nature of an appeal and not an arbitration; (*b*) that the appellant's view of the basis

[1] Lands Tribunal Act, 1949, s. 3: "(4) A decision of the Lands Tribunal shall be final: Provided that any person aggrieved by the decision as being erroneous in point of law may, within such time as may be limited by rules of court, require the tribunal to state and sign a case for the decision of the court and, where the decision of the Lands Tribunal is given on a review by way of appeal of the previous decision of another person, that person if dissatisfied with the decision of the Lands Tribunal shall be treated for this purpose as a person aggrieved thereby.

"(5) Subject to the following provisions of this section, the Lands Tribunal may order that the costs of any proceedings before it incurred by any party shall be paid by any other party and may tax or settle the amount of any costs to be paid under such order or direct in what manner they are to be taxed.

"(6) Subject to the provisions of this Act, rules may be made for regulating proceedings before the Lands Tribunal and, subject to the approval of the Treasury, the fees chargeable in respect of those proceedings, and may in particular—"(*a*) make provision—(i) as to the form in which any decision of the Tribunal is to be given, and as to the amendment of any such decision in pursuance of any directions which may be given by the court dealing with an appeal under this section; (ii) as to the time within which any proceedings before the Tribunal are to be instituted; (iii) as to the evidence which may be required or admitted in any such proceedings . . ."

[2] The Lands Tribunal Rules, 1949, r. 42 (1): ". . . the costs of and incidental to any proceedings shall be in the discretion of the tribunal."

R. 52: "The fees specified in the Third Schedule to these Rules shall be payable to the registrar, . . . by means of stamps impressed on the notice, . . . The hearing fee shall, unless otherwise directed by the tribunal, be payable by the appellant or party by whom the proceedings were instituted (without prejudice to his right to recover the amount of the fee from any other party by virtue of any order as to costs) on receipt of notification from the registrar."

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of valuation was right and that of the Central Land Board was wrong.

(4) That, the parties consenting, the just order was to direct the Central Land Board to pay one half of the appellant's costs, including one half of the hearing fee.

Observations of Lord Cave L.C. in *Donald Campbell & Co. Ltd.* v. *Pollak* [1927] A.C. 732, 809; 43 T.L.R. 787 and of Lord Goddard C.J. in *Lewis* v. *Haverfordwest Rural District Council* [1953] 1 W.L.R. 1486, 1487; [1953] 2 All E.R. 1599 applied.

Per curiam. While as a matter of administrative convenience it is sensible that one party should be directed to pay the hearing fee of the Lands Tribunal in the first instance, he should be treated as paying it on behalf of the contestants and the question of the ultimate liability for its payment should rest with, and be specifically dealt with by, the Lands Tribunal in accordance with the language of section 3 (5) of the Lands Tribunal Act, 1949. The tribunal should say by whom and in what proportions it should be paid.

Quaere whether regulation 52 of the Lands Tribunal Rules, 1949 (which puts the burden of paying the fee on a claimant), was intra vires the rule-making powers conferred by section 3 (6) of the Lands Tribunal Act, 1949.

APPEAL by case stated from the Lands Tribunal.

The case stated by the tribunal was as follows:—

"1. This was an appeal against a determination by the Central "Land Board of Development Value for the purposes of "section 58 of the Town and Country Planning Act, 1947, relating "to land at Tadworth and Walton-on-the-Hill.

"2. The determination is dated May 17, 1954, under the "Central Land Board's reference number 5D/6/S.13007 and is "that the development value of the freehold interest in the land "on July 1, 1948, was £44,500 being the difference between "£52,000 the unrestricted value and £7,500 the restricted value.

"3. The appellant is Stanley Thomas Wootton of Treadwell "House, Epsom, Surrey, who claimed that the unrestricted value "of the land was £225,017 which, after deducting the agreed "restricted value of £7,500, left an amount of £217,517 as the "development value.

"4. The grounds of appeal were (inter alia) that on July 1, "1948, the appellant was in possession of a planning consent for "the development of a Garden City project known as the Walton "Downs Garden City. This project was prepared by an eminent "town planning expert, Mr. Z. Zaidel, and was known as the "'Zaidel Plan.'

"5. This planning consent was granted by the Banstead "Urban District Council of October 22, 1938.

"6. There was a fundamental difference in the approach of "the valuers called before me to the problem of the tribunal. "The valuers who gave evidence on behalf of the appellant based "their valuations on the Zaidel Plan, calculating the unrestricted "value from the residual value remaining to the owner of the "land after the costs of laying out and dividing into plots had "been deducted from the final amount estimated to be received

"from the sale of the plots and allowing a profit to the developer.

"The District Valuer for the Croydon District called on behalf "of the Central Land Board rejected the Zaidel Plan as a basis "from which the unrestricted value should be calculated and "based his valuation on certain net figures per foot frontage for "land fronting existing roads and certain net figures per acre for "back land.

"7.—(*a*) I found that the Central Land Board was wrong in "assuming that the Zaidel Plan would never be carried out and "I accepted the appellant's method of arriving at the unrestricted "value.

"(*b*) I found that the appellant's valuation was open to some "criticism in detail principally because he had not taken sufficient "account of the delays and risks which would occur in the execu-"tion of the plan, and that the appellant was wrong in assuming, "as he did, an early execution of this plan.

"(*c*) After making such adjustments as I found necessary in "the appellant's valuation, I found that the appellant's claim "for a development value of £217,517 should be reduced to "£102,500 (that is by 53 per cent.).

"(*d*) I accordingly directed that the appeal be allowed and "that the determination of the Central Land Board be altered "by substituting a development value of £102,500, for the "development value of £44,500 determined by the board.

"8. The hearing of the case occupied five days.

"9. In considering the question of costs in the exercise of my "discretion I decided that having regard to the mistaken assump-"tions made both by the appellant and by the Central Land "Board there should be no order awarding costs to either side.

"10. The question for the opinion of the honourable court is "whether I came to a right decision in law in making no order "awarding costs to either side."

R. D. Stewart-Brown for the appellant.
Eric Blain for the Central Land Board.

The following cases were cited in argument and are not referred to in the judgments: *P. Rosen & Co. Ltd.* v. *Dowley and Selby*[3]; *Lipman* v. *George Pulman & Sons Ltd.*[4]; *Pettey* v. *Parsons*.[5]

LORD EVERSHED M.R. This appeal upon a case stated by the Lands Tribunal is unusual, since the question raised as a question of law for this court relates exclusively to the matter of costs. The short facts leading up to the case stated are these: the appellant owns and at all relevant dates owned a substantial area of land not very far from Tattenham Corner on Epsom Downs, and it appears that in the year 1948 he obtained a planning consent for the development of this piece of land as a garden

[3] [1943] 2 All E.R. 172.
[4] (1904) 91 L.T. 132.
[5] [1918] 2 Ch. 653; 30 T.L.R. 655.

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city. The project for such development is associated with the name of a planning expert, one Zaidel, and I refer to his name, because in the course of the case the method of valuation put forward on the appellant's behalf was also associated with Zaidel's name.

The matter first came before the Central Land Board for the ascertainment of the development value of this piece of land for the purposes of section 58 of the Town and Country Planning Act, 1947. It will be borne in mind that the scheme of that Act has since been superseded. But it remains necessary in such a case, at any rate, as the present, that the development value of the land should be ascertained, since that value, when ascertained, is, to put it no higher, relevant upon any future refusal of planning authority for the appellant or upon the compulsory acquisition of any part of his land.

The claim for development value which the appellant put forward throughout the proceedings was a claim not far short of a quarter of a million pounds. The Central Land Board which determined the development value pursuant to the Act of 1947 and the Claims for Depreciation of Land Values Regulations, 1948, made thereunder, assessed the development value at a very much less figure, namely, £44,500. But the appellant was dissatisfied with that assessment, and accordingly, in pursuance of his statutory right so to do, he became an applicant before the Lands Tribunal for the determination by that tribunal of the true figure. The Lands Tribunal was of opinion that the true development value of the land lay somewhere between the two figures, the quarter of a million or thereabouts propounded by the appellant and the £44,500 determined by the Central Land Board. The Lands Tribunal assessed the value at £102,500, and, as a mattter of arithmetic, it appears that that figure represents a reduction by 53 per cent. of the figure for which the appellant had contended.

The judgment giving that conclusion (which is dated February 6, 1956) concluded with the eight words: "There will "be no order as to costs." Thereupon the appellant requested that a case should be stated for this court upon that last matter. I will go back to make my references to the statutes and the relevant rules. I need not take time by referring, except very briefly, to the regulations made under section 60 of the Town and Country Planning Act, 1947; it suffices to say that under that Act and the rules, cases in which a party, a claimant, is dissatisfied with the determination of the Central Land Board were to be taken to the arbitrament of an arbitrator. But regulation 13 of the regulations of 1948 is worth some reference. By paragraph (1) of that regulation it is provided that if, inter alia, the claimant disputes the development value as determined by the board, then the dispute shall be referred to and settled by an arbitrator appointed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919. Paragraph (4) states that the

arbitrator shall by his award either confirm the development value as determined by the board under paragraph (5) of regulation 12, or direct the board to alter the development value, and so on. There is finally in paragraph (7) a provision saying that it is competent for the claimant and the board to agree a figure at any time before final determination by the arbitrator. Those provisions were substantially altered or superseded as a matter of procedure by the Lands Tribunal Act, 1949, and the Lands Tribunal Rules, 1949, made thereunder; but I have referred to the regulations and particularly to paragraph (4) of the regulations of 1948, because they indicate that the nature of the proceedings where a claimant disputes a development value fixed by the Land Board may fairly be described, as Mr. Stewart-Brown described it, as an "appeal" to another body having the right, as pointed out in the paragraph, either of affirming the development value or of altering it.

I come now to the Act of 1949. Section 1 of that Act constituted the Lands Tribunal, and provided, by subsection (3) (*d*) of that section, that there should be referred to and determined by the Lands Tribunal "any dispute arising in relation "to the determination of the development values of interests in "land by the Central Land Board or other authority prescribed "under section 60 of the Town and Country Planning Act, 1947."

Section 3 deals with procedure, appeals, costs and the like. Subsection (4) of that section provides: "A decision of the Lands "Tribunal shall be final: Provided that any person aggrieved by "the decision as being erroneous in point of law may, within "such time as may be limited by rules of court, require the "tribunal to state and sign a case for the decision of the court "and, where the decision of the Lands Tribunal is given on a "review by way of appeal of the previous decision of another "person, that person if dissatisfied with the decision of the "Lands Tribunal shall be treated for this purpose as a person "aggrieved thereby." It was under the terms of that proviso that the case stated on this matter of costs was put forward, and it is, of course, essential to the appellant's case that the point which arises should be a point of law. The appellant must satisfy us that the decision as to costs was erroneous in point of law.

Section 3 (5) provides: "Subject to the following provisions "of this section,"—and I need not refer to them because they are not for present purposes relevant—"the Lands Tribunal may "order that the costs of any proceedings before it incurred by "any party shall be paid by any other party and may tax or settle "the amount of any costs to be paid. . . ." Subsection (6): "Subject to the provisions of this Act, rules may be made for "regulating proceedings before the Lands Tribunal and, subject "to the approval of the Treasury, the fees chargeable in respect of "those proceedings, and may in particular—(*a*) make provision—"(i) as to the form in which any decision of the Tribunal is to be

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"given, and as to . . . [its amendment] (ii) as to the time within "which any proceedings before the Tribunal are to be instituted: "(iii) as to the evidence which may be required or admitted in any "such proceedings." Nothing else in subsection (6) is relevant.

It was under the powers of subsection (6) that the rules known as the Lands Tribunal Rules, 1949, were promulgated. Rule 42 provides, under the heading "Costs": "Except in "cases to which the provisions of subsection (1), (2) or (3) of "section 5 of the Act of 1919 apply"—and they do not here affect us—"the costs of and incidental to any proceeding shall "be in the discretion of the tribunal"; and it then provides that in certain cases costs are to be paid by means of the affixing of stamps on documents. Rule 52 is in these terms: "The fees "specified in the Third Schedule to these rules shall be payable "to the registrar . . . by means of stamps. . . . The hearing fee "shall, unless otherwise directed by the tribunal, be payable by "the appellant or party by whom the proceedings were instituted, "(without prejudice to his right to recover the amount of the fee "from any other party by virtue of any order as to costs) on "receipt of notification from the registrar." The Third Schedule contains a list of fees. Some of them are of a relatively trifling character; for example, on a notice of appeal against a determination, a fee is payable by means of an impressed stamp of 20s. But the hearing fees in cases of this sort are indeed heavy. In the present case, since the hearing fee depends upon the amount of the award, the hearing fee is in the region of £500; and, as will be apparent from the rule I have read, the rulemaker intended that the hearing fee should be paid by the applicant or the claimant—in this case by the appellant—without prejudice to any order which the Lands Tribunal might make in regard to it.

I have taken a little time making reference to these rules for this reason: the effect of the simple order "No costs either side" was, quoad the hearing fee, that the whole of it was paid by the appellant. I have felt, I confess, a little doubt in my mind whether really the Lands Tribunal so intended. After all, this was not like the stamp duty on a document: it was a fee substantially payable for the services of the tribunal, and we were informed that the fixing of fees on the scale on which they have been fixed was with the no doubt laudable object of making the Lands Tribunal self-sufficient in respect of finance. Still, when the matter is examined, as I shall have to examine it later, it remains to me a little surprising that. consistently with the order which the Lands Tribunal made, the appellant had to pay the whole of this very substantial hearing fee. But the matter goes somewhat further: if that is the result, then it depends upon the circumstance that the rules made under the Act have put the obligation to pay that fee, in the absence of some order to the contrary, upon the applicant or claimant; and though in the circumstances of this case and of the conclusion which I

have reached, it is unnecessary for me to express a final view about it, it is to my mind at least open to question and may at some time have to be decided, whether it was intra vires the rule-making authority's powers to make rules not merely regulating the fees, that is to say, fixing their amount, but also deciding upon whom the burden of the fees should be made to fall. I read the first paragraph of rule 42 of the rules saying that the costs of the proceedings should be in the discretion of the tribunal. I am disposed to think that that rule adds nothing in fact to the terms of section 3 (5); but, if it did add anything to it, then again the question might arise: by what power was the rule-making authority invested with the right to say that the costs should be in the discretion of the tribunal? The passages that I have read from subsection (6) lend at any rate some force to the argument that a power to regulate proceedings and regulate fees does not comprehend a power to say who pays the fees when so regulated. But, except for the bearing which this matter has upon the more general question, I do not need to take further time now upon it.

I return to the case stated. It might be of assistance if I followed Mr. Blain in making this reference to the determination of February. To make what I am about to read plain, I will now state that the case of the appellant for the very large figure which he claimed was supported by two expert valuers, and they proceeded, as a matter of principle, upon the basis of the Zaidel plan, that is to say, they proceeded on the footing that you should ascertain on the basis of that plan when put into execution what in the end the landowner would make out of it, allowance being made for his costs in lay-out and also for the circumstance that buyers of the plots in the planned garden city would themselves not become buyers in a purely altruistic spirit. On the other hand, the valuer for the Central Land Board had contended that the Zaidel plan had nothing to do with it and should be left entirely out of consideration. He said that you should arrive at your value by taking a figure of so much per foot frontage on the roads. This was the concluding part of the judgment of February: "For these reasons, I accept Mr. "Hanscomb's method of arriving at the unrestricted value as "supported by Mr. Oliver," the appellant's valuer. "I find, "however, that Mr. Hanscomb's valuation is open to some "criticism in detail, principally in that he has not taken sufficient "account of the probable delays and risks which on July 1, 1948, "a purchaser would contemplate in offering a price. I have "gone all through Mr. Hanscomb's calculations and I have made "such adjustments as I find necessary, in the light of the "evidence adduced at the hearing, and I have come to the "conclusion that the proper unrestricted value in this case is"—and then he gives the figure of £102,500.

In the case stated the Lands Tribunal first of all sets out the narrative and proceeds as follows in paragraph 7 (*a*): "I found

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"that the Central Land Board was wrong in assuming that the "Zaidel plan would never be carried out and I accepted the "appellant's method of arriving at the unrestricted value. (*b*) I "found that the appellant's valuation was open to some criticism "in detail principally because he had not taken sufficient account "of the delays and risk which would occur in the execution of the "plan, and that the appellant was wrong in assuming, as he did, "an early execution of this plan. (*c*) After making such adjust-"ments as I found necessary in the appellant's valuation, I found "that the appellant's claim for a development value of £217,517 "should be reduced to £102,500 (that is by 53 per cent.). (*d*) I "accordingly directed that the appeal be allowed and that the "determination of the Central Land Board be altered by sub-"stituting a development value of £102,500 for the development "value of £44,500 determined by the board."

I emphasize in reading the language of the Lands Tribunal the words used and, as I think, not improperly used in view of regulation 13 of the regulations of 1948: "I directed that the "appeal be allowed." Paragraph 8: "The hearing of the case "occupied five days. 9. In considering the question of costs in "the exercise of my discretion I decided that having regard to "the mistaken assumptions made both by the appellant and by "the Central Land Board there should be no order awarding "costs to either side." The question for the opinion of this court "is whether I came to a right decision in law in making no "order awarding costs to either side."

It is a common-place in cases which come before this court relating to the exercise of a discretion, and more particularly relating to the exercise of a discretion in regard to costs, that this court is very slow indeed to interfere with such exercise. Put in another way, it can be asserted that there is no question of law which this court is competent to determine relating to the exercise of a discretion, unless it is shown clearly that, in the exercise of the discretion, the tribunal appealed from has in some material and substantial respect wrongly or unjudicially exercised the discretion, either by some wrong, some erroneous, direction of himself as a foundation for the exercise, or (I think sometimes it may be said) where the result arrived at is one producing in the opinion of this court a manifest injustice; and the question in this case is whether Mr. Stewart-Brown can bring himself within such a formulation of this court's powers. I have come to the conclusion, not without some hesitation, that the answer to that question is in the affirmative. I think here that the tribunal failed to exercise judicially the discretion vested in the tribunal, with the result that it is incumbent upon this court now to review and amend the tribunal's conclusion. I should not wish to make any rash attempt at laying down in any kind of precise language the limits of such a discretion as is here vested in the Lands Tribunal, or to set out in any kind of table or category the sort of things which a tribunal can take

into account in exercising the discretion; but I would like to make two general observations. First, section 3 of the Lands Tribunal Act, 1949, shows that this question of the award of costs is in truth one for the discretion of the tribunal, but is not otherwise subject to any special or particular limitations. Where a case relating to the award of costs comes to this court from the High Court, then the powers of this court are even more strictly limited by the terms of section 31 (1) (*h*) of the Supreme Court of Judicature (Consolidation) Act, 1925. So much was made plain by the House of Lords in the case of *Donald Campbell & Co. Ltd.* v. *Pollak*,[1] where the House, particularly in the speech of Lord Cave L.C., set out the relevant provisions of the Judicature Act then in force, including section 49 of the Act of 1873, which says that no order made by the High Court of Justice or any judge thereof as to costs only which by law are left to the discretion of the court shall be subject to any appeal except by the leave of the court or judge making the order. There is no such provision affecting this award. That is not, of course, to say that the general principles affecting interference by the Court of Appeal with discretionary powers are thereby made looser or wider. But this case I think is like the case of any other discretionary power exercised by a court—for example, a discretionary power to grant or not to grant an injunction. To that extent, an appeal in the form of a case stated as to the power of awarding costs in section 3 (5) may be somewhat more open than an appeal as to costs from the High Court; but I should not wish to put it at all higher than that.

The second point is this: it will be recalled that the presence of the Lands Tribunal as a reviewing authority is due to the fact that the original arbitrator, the arbitrator originally specified under the Act of 1947, was superseded by the Lands Tribunal as a result of the legislation of 1949; but historically the inference, I think, of the idea of arbitration may fairly be said to persist, and Mr. Stewart-Brown, in the course of his opening, referred to the language which had fallen from Lord Goddard C.J. in *Lewis* v. *Haverfordwest Rural District Council*.[2] That was a case of arbitration which arose under the Public Health Act, 1946. The arbitrator, having made a certain award, proceeded then to say that each party should bear its own costs. Lord Goddard C.J., who referred to several cases, including that of *Donald Campbell & Co.* v. *Pollak*,[3] said[4]: "In the present case "the arbitrator, when asked why he made this order as to costs, "answered: 'I had several reasons for awarding that each party "'should bear its own costs, and one of those was that I had "'no evidence that during the long time between the event and "'the date of the arbitration any serious effort had been made

[1] [1927] A.C. 732, 809; 43 T.L.R. 787.
[2] [1953] 1 W.L.R. 1486, 1487; [1953] 2 All E.R. 1599.
[3] [1927] A.C. 732.
[4] [1953] 1 W.L.R. 1486, 1487.

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"'by either party to settle the question.'" The Lord Chief Justice also said: "I do not think it is a 'judicial exercise' of "discretion to say that 'because neither party did anything, "'therefore I am not going to award the successful party the "'costs.'" Then, after referring to *Donald Campbell & Co. Ltd.* v. *Pollak*,[5] he continued[6]: "Of course, in a matter of this sort, "making an offer would be regarded in the same way as a payment into court, and if the council had made an offer of a sum "round about that which the applicant recovered, or even more, "that would have been an excellent reason for the arbitrator "refusing to give him any costs. It might even be a reason for "saying that the applicant should pay the council's costs." But he had also earlier said[7]: "It is a curious circumstance—and "one experiences it time and time again—that lay arbitrators "always seem to think that parties should pay their own costs."

There was some argument here on the question: Was not the Central Land Board in a rather special position? It was said, and said forcibly, by Mr. Blain: It is all very well, but the Central Land Board, which has to determine this matter of value, cannot then make some higher offer which would seem to indicate that its determination had not been genuinely and sincerely come to. Nor can it protect itself in the same way as an ordinary litigant can by making payments into court. That, I think, is a matter of some weight. The Central Land Board, which has a responsible position not at all like that of a private individual, is in a situation different from that of the Haverfordwest Council in the case last cited. On the other hand, I have already drawn attention more than once to the circumstance that the nature of the application to the Lands Tribunal is that of an appeal and, for better or worse, it must, I think, properly so be judged. I am bound to say that when I read the Lands Tribunal's reasons for making no award as tn costs, I am left with an ineffaceable impression that the tribunal did what Lord Goddard C.J. says one finds time and again lay arbitrators do, that is, acted on the kind of basis that here were two parties who had come before the tribunal; each had put forward figures; both had made mistakes; and therefore the fair thing was to make no order at all as to costs. I must say I think that was a wrong approach. I cannot read paragraph 9 without asking myself the question: What was the relevance—bearing in mind that this was in the nature of an appeal—of the circumstance that there had been mistaken assumptions by the Land Board? It looks as though, indeed, the tribunal had entertained the notion that the Central Land Board might have come and said: "We are entitled in the circumstances to all the costs "because £102,000 is nearer £44,000 than it is to £217,000." That is surely wrong. It would, of course, be quite competent, proper and relevant to the exercise of the discretion for a court

[5] [1927] A.C. 732.
[6] [1953] 1 W.L.R. 1486, 1488.
[7] Ibid. 1487.

or a tribunal to say: True, the applicant has achieved an upsetting and discharge of the figure which had been awarded against him, but he very much overstated his case, time and costs were occasioned unnecessarily by the inflated nature of his claim and therefore, in the exercise of our discretion, he must be deprived partly or even wholly of his costs. If that had been the basis of the jurisdiction, it might well be that this court would have to say: "Well, it seems a rather hard and "severe exercise of the discretion, but still the ground was a "valid one for its exercise and for the way in which it was "exercised, and we cannot interfere."

That last sentence brings me to a reference to another case which I think is helpful and which Mr. Blain mentioned, namely, *Pitkin* v. *Sanders & Forster Ltd.*[8] I shall not read the facts or the headnote, but it is significant because the case was one in this court when Lord Sterndale was presiding as Master of the Rolls. He had himself used certain language in an earlier case of *Ritter* v. *Godfrey*,[9] to which Lord Goddard C.J. referred in the *Lewis* v. *Haverfordwest*[10] decision. The House of Lords in *Donald Campbell & Co. Ltd.* v. *Pollak*[11] had overruled the Court of Appeal's conclusion in *Ritter* v. *Godfrey*,[12] but had confirmed Lord Sterndale M.R.'s own expressions in his judgment in that case,[13] but in *Pitkin's* case the Master of the Rolls expanded the language he used in *Ritter* v. *Godfrey*,[14] and the expanded language, I think, is useful and most instructive for the present question. He said[15]: "In this case, therefore, we have to see "if the judge had any grounds for the exercise which he made of "his discretion; and if there were any grounds on which he could "exercise his discretion in the way in which he did, we cannot "interfere."

It is in reliance on that passage that I said a moment ago that if the Lands Tribunal had here said that there was expenditure of costs and so forth occasioned and unnecessarily occasioned by the inflated nature of the appellant's claim and that it would take that into account against him in the exercise of its discretion by depriving him of his costs, then it might well be that we could not interfere; but, as I read the case, that is not at all the way in which the tribunal has instructed himself as to discretion. He seems to have omitted two vital facts: first, as was earlier said, that this was in the nature of an appeal; and, second—perhaps even more important—that on the really vital question which he had to decide, the matter of principle, the appellant's view was the right one and the Central Land Board's view was the wrong one. In light of that, it surely was a serious misdirection of himself to say: Here are two parties; both have made erroneous estimates and I shall deprive them both of costs. The

[8] (1923) 128 L.T. 789.
[9] [1920] 2 K.B. 47.
[10] [1953] 1 W.L.R. 1486, 1487.
[11] [1927] A.C. 732.
[12] [1920] 2 K.B. 47.
[13] [1927] A.C. 732, 811, 812.
[14] [1920] 2 K.B. 47.
[15] 128 L.T. 789, 790.

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right approach, I venture to think, was this: "the appellant"—for such was the nature of his role before the Lands Tribunal—"put forward a claim on the right principle; the Central Land "Board opposed it on a wrong principle; I therefore reject the "Central Land Board's evidence more or less altogether; but, "since the appellant has overstated his case on the figures, should "I, in the exercise of my discretion as to the costs to which "prima facie in justice the appellant would lay claim, exercise "my discretion to some extent or even wholly against him for "that reason?" Because he put it, as I think, wrongly, I cannot resist the conclusion that he posed the problem to himself wrongly and fell into the error upon which Lord Goddard C.J. animadverted in the *Haverfordwest* case.[16] Nor is that quite all. I come back to the hearing fee. If the justice of the case required that neither party should recover any costs against the other, then surely it is unjust, surely it is wrong, that in the result the appellant should pay the whole of the hearing fee of £500. At the very least it should have been equally borne between them. I have already referred to the rule and expressed a doubt as to its validity. As a matter of administrative convenience I think it highly sensible that one party should be directed to pay the fee in the first instance; but he should, I would have supposed, be treated as paying it on behalf of the contestants and the question of the ultimate liability should rest with, and be dealt with by, the Lands Tribunal in accordance with the language of the section itself. And, as I have referred to this matter, I venture to express the view that in these cases it would be, to say the least, prudent and desirable that the Lands Tribunal should deal specifically with the hearing fee and say by whom or in what proportion it should be paid, thereby getting rid of any possible question which one or other party might raise as to the vires of regulation 52. As I said, I think that to leave the appellant saddled with the exclusive burden of paying the whole hearing fee was wrong and was unjust, and I doubt whether it was consistent with the order which the Lands Tribunal in terms made.

The last matter to which I would like briefly to refer is this: Mr. Blain referred us to two cases—*Le Witt* v. *Brookes*[17] and *Gold* v. *Brighton Corporation*[18]—under the landlord and tenant legislation in this court presided over by my Brother Denning, and suggested that those cases provided a fair analogy for application in the present case. Those were cases where a landlord had agreed to grant a tenancy or had been bound to grant a tenancy and the issue between landlord and tenant related to term only: the amount of the rent, the existence of repairing and other covenants, and so forth; and in each case, according to the statute, those questions were referred to the arbitrament of the

[16] [1953] 1 W.L.R. 1486.
[17] [1956] 1 W.L.R. 1438; [1956] 3 All E.R. 676.
[18] [1956] 1 W.L.R. 1291; [1956] 3 All E.R. 442.

county court judge. The landlord, as frequently happens in these cases, suggested a rent of "X," the tenant suggested a rent of "Y"; the figure at which the county court judge arrived was a figure somewhere between "X" and "Y," and the county court judge thought that in the circumstances neither party should get any costs. My Brother pointed out in one of the judgments that in such cases the proper approach was to consider whether what had been put forward on one side and on the other was reasonable, to seek a balance of reasonableness between the rival contentions; and if it was thought, as it had been in those cases, that there was about an equal degree of reasonableness or unreasonableness on both sides, then a fair result would be no award as to costs. I am not saying that those cases do govern a case like the present where the appellant was in the position of an appellant against the Central Land Board's finding against him, and, pursuant to his statutory right, took the Central Land Board before the Lands Tribunal and there challenged the validity of the award or determination, and successfully did so; but, assuming an analogy between the two, the difference in the present case seems to me to lie in this, that upon the main question of principle the tribunal held that it was the appellant who was right and the Central Land Board which was wrong; and what is referred to as some criticism of detail which was applicable to the appellant's case does not seem to me to amount to a matter of anything like sufficient gravity to justify the conclusion as to costs which the Lands Tribunal reached.

There remains therefore only: what order should this court now make? I asked both counsel, with a view perhaps to saving further expenditure of costs in detailed taxations, whether they would oppose this court making a fractional award, as sometimes is done, as to costs, and they both assented to our doing so. Bearing that in mind and after consultation with my Brethren, I have come to the conclusion that a just order would be to direct that the Central Land Board pay one half of the costs of the appellant; and that will mean, inter alia, that they will pay one half of the hearing fee. In giving the direction of one half I have tried to do justice to the view which the Lands Tribunal obviously did take, that a not negligible part of the 5-day hearing was taken by the circumstance that the detailed figures put forward on the appellant's behalf had to be subjected to close inquiry and review and in the end had to be reduced by not less than 53 per cent.

For the reasons which I have stated, I think that the answer to the question posed is in the negative, that the order as to costs should be discharged and that there should in lieu be an order upon the Central Land Board to pay one half of the hearing fee and one half of the appellant's other taxed costs of the proceedings. I think, also, that Mr. Stewart-Brown is entitled to his costs in this court.

C. A.
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Wootton v. Central Land Board.

Denning L.J. I entirely agree. I would only say a word on the landlord and tenant cases, because I think they show the fallacy into which the Lands Tribunal have fallen. In *Le Witt* v. *Brookes* [19] a landlord and tenant had agreed that there should be a new lease, and the only question was what was a fair rent for that new lease. They could not agree upon it and it was referred to the court, as an authority of first instance, to decide what the fair rent was. In that case neither side was right or wrong; there was no claim to be enforced or resisted; neither side was truly in a position of plaintiff or defendant, or appellant or respondent. So when a middle figure was chosen, each side had to bear his own costs. I think the Lands Tribunal must have considered the present case as a case of that kind, a case of valuation by the tribunal deciding, as a valuer, two rival figures, where one side put forward too high a figure, and the other too low a figure. But it is no such case. The Central Land Board, as my Lord has observed, were an authority of first instance themselves. Under regulation 12 of the Claims for Depreciation of Land Values Regulations, 1948, the board themselves have to inquire into the matter in a judicial manner. They hear objections and decide on the value themselves as an authority of first instance. Thereupon the landowner, in this case the appellant, appeals to the Lands Tribunal from their decision, saying they are wrong. At that point the Central Land Board come in as a party, as a respondent, so to speak, to resist his appeal. So when it gets to the Lands Tribunal it is a matter of right or wrong; it is a matter of appellant and respondent. The appellant succeeded in establishing that the Central Land Board were wrong. He had to come to the tribunal to get his rights established, and he ought in the ordinary way to recover his costs of coming to the tribunal for the purpose, except in so far as he has increased the costs by putting forward too high a claim. It seems to me the tribunal exercised their discretion in a wrong manner, which is an error in point of law, and the appeal should be allowed accordingly in the terms my Lord has suggested.

Romer L.J. I agree fully with the judgments which my Brethren have delivered and there is nothing I can usefully add.

Appeal allowed.

Solicitors: *W. H. Chitty & Fryzer; Treasury Solicitor.*

B. A. B.

[19] [1956] 1 W.L.R. 1438.

[QUEEN'S BENCH DIVISION.]

* PRACTICE DIRECTION.

(NON-JURY LIST: POSTPONEMENT OF CASES.)

1957
Feb. 1.

Lord Goddard C.J.

Practice and Procedure—Trial—Postponement—Non-jury list—Case in week's list—Application to judge in charge of list necessary.

LORD GODDARD C.J. Since the beginning of these sittings there has been an exceptionally large number of consent applications to postpone cases in the non-jury list due no doubt largely to the rapidity with which cases now come on for trial. This has led to a certain amount of confusion and indeed often to serious inconvenience, since parties have found that, owing to the postponement of cases which would otherwise have been tried first, their own has unexpectedly come into the list for trial. In recent years a practice has grown up, though not authorized by any rule, whereby a postponement has been granted upon the filing of a properly stamped form of consent and an application to the judge in charge of the list has not been required. For the time being, at least, this practice must be discontinued and in future, if postponement of a case which is in the week's list is desired, application must be made to the judge in charge of the list and good cause shown. As a further measure to meet the present situation, the number of cases which will be included in the week's list will be considerably reduced and will be limited to 70 for the coming week.

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

[CHANCERY COURT.]

* POWELL *v.* REPRESENTATIVE BODY OF THE CHURCH IN WALES.

1957
Jan. 15, 22.

Wynn-Parry J.

[1955 P. 2328.]

Ecclesiastical Law — Wales — Peculiar — Right of rector to grant marriage licences—Whether right extinguished on the disestablishment of the Church in Wales—Welsh Church Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 91), *s.* 23 — *Welsh Church (Temporalities) Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 65), *s.* 6.

The ancient parish of Hawarden situate in the county of Flint comprised the present parish of Hawarden and the neighbouring

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parishes of Buckley and Shotton, which were carved out of the ancient parish at or about the end of the nineteenth or the beginning of the twentieth century. The ancient parish has for many centuries been included in the principality of Wales; but it lies to the east of Offa's Dyke and was at one time part of the Kingdom of Mercia and was originally included in the Mercian diocese of Lichfield. On the creation, however, in 1541 of the diocese of Chester the ancient parish was included in the Chester diocese, and continued therein until 1849, when under an Order in Council of that year made under the Ecclesiastical Commissioners Act, 1847, it was transferred to the diocese of St. Asaph.

For many years before 1846 the rectors of the ancient parish had enjoyed and exercised certain peculiar privileges, which including the granting of marriage licences, the probate of wills, and the holding of their own courts and having their own proctors. In respect of the privilege of granting marriage licences within the area of the ancient parish, the rectors of Hawarden, concurrently with the bishops of St. Asaph, had continued to exercise such privilege from the passing of the Ecclesiastical Jurisdiction Act, 1847, until the disestablishment of the Church in Wales on March 31, 1920.

On the question whether the passing of the Welsh Church Act, 1914,[1] and the Welsh Church (Temporalities) Act, 1919, had extinguished the right of the rector of Hawarden to grant marriage licences within the area of the ancient parish:—

Held, (1) that section 23 of the Act of 1914 abolished the right of both the bishop of St. Asaph and the rector of Hawarden to grant marriage licences; but that (2) the effect of the repeal of section 23 by section 6 of the Act of 1919, was to restore or

[1] Welsh Church Act, 1914, s. 23: "As from the date of disestablishment, the law relating to marriages in churches of the Church of England (including any law conferring any right to be married in such a church) shall cease to be in force in Wales and Monmouthshire, and the provisions of the Marriage Acts, 1811 to 1898, relating to marriages in registered buildings, shall apply to marriages in churches of the Church in Wales, and every such church may accordingly be registered under and subject to the conditions imposed by those Acts: Provided that—(*a*) Every church in Wales and Monmouthshire in which immediately before the date of disestablishment marriages could lawfully be solemnised, shall without registration or the payment of any fee become, as from that date, a registered building within the meaning of the said Acts, and all churches which at the date of disestablishment appear in the official list of the Registrar-General shall be deemed for the purpose of this section to be churches in which marriages can lawfully be solemnised."

"(*b*) A person who at the date of disestablishment is the incumbent of any parochial benefice in Wales or Monmouthshire shall, on making application to the registrar-general for the purpose, be entitled to be appointed as the authorized person with respect to all churches within his spiritual charge as such incumbent which by virtue of this section become registered buildings."

Welsh Church (Temporalities) Act, 1919, s. 2: "The date of disestablishment of the Church in Wales shall, notwithstanding anything in the Welsh Church Act, 1914, or the Suspensory Act, 1914, or any order made thereunder, be, for the purposes of this Act and of the first-mentioned Act, the thirty-first day of March, nineteen hundred and twenty."

S. 6: "Nothing in this Act or in the Welsh Church Act, 1914, shall affect—(*a*) the law with respect to marriages in Wales or Monmouthshire; or (*b*) the right of bishops of the Church in Wales to license churches for the solemnisation of marriages or to grant licenses to marry; and section twenty-three of the Welsh Church Act, 1914, is hereby repealed."

preserve the right of the rector of the ancient parish and the bishop to grant marriage licences, and that it was immaterial in this connexion that the rectorship of the ancient parish was no longer a corporation sole; accordingly, the right in question was enjoyed concurrently with the bishop.

ADJOURNED SUMMONS.

The ancient parish of Hawarden, situate in the county of Flint ("the ancient parish") comprised the present parish of Hawarden (including the districts of Broughton, Pentrobin, Sandycroft, Sealand and Ewloe) and the neighbouring parishes of Buckley and Shotton, which were carved out of the ancient parish at about the end of the nineteenth or the beginning of the twentieth century.

The ancient parish is situated on the west side of the river Dee and has for many centuries been included in the principality of Wales; but it lies to the east of Offa's Dyke and was at one time part of the kingdom of Mercia, and as such was originally included in the Mercian diocese of Lichfield. When in the reign of King Henry VIII the diocese of Lichfield was split up and (in the year 1541) the new diocese of Chester was erected, the ancient parish was included in the Chester diocese, in which it continued to be locally situated till the year 1849. In that year, by an Order in Council dated July 30, 1849, which was made under the Ecclesiastical Commissioners Act, 1847, and was published in the London Gazette on August 17, 1849, and which became operative three weeks after such publication, all parts of the county of Flint then comprised in the diocese of Chester were transferred to the diocese of St. Asaph; and the said order provided in particular that "the parish of Hawarden in the county of Flint, "now so to be transferred from the diocese of Chester to the "diocese of St. Asaph, shall be included in and form part of the "deanery of Mold and the archdeaconry of St. Asaph."

For many years before 1846 the rectors of the ancient parish had enjoyed and exercised certain peculiar privileges, which included the granting of marriage licences, the probate of wills, and the holding of their own courts and having their own proctors. A number of marriage licences for use in the ancient parish or for alternative use either in that parish or in some other specified parish in the diocese, were also from time to time granted by the Bishop of Chester prior to 1846; but the circumstances in which the latter licences were issued was not known.

By the Order in Council, No. 20642, made under the Ecclesiastical Commissioners Act, 1836, and dated August 27, 1846, which was published in the London Gazette on September 18, 1846, and came into force on October 1, 1846, it was provided (amongst other things) that all parishes and places then locally situate within the limits of the diocese of Chester and of the several archdeaconries thereof (as the ancient parish then was), and all churches and chapels and the whole clergy and others Her Majesty's subjects locally situate within the limits of such

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parishes and places respectively, should notwithstanding any peculiar or other ecclesiastical jurisdiction or exemption from jurisdiction which they might possess or be subject to, or claim to possess or be subject to, be respectively under and subject only to the jurisdiction and authority of the bishop of the diocese (with certain immaterial exceptions); and that with the like exceptions all such parishes, places, churches and chapels as aforesaid, and all other parishes, places, churches and chapels locally situate within the diocese, should be included in and form part of the diocese.

Notwithstanding the said Order in Council, marriage licences were granted from time to time by the rector of Hawarden in his own right within the area of the ancient parish from the passing of the Ecclesiastical Jurisdiction Act, 1847, until the disestablishment of the Church in Wales on March 31, 1920; and during the same period marriage licences were also from time to time granted by the bishop of the diocese or his surrogates. It is believed that licences were granted by the rector on the assumption that his peculiar rights, in so far as they were abolished by the said Order in Council, were as regards marriage licences restored by the Ecclesiastical Jurisdiction Act, 1847, and again became exercisable.

Shortly after the disestablishment of the Church in Wales, the defendants, the Representative Body of the Church in Wales, were advised by their legal committee that the privileges of the Peculiar of Hawarden in the matter of marriage licences were unchanged by the Welsh Church Acts, 1914 and 1919. In reliance on this advice, marriage licences continued to be granted (as before) by the successive rectors of Hawarden within the area of the ancient parish until the death of the last rector, the Reverend Daniel Saunders Rees, on March 15, 1952, when the question of the right of the rector to grant such licences was again raised.

Accordingly, the plaintiff, the Reverend Norman Sydney Baden Powell, the present rector of Hawarden, issued the present summons for the determination of the following questions: (1) Whether upon the true construction of the Ecclesiastical Commissioners Act, 1836, and of the Order in Council, No. 20642, dated August 27, 1846, and made thereunder, the authority of the rector of Hawarden to grant marriage licences within the area comprised in the ancient parish of Hawarden was effectually abolished by the said Order in Council. (2) If the answer to question (1) was in the affirmative whether upon the true construction of the Ecclesiastical Jurisdiction Act, 1847, the said authority of the rector of Hawarden was restored. (3) (a) Whether upon the true construction of the Welsh Church Act, 1914, and the Welsh Church (Temporalities) Act, 1919, all such authority as was vested in the rector of Hawarden immediately before March 31, 1920 (being the date of the disestablishment of the Church in Wales) to grant marriage licences

within the said area was abolished as from that date and, if so, (b) whether upon the true construction of the said last-mentioned Acts the Bishop of St. Asaph or some other person or persons, and if so who, has or have authority to grant marriage licences within the said area.

At the hearing of the summons it was agreed between the parties that at any rate until March 31, 1920, the date of the disestablishment of the Church in Wales, the ancient parish of Hawarden was a peculiar, the rector of which had a right, concurrently with the Bishop of St. Asaph, of granting marriage licences. Accordingly, the court heard argument only on question (3) of the summons.

R. O. Wilberforce Q.C. and *K. J. Elphinstone* for the plaintiff.
R. Gwyn Rees and *W. S. Wigglesworth* for the defendants.

The following cases were cited in argument: *Dryden* v. *Overseers of Putney* [2]; *Lowe* v. *Dorling & Son.* [3]

Cur. adv. vult.

January 22, 1957. WYNN-PARRY J. read the following judgment: This summons raises the question whether or not the plaintiff, as the rector of Hawarden in the county of Flint, is entitled to grant marriage licences within the ancient parish of Hawarden and to receive fees in respect thereof.

The summons raises three questions, but as matters developed it became unnecessary for me to hear any argument on the first two questions, because it was agreed between the parties that at any rate until March 31, 1920, the date of the disestablishment of the Church in Wales, the ancient parish of Hawarden was a peculiar, the rector of which had a right, concurrently with the Bishop of St. Asaph, of granting marriarge licences.

I propose, therefore, to deal with questions 1 and 2 by making a declaration which has been agreed by counsel, and of which I approve, in the following terms: "Declare that immediately "before March 31, 1920 (being the date of the disestablishment of the Church in Wales), the rector of Hawarden had authority "(concurrently with the bishop of the diocese of St. Asaph who "had the like authority) to grant marriage licences within the "area comprised in the ancient parish of Hawarden such autho-"rity of the said rector either never having been abolished or "(if abolished) having been restored by the Ecclesiastical "Jurisdiction Act, 1847."

There remains the third question, which involves a consideration of the impact of this right in question on the Welsh Church Act, 1914, and the Welsh Church (Temporalities) Act, 1919.

There is no doubt that the draftsman of the Welsh Church Act, 1914, set out to abolish the right of both the bishop and the

[2] (1876) 1 Ex.D. 223.

[3] [1906] 2 K.B. 772, 784, 785.

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rector to grant marriage licences; and there can be no doubt that the Act carries out this intention. The question is, by which section of the Act was this achieved? The plaintiff contends that the abolition was achieved by section 23; while the defendants contend that it was done by section 3. It is, therefore, necessary to consider these two sections.

Section 3 (1) of the Welsh Church Act, 1914, reads as follows: "As from the date of disestablishment ecclesiastical "courts and persons in Wales and Monmouthshire shall cease to "exercise any jurisdiction, and the ecclesiastical law of the "Church in Wales shall cease to exist as law."

Pausing there, I would say that if this were the only relevant provision to consider, there would be ground for saying that this subsection is capable of abolishing the right of any ecclesiastical person in Wales and Monmouthshire to grant marriage licences; because, as was agreed by counsel for both parties, and as appears from the Canons 101 and 103 of 1603, the Marriage Acts of 1823 and 1836, and the Matrimonial Causes Act, 1857, the granting of a marriage licence involves the exercise of a jurisdiction. The matter, however, does not rest there. The object and scope of section 3 is made clear by subsection (2); it is to re-establish the Church in Wales on a contractual basis; and subsection (1) contains preliminary matters necessary to this end. The scope of the section is therefore essentially wide.

If section 23 had not been included in the Act of 1914, it would appear to me that "the law relating to marriages in "churches of the Church of England" would have continued to apply in Wales and Monmouthshire, though only as part of the contract which emerges from subsection (2). It is, therefore, at least doubtful on the language of section 3 construed by itself whether the word "jurisdiction" in subsection (1) ought to be held to cover the granting of a marriage licence.

The language of section 23 is completely apt to cover the abolition of the right in any ecclesiastical person to grant marriage licences. The phrase "the law relating to marriages in churches "of the Church of England" must cover the question as to who can grant marriage licences and on what terms and subject to what conditions. Further, a perusal of the section as a whole discloses that its scheme is to regulate marriages in churches of the Church in Wales as in the case of marriages in nonconformist churches or chapels, with the result that no licence from any ecclesiastical person, bishop or ordinary, would be required.

I come therefore to the conclusion that it is section 23 and not section 3 of the Act of 1914 which abolishes the right of an ecclesiastical person to grant marriage licences.

I turn now to section 6 of the Welsh Church (Temporalities) Act, 1919. This section reads as follows: "Nothing in this "Act or in the Welsh Church Act, 1914, shall affect—(*a*) the "law with respect to marriages in Wales or Monmouthshire; or

"(*b*) the right of bishops of the Church in Wales to license "churches for the solemnisation of marriages or to grant licenses "to marry; and section 23 of the Welsh Church Act, 1914, is "hereby repealed."

In view of the provision repealing section 23 of the Act of 1914, I conclude that the phrase "the law with respect to "marriages" in section 6 has the same content as the phrase "the law relating to marriages" in section 23 of the Act of 1914. Putting aside for the moment paragraph (b) of section 6 of the Act of 1919, I would conclude that the effect of the repeal of section 23 of the Act of 1914 was to restore or preserve the right of the plaintiff, and in this connexion it is, in my view, immaterial that the rectorship of the ancient parish of Hawarden is no longer a corporation sole.

It remains therefore to consider the effect of paragraph (*b*) of section 6. Express provision is made that the right of the bishops of the Church in Wales to grant marriage licences is not to be affected by either of the Acts; but nothing is said about the rights of other persons, which previously existed, to grant marriage licences. The section is essentially a preserving section and not one whose object is to effect any abolition. In those circumstances I can see no room for the application of the doctrine "expressio unius est exclusio alterius," or the doctrine "expressum facit cessare tacitum."

In my view, therefore, the right claimed by the plaintiff survives, and he enjoys that right concurrently with the Bishop of St. Asaph. There will be appropriate declarations under question 3 accordingly.

Declarations accordingly.

Solicitors: *Freshfields; Trower, Still & Keeling.*

J. A. G.

[QUEEN'S BENCH DIVISION.]

* WEST HARTLEPOOL CORPORATION *v.* NORTHERN GAS BOARD.

1957
Jan. 24.

Lord Goddard C.J., Cassels and Lynskey JJ.

Rates and Rating — Gas Board — Overpayment of rates — Refund— Calculation—"Rates actually levied"—"Levied"—Whether discount to be taken into account—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *Sch.* 4 (2).

A refund was due to a gas board under the transitional provisions of Schedule 4 (2) to the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of rates overpaid during the four

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rating periods from April 1, 1952, to March 31, 1956. During those four rating periods each of the demand notes served on the board had shown the amount of the 2½ per cent. discount allowable under section 8 of the Rating and Valuation Act, 1925, on prompt payment of rates, and the board had taken advantage of the discount allowance and had paid the gross amount demanded less 2½ per cent. The rating authority considered that the words "rates "actually levied" in paragraph 2 (1) of the Fourth Schedule to the Act of 1955 meant, up to the last date for allowance of the discount, the amount of the rates less the discount, and, on April 6, 1956, making their calculations on the footing that the amount due to be refunded to the board was the difference between the amount of rates demanded during the four periods less 2½ per cent. discount and the amount of rates due according to the new assessment less 2½ per cent. discount, paid £8,989 9s. 2d. to the board in purported discharge of the refund. The board calculated the amount of refund due to them as being the difference between the gross amount of rates demanded during the four periods and the gross amount of rates due according to the new assessment and, claiming that the sum of £204 5s. 4d. was outstanding under the composite settlement required by the Fourth Schedule to the Act of 1955, withheld that amount from this payment of the current general rate. On appeal by the rating authority from the dismissal by justices of a complaint asking for the enforcement of the £204 5s. 4d.:—

Held, (1) that the actual amount of rates "levied" was the full amount demanded of the ratepayer, and was not the same as the amount of rates "collected" and that, therefore, the 2½ per cent. discount should not be taken into account in calculating the settlement due under the Fourth Schedule to the Act of 1955.

(2) That, since the rating authority were asking for a distress warrant, the justices, on the hearing of the complaint, had to determine whether any sum was owing and therefore were not only entitled, but bound, to inquire into what amount, if any, was due to the board as a refund.

CASE STATED by West Hartlepool justices.

On August 10, 1956, the West Hartlepool Corporation, the rating authority for the county borough of West Hartlepool, preferred a complaint against the Northern Gas Board praying that the board be summoned to show cause why they had not paid the sum of £204 5s. 4d. in respect of current rates.

The following is a summary of the facts found by the justices. On March 1, 1956, the rating authority made and approved a general rate of 16s. in the £ in respect of the period April 1, 1956, to March 31, 1957. In the current valuation list the rateable value of the hereditaments which the board was to be treated as occupying was specified as £4,694, and on April 18, 1956, a demand note was served on the board in the sum of £1,877 10s., being the first instalment of the general rate assessment then due. During the four rating periods prior to March 31, 1956, the rating authority had omitted to raise separate assessments on the board in respect of two houses in Lancaster Road, West Hartlepool, the rateable value of which was respectively £14 and £15, and on December 21, 1955, a demand note was served on the board in respect of those two properties in the sum of £117 9s. as unpaid rates for those four periods.

By virtue of the transitional provisions relating to the rating of gas boards contained in the Fourth Schedule to the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1] a refund in respect of rates overpaid during the rating periods April 1, 1952, to March 31, 1953, April 1, 1953, to March 31, 1954, April 1, 1954, to March 31, 1955, and April 1, 1955, to March 31, 1956, became due and payable to the board. During those four rating periods the amount of discount allowable under section 8 of the Rating and Valuation Act, 1925, on prompt payment of rates was shown on each demand note served by the rating authority on the board and the board had taken advantage of the discount allowance and had paid the amount of rates less 2½ per cent. discount. On April 6, 1956, the rating authority, making their calculation on the footing that the amount due to be refunded under paragraph 2 of the Fourth Schedule to the Act of 1955 was the difference between the amount of rates less the 2½ per cent. discount paid by the board during the four periods and the amount of rates leviable under the new assessment less 2½ per cent. discount, paid to the board the sum of £8,989 9s. 2d. in purported discharge of the sum due. The board calculated the amount of the refund due to them as being the difference between the gross amount of rates demanded during the four periods and the amount of rates leviable under the new assessments, and on May 2, 1956, they paid to the rating authority the sum of £1,790 15s. 8d. in respect of the current rate. A statement accompanying their cheque indicated that £204 5s. 4d. had been withheld from the general rate in respect of the amount which they claimed to be outstanding under the composite settlement required in accordance with paragraph 2 (1) of the Fourth Schedule to the Act of 1955, but that there had been set off against that deduction £117 9s. (the unpaid rates on the properties in Lancaster Road), thus making a net deduction from the sum demanded of £86 16s. 4d.

It was contended on behalf of the rating authority that the justices had no jurisdiction to determine what amount, if any,

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, Sch. 4: "Transitional provisions relating to "Gas Boards. . . . 2 (1) For the purposes of the levying of rates by a "rating authority on a gas board for "any rate period beginning after "March 31, 1952, and before April 1, "1956, there shall be calculated what "amount of rates would have been so "leviable in the following circumstances . . .—(*a*) the provisions of "section 6 of this Act, and of the "Third Schedule . . . had been in "operation during that rate period, "and (*b*) references in those provisions to March 31, 1956, had been "references to March 31, 1952; and, "if the amount calculated in accordance with the preceding provisions "of this sub-paragraph is less than "the total amount of rates actually "levied on the board by that rating "authority for that rate period, the "difference shall be repaid or allowed, "or, if the amount so calculated is "greater than the amount actually "levied, the difference shall be paid "and may be recovered as if it were "arrears of those rates:"

S. 6: "(5) The transitional provisions contained in the Fourth "Schedule to this Act shall have "effect with respect to rates leviable "on gas boards for rate periods "beginning after March 31, 1949, "and before April 1, 1956."

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was still due to the board as a refund in addition to the amount already refunded by them on April 6, 1956, but that it was the duty of the justices solely to determine whether the board had paid the rate demanded, and, if they found that they had not, to grant a distress warrant, leaving it open to the board, if they chose, to sue the rating authority elsewhere for the recovery of £204 5s. 4d.; that the amount of rates actually levied on the board during the rating periods 1952–1953, 1953–1954, 1954–1955 and 1955–1956 within the meaning of the words "actually levied" in paragraph 2 (1) of the Fourth Schedule to the Act of 1955 was the amount actually demanded in the demand note; and that since by the amount of discount allowable under section 8 of the Rating and Valuation Act, 1925, on payment of rates before a date specified by the rating authority was shown on each demand note, the amount demanded up to the last date for allowance of discount was the gross amount of rates less the discount and that only that amount could have been recovered by the board; that the amount of the refund due to the board under the provisions of the Act of 1955 should therefore be calculated as follows: Rates actually demanded, i.e., gross amount less discount, less rates due according to new assessment, i.e., gross amount on amended value, less discount; that the amount of the refund due was therefore £8,989 9s. 2d. which they had paid to the board; and that, therefore, the board had withheld £204 5s. 4d. from their current rates without valid reason, and a distress warrant should be issued.

It was contended on behalf of the board that the justices had jurisdiction to determine what amount, if any, was still due to the board as a refund; that the amount of the refund due to the board by virtue of the operation of the Fourth Schedule to the Act of 1955 depended solely on the interpretation of the words "actually levied" and "so leviable" in paragraph 2 of the Fourth Schedule; that the words "actually levied" meant "actually demanded" and not "actually collected" or "actually recovered," for under section 16 of the Act of 1955 the words "levy" or "levied" must bear the same meaning in the Act of 1955 as in the other Acts referred to in that section, and the following were referred to as showing the distinction between the word "levied" and the words "collected" or "recovered": the Rating and Valuation Act, 1925, ss. 2 (3), 7 and 11 (4), and the Local Government Act, 1948, s. 51; that the amount actually demanded by the corporation was the gross amount as shown on the demand note and no account should be taken of discount, and the amount of the refund due to the board under the provisions of the Act of 1955 therefore should be calculated as follows: gross amount demanded on previous assessments less gross amount due on revised assessment; and that the amount of the refund due was therefore £9,193 14s. 6d., and in respect of such refund the rating authority had paid £8,989 9s. 2d. which was accepted by the board on account leaving a balance of £204 5s. 4d. which the board were entitled to set off against current rates.

The justices were of the opinion that the contentions of the board were right, and they accordingly dismissed the complaint.

The rating authority appealed.

R. E. Megarry Q.C. and *W. B. Harris* for the appellant rating authority.

Percy Lamb Q.C. and *W. R. Steer* for the board.

No cases were cited in argument.

Lord Goddard C.J. This is a case stated by justices for West Hartlepool, before whom a complaint was preferred by the appellants, the West Hartlepool Corporation and the rating authority "praying that the respondents be summoned to show "cause why they had not paid the sum of £204 5s. 4d. in respect "of current rates." In other words, the rating authority was asking for the enforcement of a sum of money due for rates, and the whole question turns on the true construction of a few words in the Fourth Schedule to the Rating and Valuation (Miscellaneous Provisions) Act, 1955. That Act was passed after a number of boards had been set up, including gas boards, in relation to which a new form of valuation was introduced, and the Fourth Schedule contains transitional provisions. There are certain matters which have to be considered between the years 1949 and 1952, and perhaps it would be better, because it is in some respects a little complicated, if I read two clauses of the Fourth Schedule. Paragraph 1 of that schedule provides: "For "the purposes of the levying of rates on gas boards"—I call attention to those words—"for any rate period beginning after "March 31, 1949, and before April 1, 1952, (*a*) any alteration "made in a valuation list after March 18, 1955, shall be dis-"regarded, and (*b*) without prejudice to any alteration made on "or before that day, no effect shall be given after the passing of "this Act to any proposal for altering a valuation list." By paragraph 2: "(1) For the purposes of the levying of rates by a "rating authority on a gas board for any rate period beginning "after March 31, 1952, and before April 1, 1956, there shall be "calculated what amount of rates would have been so leviable "in the following circumstances, that is to say, if (*a*) the pro-"visions of section 6 of this Act, and of the Third Schedule to "this Act, had been in operation during that rate period, and "(*b*) references in those provisions to March 31, 1956, had been "references to March 31, 1952." Then comes the important part, the establishment of the sliding scale, "and, if the amount "calculated in accordance with the preceding provisions of this "sub-paragraph is less than the total amount of rates actually "levied on the board by that rating authority for that rate period, "the difference shall be repaid or allowed, or, if the amount so "calculated is greater than the amount actually levied, the "difference shall be paid and may be recovered as if it were "arrears of those rates."

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The point in this case has arisen in this way. West Hartlepool is one of the boroughs which has adopted the permission given by section 8 of the Rating and Valuation Act, 1925, of offering ratepayers a discount of 2½ per cent. if they pay their rates promptly within 14 days; so that it is said by the rating authority that the amount actually levied by the rate is the amount of the rate less 2½ per cent. If they are right in that, then £204 was due by the gas board. The gas board say: "No, "these words mean what they say. The rate that is levied is "the full amount." They contend that the amount that is collected may be 2½ per cent. less than the full amount of the rate if the ratepayer pays promptly, but that the words used by the Act are, first, in paragraph 1 of the Schedule, "for the "purposes of the levying of rates" and then in paragraph 2 "if "the amount calculated in accordance with the preceding pro-"visions of this sub-paragraph is less than the total amount of "rates actually levied," and, again, "or, if the amount so "calculated is greater than the amount actually levied."

In my opinion, the "actual amount levied" is the demand which is made on the ratepayer. Notice is given to a ratepayer that the rating authority have made a rate at so much in the £ and, his valuation being so much, the amount due from him is £X. That is the amount levied, and I think that the matter becomes even clearer, if anything were required to make it more clear, by reference to the Rating and Valuation Act, 1925, where one finds the expressions "making the rate," "levying the rate," "collecting the rate," and "recovering the rate." Levying and collecting are quite different things. If Parliament had meant that the discounts provided for by section 8 of the Act of 1925 should be taken into account they would, instead of using the words "the rates actually levied," have said "the rates actually "collected."

In my opinion, the justices came to a perfectly right decision on the construction of the Schedule, and once they had come to that decision the case seems to me to be at an end. It is said that the justices had no power to inquire into what was the amount leviable, but the rating authority had gone to the justices for the purpose of enforcing arrears of rates; in other words, they were asking for a distress warrant, and the first thing the justices have to do is to be satisfied that some sum was due and owing. As was pointed out in the course of the argument, paragraph 4 (*b*) of the Schedule expressly provides that "any amount repayable "or allowable to the gas board by the rating authority, or "recoverable from the board by that authority, by virtue of "paragraph 2 of this schedule, shall be subtracted from, or, as "the case may be, added to, the proceeds of the rates leviable "by that authority in respect of the year in which that amount "is found to be so repayable, allowable or recoverable." The gas board were saying in this matter: "£204 has not been "allowed us; you have kept that by. You ought to have allowed

"us that sum; you have not. If you did not, obviously there is "nothing due." In my opinion, the justices were not only entitled, but bound, to consider whether anything was due, and they have found on their construction of the Act, with which we agree, that there was nothing due. For these reasons, I think that the justices came to a perfectly proper decision in point of law, and this appeal is dimissed.

CASSELS J. I agree.

LYNSKEY J. I agree.

Appeal dismissed.

Solicitors: *Lewin, Gregory, Mead & Sons for Town Clerk, West Hartlepool; Kerly, Sons & Karuth for J. F. Jackson, Newcastle-upon-Tyne.*

J. F. L.

[PROBATE, ETC., DIVISION.]

* ROSE *v.* ROSE.

1957
Feb. 5.
Willmer J.

PRACTICE NOTE.

Husband and Wife—Divorce—Decree—Decree absolute—Application—Cohabitation resumed after decree nisi—Oral evidence required save in special circumstances—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940 (*L.* 27)), *r.* 40.

SUMMONS for leave to apply for decree absolute.

The applicant wife was granted a decree nisi on June 6, 1945, on the ground of the husband's adultery. The parties then became reconciled and lived together until September, 1953, when the husband left the wife to live with another woman with whom he had been living ever since. The wife made an application under rule 40 of the Matrimonial Causes Rules, 1950,[1] for leave to apply for the decree nisi to be made absolute. Her application was supported by an affidavit in which she set out the facts, and by the affidavit of an inquiry agent as to the subsequent adultery.

[1] Matrimonial Causes Rules, 1950, r. 40 (1): "An application by a "spouse to make absolute a decree "nisi pronounced in his favour shall "be made by lodging in the registry "where the cause is proceeding a "notice of application in accordance "with Form 14 on any day after "the expiration of the period pre-"scribed for making the decree "absolute. . . ." "Provided that if the application "is made after the expiration of one "year from the date of the decree nisi "there shall be lodged with the notice "an affidavit by the applicant account-"ing for the delay, and the notice "shall not be filed without leave. "(2) Upon the filing of the said "notice the decree nisi shall become "absolute."

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v.
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Notice of the new charge of adultery was given both to the husband and the woman with whom he was alleged to be living, and copies of the affidavits were served upon them. Written statements from both were before the court admitting the adultery and stating that they wished to take no part in the proceedings.

The matter came before Willmer J. on December 5, 1956, who asked for the assistance of the Queen's Proctor. At the resumed hearing the court was informed that the Queen's Proctor had ascertained no facts running counter to those put before the court by the wife.

Maurice Ahern for the wife.
Roger Ormrod for the Queen's Proctor.

WILLMER J., in the course of his judgment, said that it was submitted that the present case was completely covered by his decision in *E.* v. *E.*,[1] and that he ought now to allow application to be made for decree absolute. He shared with counsel for the Queen's Proctor the difficulty of understanding why provision was not made in the rules for dealing with this kind of eventuality. That was a matter on which he commented in the course of his judgment in *E.* v. *E.*,[1] when he said that the fact that the rules of court made no provision for dealing with this sort of case was much to be deplored, and suggested that opportunity might be taken of considering whether some amendment of the rules might be required. No amendment had in fact been made as yet, and in the circumstances he agreed with Mr. Ormrod, who described the area of inquiry in a case such as the present as something in the nature of "a procedural desert." He could not think that it was a very satisfactory way of dealing with the sort of problem that arose in such cases.

He had been told by Mr. Ormrod that he had ascertained no facts which would run counter to those which had been put forward on behalf of the wife. But for that statement made on behalf of the Queen's Proctor his Lordship would have taken the view that this was a case which ought not to be allowed to go any further without hearing oral evidence from the wife petitioner. But having regard to the assurance that had been given to the court that the Queen's Proctor had been unable to ascertain any relevant facts other than those disclosed by the wife he had not thought it necessary to require oral evidence from the wife in this case. In the special circumstances of the present case oral evidence would have been a useless formality, since it was not possible to think what further questions one would have been able to ask the wife, seeing that she had so fully and fairly set out her story in the affidavit which had been filed.

[1] [1950] P. 232; 66 T.L.R. (Pt. 1) 751; sub nom. *Elwes* v. *Elwes* [1950] 1 All E.R. 826.

If the present method of procedure were to become a normal form of procedure, he would take the view that, in the absence of special circumstances such as existed in the present case, the petitioner ought to go into the witness-box and tell the story in full, in exactly the same way as on an original petition.

[His Lordship then held that the original adultery which had been fully condoned was revived by the husband's subsequent desertion and adultery and that, in all the circumstances, the wife's delay in making her application had not been unreasonable, and granted leave to apply for the decree nisi to be made absolute.]

Solicitors: *J. Rothwell Dyson & Co.; The Queen's Proctor.*

E. J.

[COURT OF PROTECTION.]

* PRACTICE DIRECTION (COURT OF PROTECTION).

1957
Feb. 11.

Mental Deficiency—Patients' estates—Originating summons—Form—Management of Patients' Estates Rules, 1934 (*S.R. & O.,* 1934, *No.* 269, *L.* 2), *Sch., Form A, para.* 3 (ii).

PURSUANT to my powers under rule 147 (1) of the Management of Patients' Estates Rules, 1934, I hereby direct that as from March 1, 1957, every originating summons relating to express trusts constituted by a written document or to the statutory trusts shall be entitled in the matter of the relevant trusts and in the matter of the patient and in the matter of the Trustee Act, 1925, and accordingly the following paragraph shall be substituted for paragraph (3) (ii) of Form A of the Schedule to the said Rules:—

(ii) Relating to land held upon the Statutory Trusts:—
53 Vict. c. 5,
and Amending Acts. 195... No. .....
In the matter of the Statutory Trusts
(defining them)
and
In the matter of (Patient)
and
In the matter of the Trustee Act, 1925.

RAYMOND JENNINGS,
Master.

February 11, 1957.

[HOUSE OF LORDS.]

H. L. (E.)† 1957 *Feb.* 13, 14.

* BOAKS . . . . . Petitioner;

AND

REECE . . . . . Respondent.

Petition for leave to appeal to the House of Lords from the decision of the Court of Appeal in *Boaks* v. *Reece*.[1]

The Appeal Committee dismissed the petition.

H. L. BOLTON (ENGINEERING) CO. LTD. . Petitioner;

AND

T. J. GRAHAM & SONS LTD. . . . . Respondent.

Petition for leave to appeal to the House of Lords from the decision of the Court of Appeal in *H. L. Bolton (Engineering) Co. Ltd.* v. *T. J. Graham & Sons Ltd.*[2]

The Appeal Committee dismissed the petition.

TAYLOR . . . . . Petitioner;

AND

NATIONAL ASSISTANCE BOARD . . Respondents.

Petition for leave to appeal to the House of Lords from the decision of the Court of Appeal in *Taylor* v. *National Assistance Board*.[3]

The Appeal Committee allowed the petition.

F. C.

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† *Present*: Lord Oaksey, Lord Morton of Henryton and Lord Cohen.

[1] [1956] 3 W.L.R. 1126; [1956] 3 All E.R. 986.

[2] [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624.

[3] [1957] 2 W.L.R. 189; [1957] 1 All E.R. 183.

[COURT OF CRIMINAL APPEAL.]

* REGINA v. HACKER.

(PRACTICE NOTE.)

C. C. A.

1957
Feb. 11.

Lord Goddard C.J., Cassels and Hinchcliffe JJ.

Criminal Law—Practice—Trial—Court of—Grave offence—Demanding money with menaces with intent to steal—To be tried at assizes in absence of compelling reason.

APPLICATION for leave to appeal against conviction and sentence.

The applicant, Dennis John Hacker, was committed for trial at Andover Borough Quarter Sessions on a charge of demanding with menaces, between May 1 and 31, 1956, at Basingstoke, Hampshire, the sum of £300 of one Victor Alexander Simmons with intent to steal the same, contrary to section 30 of the Larceny Act, 1916. He was convicted and sentenced to four years' imprisonment. He applied for leave to appeal against conviction and sentence.

The applicant did not appear and was not represented.

LORD GODDARD C.J. stated the facts and continued: It is impossible to find any ground on which we could give leave to appeal. The conviction was the only possible one, but I want to say this: The applicant was tried at the Andover Borough Quarter Sessions, being sent there under section 10 (1) of the Magistrates' Courts Act, 1952, which enabled him to be sent to any convenient court if the assizes were not being held at any particular time. The court desires to say that the case was admirably conducted by the recorder, and his summing-up was as good as could be desired but, generally speaking, a case of this gravity, blackmail, ought not to go to quarter sessions; it ought to be sent to the assizes. It is true that this is not an offence under section 29 of the Larceny Act, 1916, which imposes a maximum sentence of imprisonment for life; it is an offence under section 30 for which five years' imprisonment is the maximum; but I hope magistrates will take note that as a general rule charges of blackmail ought to be sent to the assizes and not quarter sessions, unless there is some very compelling reason.

Application dismissed.

E. M. W.

[QUEEN'S BENCH DIVISION.]

1957
Feb. 13.

Lord
Goddard C.J.

* MONMOUTHSHIRE COUNTY COUNCIL *v.* BRITISH TRANSPORT COMMISSION.

[1956 M. No. 146.]

Railway—Bridge—"Immediate approaches"—Bridge built by railway company to carry road over railway—Road diverted for 367 *yards to connect with bridge—Liability of British Transport Commission to maintain diverted road—Railways Clauses Consolidation Act,* 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 46, 50.

In 1860 a railway company, pursuant to a private Act incorporating the provisions of the Railways Clauses Consolidation Act, 1845, constructed an extension to an existing railway so that it crossed a turnpike road. The company built a bridge to carry the road over the railway and the original line of the road was diverted at two points either side of the bridge so as to lead up to the bridge. The diversion on the north side of the railway necessitated a new stretch of road being constructed which, from the point where it left the old road to the bridge, measured some 367 yards, and ran along the top of the railway embankment. During recent years the embankment had started to slip and the road was in danger of giving way. In an action by the plaintiffs, as the highway authority, against the defendants for a declaration that the defendants were liable to maintain the new stretch of road and the embankment as constituting part of the "immediate approaches" to the bridge within section 46 of the Act of 1845:—

Held, that section 46 of the Act of 1845 was only concerned with bridges, the immediate approaches to them and the necessary works connected with them; that that section, read in conjunction with section 50, made it clear that "immediate approaches" only referred to that part of the approaches which was adjacent to the bridge; and that the work required in the present case was not necessary work connected with the bridge or with the approaches to it; accordingly, the plaintiffs were not entitled to the declaration sought.

Observation of Mellor J. in *London and North Western Railway Co.* v. *Skerton* (1864) 5 B. & S. 559 applied.

Action.

The plaintiffs were the highway authority for the county of Monmouth and the defendants the successors in title to the Newport, Abergavenny and Hereford Railway Co. In 1847 the company was authorized by a private Act, which incorporated the provisions of the Railways Clauses Consolidation Act, 1845,[1]

[1] Railways Clauses Consolidation Act, 1845, s. 46: "If the line of the "railway cross any turnpike road or "public highway, then (except where "otherwise provided by the special "Act) either such road shall be carried "over the railway, or the railway shall "be carried over such road, by means "of a bridge, of the height and width "and with the ascent or descent by "this or the special Act in that "behalf provided; and such bridge, "with the immediate approaches, and "all other necessary works connected "therewith, shall be executed and at "all times thereafter maintained at "the expense of the company. . . ."

S. 50: "Every bridge erected for "carrying any road over the railway "shall (except as otherwise provided

to construct an extension to the Taff Vale Railway, from the parish of Llanvrechva to Merthyr Tydvil. Accordingly, in 1860 the company constructed the extension so that it crossed a turnpike road. For this purpose a bridge was built by the company to carry the road over the railway, the original road being diverted between two points A and B on a plan and two new stretches of road approximately 143 yards in length on the south side of the railway and some 367 yards on the north side were constructed to lead up to the bridge. The new stretch of road and a footpath on the north side of the line ran along the top of an embankment which during recent years had started to slip so that the road was in danger of giving way. The plaintiffs claimed a declaration that on the true construction of the Railways Clauses Consolidation Act, 1845, the defendants were liable to maintain the bridge with its approaches and all necessary works connected therewith from points A to B including the embankment, and an order that the defendants forthwith and at their own expense carry out between those points (a) all such works as might be required for the reconstruction and reinstatement of the embankment; (b) all such supplementary works as might be necessary for the repair and maintenance of the road and footpath.

Harold Williams Q.C. and *Harold Marnham* for the county council.

Geoffrey Cross Q.C. and *H. E. Francis* for the British Transport Commission.

The following cases were referred to in argument in addition to that cited in the judgment: *Bury Corporation* v. *Lancashire and Yorkshire Railway Co.*[2]; *Attorney-General* v. *Great Northern Railway Co.*[3]

LORD GODDARD C.J. stated the facts and continued: This action is brought, as I understand it, to test whether the liability to repair the road and the embankment, or to make the road safe, at this point rests upon the British Transport Commission or upon the Monmouthshire County Council, who are the highway authority, this being a main trunk road.

The case for the county council is based entirely upon section 46 of the Railways Clauses Consolidation Act, 1845, which, of course, is incorporated in the several Acts under which this line was constructed.

[His Lordship read section 46 and continued:] I confess that when this case was first opened it seemed to me that it was, at

"by the special Act) be built in conformity with the following regulations; (that is to say) there shall be a good and sufficient fence on each side of the bridge of not less height than four feet, and on each side of the immediate approaches of such bridge of not less than three feet. . . ."

[2] (1888) 20 Q.B.D. 485; affirmed (1889) 14 App.Cas. 417.

[3] [1916] 2 A.C. 356; 32 T.L.R. 674.

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Monmouthshire County Council v. British Transport Commission.

Lord Goddard C.J.

any rate, a reasonable interpretation to say that the approaches to the bridge were these two new pieces of road that had been made from the part marked A on the plan to the north end of the bridge, and on the south part of the plan to the point marked B, the two new pieces of road which have been constructed to take the place of the old road through which the railway runs, but on further consideration of this section and other sections I am now quite satisfied that that construction would not be right.

In the first place section 46 does not deal with roads at all. It simply deals with bridges and with the obligation on the railway company, if it has got to cross a turnpike road, to either carry the railway over the road or under the road; in either case, of course, by means of a bridge. As I say, this section is dealing with bridges and, of course, the immediate approaches to them and the necessary works connected with bridges. That is the interpretation that I put upon the words "all other necessary "works connected therewith." No doubt the words could also include works connected with immediate approaches, but certainly it refers to works connected with bridges.

[His Lordship read section 50 and continued:] I am quite certain that it was never intended by that section to impose an obligation upon the railway company to put a fence of not less than three feet along miles of road. In this case the particular portion of the embankment with which we are concerned is a quarter of a mile away from the north end of the bridge, and if the construction that I am asked to put upon it is right it might have been a couple of miles away, or even further.

Of course we know that a railway company must keep fences erected in a proper manner if the railway runs alongside a high road, and that there is an additional obligation upon a railway company with regard to bridges, but I think that when one comes to notice the diversions and alterations which are dealt with by subsequent sections—and for this purpose I suppose we need not go further than section 56—one finds they are sections which are dealing with roads.

I do not think that section 46 has anything to do with roads, but is simply concerned with bridges, and I am not prepared to hold that the words "immediate approaches" mean anything except that part that is adjacent to the bridge, so to speak.

I think that some help is to be found from an observation of Mellor J. in *London and North Western Railway Co.* v. *Skerton.*[1] It is true it was only an interlocutory observation, yet I suppose it could be said to be obiter. He specially points out that "the "words 'ascents and descents and other convenient approaches' "show that the legislature used the terms 'ascent and descent' "and 'approaches' as equivalent, or ejusdem generis." I think that is right because section 46 talks about the road being "carried over the railway . . . by means of a bridge . . . with

[1] (1864) 5 B. & S. 559, 564.

"the ascent or descent by this or the special Act in that behalf "provided," and that is followed immediately by the words "and such bridge, with the immediate approaches."

Section 50 also deals with "a good and sufficient fence on "each side" of the immediate approaches, and I think that refers to a bridge which could come up one side and go down the other.

I do not think that this part of the road and embankment with which I am concerned in this case comes within section 46 at all. I cannot say that in doing work that is required to prevent the road in this way falling into the cutting it is necessary work connected with the bridge, or with the approaches to the bridge. I think it is a cutting which has an embankment which is there for the protection of the cutting. It is not there for the protection of the bridge.

For those reasons this action fails and must be dismissed.

Judgment for the defendants.

Solicitors: *Overton & Blackbourn for Vernon Lawrence, Newport; M. H. B. Gilmour.*

J. D. P.

[COURT OF APPEAL.]

* YELLAND *v.* TAYLOR.

C. A.
1957
Feb. 14.
Jenkins, Morris and Sellers L.JJ.

[Plaint No. M. 79.]

Landlord and Tenant—Rent restriction—Possession application—Perjury by applicant—Reasonableness—Finding by judge of greater hardship on landlord—Order refused on account of landlord's perjury on another issue—Whether proper exercise of discretion—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3 (1), *Sch. I* (*h*).
Perjured Evidence—Discretion to refuse order.

The landlord of a dwelling-house made an application for possession, on the grounds (a) that the letting was a furnished one and therefore not within the Rent Acts; (b) that he could offer suitable alternative accommodation, and so bring into effect section 3 (1) (*b*) of the Act of 1933,[1] and (c) that he required the house for his own

[1] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3: "(1) No order or judgment for "the recovery of possession of any "dwelling-house to which the prin-"cipal Acts apply or for the ejectment "of a tenant therefrom shall be made "or given unless the court considers "it reasonable to make such an order "or give such a judgment, and "either—(*a*) the court has power so "to do under the provisions set out "in the First Schedule to this Act; "or (*b*) the court is satisfied that "suitable alternative accommodation "is available for the tenant . . ."

Sch. I: "A court shall, for the "purposes of section 3 of this Act, "have power to make or give an order "or judgment for the recovery of pos-"session of any dwelling-house to "which the principal Acts apply . . . "without proof of suitable alternative "accommodation (where the court

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accommodation, and was suffering greater hardship within paragraph (*h*) of Schedule I to the Act.

The county court judge found that the alternative accommodation was not suitable, but that the balance of hardship was in favour of the landlord, and that the letting was unfurnished but that the landlord and certain witnesses had conspired to deceive the court by giving false evidence on this issue; and in view of that circumstance he held that it was not reasonable to make an order for possession. On appeal:—

Held, that the landlord's lying evidence was a matter which the judge could take into consideration in determining whether it would be reasonable to make an order or not.

Appeal from Judge Baxter, sitting at Uxbridge County Court. The facts are stated in the judgment of Jenkins L.J.

C. Salmon for the landlord.
Alan Fletcher for the tenant.

The following cases were cited in argument: *Chiverton* v. *Ede* [2]; *Cresswell* v. *Hodgson* [3]; *Regional Properties Co. Ltd.* v. *Frankenschwerth and Chapman.* [4]

Jenkins L.J. This is an appeal by a landlord from an order of Judge Baxter given at Uxbridge County Court on November 27, 1956, whereby he refused the landlord possession of premises called "Norfolk Lea," Love Lane, Iver, of which the defendant was the tenant.

There were three grounds on which the plaintiff sought possession. First and foremost, he said that this was a furnished letting and therefore not within the protection of the Rent Acts. Alternatively, he said he was able to offer alternative accommodation, which would bring his claim for possession within the ambit of the judge's discretion under section 3 (1) of the Act of 1933; and, finally, he claimed on the ground of greater hardship under paragraph (*h*) of the First Schedule to the Act of 1933.

The judge heard the plaintiff and other witnesses. He came to the conclusion that the plaintiff was lying when he said that the house was let furnished, and that it was not let furnished at all. He went on to reject the alternative accommodation as not suitable; but he found that the facts showed that, in the circumstances of the case, the greater hardship fell upon the plaintiff. So the plaintiff's case was, in the judge's view, made out on that ground, subject to the overriding consideration of reasonableness.

"considers it reasonable so to do) "if—. . . (*h*) the dwelling-house is "reasonably required by the landlord ". . . for occupation as a residence "for (i) himself . . . : Provided that "an order or judgment shall not be "made or given on any ground "specified in paragraph (*h*) . . . if "the court is satisfied that having "regard to all the circumstances of "the case . . . greater hardship would "be caused by granting the order or "judgment than by refusing to grant "it."

[2] [1921] 2 K.B. 30; 37 T.L.R. 242.

[3] [1951] 2 K.B. 92; [1951] 1 T.L.R. 414; [1951] 1 All E.R. 710.

[4] [1951] 1 K.B. 631; [1951] 1 All E.R. 178.

But he went on to say, in effect, that he did not consider it reasonable to make an order, in view of the lying evidence on the plaintiff's side in regard to the letting being furnished. He gave a very short judgment and a supplementary judgment. I think I should read those: "Held, not furnished—no furniture "there. Accommodation at Ealing not suitable alternative "accommodation. Reasonably wants place for own occupation. "Balance of hardship in favour of landlord. Would probably "have held reasonable to make an order but plaintiff and wit-"nesses have lied about furniture. Not reasonable to make an "order in case where deliberate attempt to deceive court." He was asked by Mr. Salmon, for the plaintiff, to amplify that, because of the presence of the word "probably" in the sentence "Would probably have held reasonable to make an order." The judge complied with that request and made this supplementary note: "I have been asked to consider whether I used word "'probably' in delivering the oral judgment. I think I did but "its use had no real significance. I would have made an order "if I had not been satisfied that the plaintiff and his witnesses "had been lying about an essential matter: moreover their lies "were of a type which showed they were part of a deliberate "conspiracy to deceive the court. I accepted the evidence of the "plaintiff as to his need for the accommodation, his wife's health "and his efforts to find other accommodation for the defendant."

On that, Mr. Cyril Salmon submits that the judge had, in effect, no jurisdiction to refuse the plaintiff possession of the premises. Mr. Salmon says the mere fact that the plaintiff misconducted himself before the court and told lies was beside the point; and the judge, having held that the balance of hardship was in favour of the landlord and having found in other respects that it was reasonable to make the order, should not have held it unreasonable to make the order on account of the plaintiff's lying. That, says Mr. Salmon, is something altogether outside the purview of the Acts, the discretion vested in the judge being in his submission a discretion limited to matters concerning the circumstances of the parties, and so forth. I do not propose to attempt to define the scope of the court's discretion in these Rent Act cases, but it seems to me that one can at all events say this: that the interests of the parties are plainly relevant to the exercise of such discretion and, in my view, in a case of this sort, where the judge finds that a plaintiff landlord has sued a tenant, putting in the forefront a lying claim that the letting is a furnished letting, he is well entitled to hold it in the interests of the tenant, and unreasonable from the tenant's point of view, that having successfully defeated that perjured claim, the tenant should be put in peril on a different ground if the lying plaintiff has a second string to his bow on which he can make out some sort of case.

Accordingly, in my view, it cannot be said that this matter of the plaintiff's lying evidence is a matter which the judge could

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not take into consideration in determining whether it would be reasonable to make an order or not. That being so, there is an end of the case. In my view, it is very salutary that landlords should appreciate that if they choose to found their claims for possession on evidence they know to be false, then when they ask the judge for an exercise of discretion to enable them to get possession on some other ground, the judge may think it right to refuse them that relief. In my view, this court should clearly not interfere in this matter; and the appeal fails and should be dismissed.

Morris L.J. I entirely agree.

Sellers L.J. I agree. I can see no ground at all for seeking to disturb the judge's discretion. In my view, he took a very proper course in the circumstances which confronted him.

Appeal dismissed.

Solicitors: *Lees, Smith & Crabb; Turberville, Smith & Co.*

F. R. D.

[PROBATE, ETC., DIVISION.]

1957
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* PRACTICE DIRECTION (Foreign Law).

Probate—Administration—Foreign law—Deceased with foreign domicile—Affidavit of law—Non-Contentious Probate Rules, 1954 (*S.I.* 1954, *No.* 796), *r.* 29.

On application for an order for a grant under rule 29 of the Non-Contentious Probate Rules, 1954 [which refers to grants where the deceased died domiciled outside England], any affidavit of law should refer to the facts and state the law applicable, but this must be supported by adequate evidence (normally an affidavit, or statement in the oath, by the applicant) as to the facts themselves.

B. Long,
Senior Registrar.

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[COURT OF CRIMINAL APPEAL.]

* REGINA v. WILLIAMS.

REGINA v. BELL.

[PRACTICE NOTE.]

C. C. A.

1957
Feb. 25.

Lord Goddard C.J., Cassels and Gorman JJ.

Criminal Law—Court of Criminal Appeal—Application for leave to appeal to—Report—Police report made subsequent to trial submitted to Court of Criminal Appeal—Undesirability.

APPLICATIONS for leave to appeal against conviction.

The applicant, Christopher Joseph Williams, was convicted at the Crown Court, Liverpool, of robbery with violence and robbery with aggravation and sentenced to five years' imprisonment, and the applicant, Edward Bell, pleaded guilty to robbery with aggravation and was sentenced to three years' imprisonment.

Both applied for leave to appeal against conviction.

The applicants did not appear and were not represented.

CASSELS J. The court refuses leave to appeal in these cases but desires to make some observations. The recorder before whom the applicants were tried has seen fit to send to the court a detective-sergeant's report as the result of inquiries made subsequent to the trial, and in respect of certain allegations made by one of the applicants against the police. This court sometimes asks for a special report, and sometimes the Home Office does so, but we think it is undesirable that recorders or judges or anybody else before whom a case has been tried should go out of his way to make further inquiries, because this court has to make up its mind on the evidence which was actually given before the court of trial and upon what took place at that court. In this particular case a long and detailed report has been made and observations put forward upon the allegations which one of the applicants made in regard to the case. It is quite unnecessary and of no assistance to this court, and we desire that the practice should not be repeated.

Applications refused.

E. M. W.

[PROBATE, ETC., DIVISION.]

1957
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* PRACTICE DIRECTION (Attorney Administrator).

Probate—Administration—Attorney administrator—Further grant—Inspection of power of attorney.

Where an attorney administrator seeks a concurrent grant in another estate in his capacity of personal representative, this further grant will not be issued without inspection of the power of attorney. A power in general terms appointing the attorney for all purposes will be accepted as establishing his right to apply for the further grant; but if the power is a limited one confined to obtaining the first grant, a further power extending the attorney's duties to obtaining the further grant will be required.

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Senior Registrar.

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[HOUSE OF LORDS.]

H. L. (E.)†

1956
Dec. 13, 17, 18.
1957
Feb. 14.

* FIRESTONE TYRE AND RUBBER CO. LTD. Appellant;
AND
LEWELLIN (INSPECTOR OF TAXES) . . Respondent.

Revenue—Income tax—Non-resident—Trade within United Kingdom—Contracts made in United Kingdom for sale of goods manufactured there — United Kingdom company assessed as agent of foreign company — Whether authorized regular agent of foreign company carrying on trade or business within the United Kingdom—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, para.* 1 (*a*) (iii); *All Schedules Rules, rr.* 5, 10.

A company registered in the United Kingdom (hereafter called "Brentford") was assessed to income tax on the profits of its business of branded tyre manufacturers within the United Kingdom. In addition it was assessed to income tax on the profits of the trade of marketing the branded tyres carried on with customers on the continent of Europe. This additional assessment was made on the footing that Brentford was itself carrying on that trade or, alternatively, that a foreign non-resident company (hereafter called "Akron") which owned all the shares in Brentford was (*a*) itself carrying on the trade within the United Kingdom of selling the tyres outside the United Kingdom, or (*b*) was carrying on that trade through the agency of Brentford.

Akron had made agreements relating to the sale of its products with distributors on the continent of Europe, giving them lists of

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† *Present*: Lord Morton of Henryton, Lord Radcliffe, Lord Tucker and Lord Cohen.

the suppliers from whom they might order the goods. Brentford was an authorized supplier. By agreements between Akron and Brentford the latter was authorized to fulfil orders received from distributors. A subsequent agreement made between Akron and Brentford ostensibly altered this, Brentford agreeing to fulfil all orders obtained by Akron in Europe or elsewhere, as and when requested by Akron, to forward the goods ordered to the purchaser and to give such instructions as to payment as were requested by Akron. In practice, however, Brentford continued to fulfil orders received direct from the authorized distributors, normally without further intervention by Akron. Delivery of the goods was f.a.s. and payment was in each case effected in the United Kingdom. Brentford retained out of the payments received the cost price plus 5 per cent. and remitted the balance to Akron (or, when that became impossible, owing to wartime currency restrictions, it credited the sums held on behalf of Akron to a separate account in its books). Akron was supplied with details of each order effected:—

Held, that the trade of selling tyres to persons outside the United Kingdom was carried on within the United Kingdom and was exercised by Akron through Brentford as its agent. Accordingly, tax was chargeable in respect of that trade under Schedule D, para. 1 (*a*) (iii), to the Income Tax Act, 1918, and Brentford was Akron's regular agent in whose name it was properly assessed to tax on profits of that trade under rules 5 and 10 of the All Schedules Rules.

An order and its acceptance alone constituted the effective contract under which a distributor could call on Brentford to deliver tyres. Accordingly, Brentford was selling under contracts made in the United Kingdom tyres manufactured by it in the United Kingdom and deliverable in the United Kingdom to purchasers thereof against payment in the United Kingdom of the purchase price. Further, the course of dealings between Akron and Brentford was to set up standing arrangements whereby Brentford agreed to hold goods of its own at the disposal of Akron and to sell them on Akron's behalf to customers approved by Akron and subject to terms imposed by Akron and to account to Akron for the proceeds of the sales.

Decision of the Court of Appeal [1956] 1 W.L.R. 352; [1956] 1 All E.R. 693 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Jenkins and Birkett L.JJ.).

This was an appeal from an order of the Court of Appeal dated February 13, 1956, dismissing an appeal from an order of the High Court (Harman J.) dated October 20, 1955. The appellant was Firestone Tyre and Rubber Co. Ltd. (hereafter called "Brentford"), carrying on the business of tyre and rubber manufacturers at Great West Road, Brentford, in Middlesex. By the order of the High Court an appeal by Brentford on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and their determination was affirmed. The matter arose on assessments to income tax made on Brentford under Schedule D to the Income Tax Act, 1918, for the five years 1940–1941 to 1944–1945 inclusive as agents for a non-resident company, Firestone Tire and Rubber Co. of Akron, Ohio, in the United States of America (hereafter called "Akron").

The questions for the determination of the Special Commissioners were set out in the case stated as follows: "(*a*) whether

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"Brentford itself was carrying on a trade on its own behalf of "selling tyres to persons outside the United Kingdom; and, if not, "(*b*) whether Akron was exercising within the United Kingdom "a trade of selling tyres to persons outside the United Kingdom; "and, if so, (*c*) whether that trade was carried on by Akron "through the agency of Brentford." They answered (*a*) in the negative and (*b*) and (*c*) in the affirmative. The Crown did not challenge the answer to (*a*).

Paragraph 5 of the case stated was as follows: "Firestone "tyres which had been manufactured by Brentford were exported "to customers outside the United Kingdom by agreement with "Akron in accordance with the following arrangements. They "were exported only to persons approved by Akron as 'dis-"'tributors' of Firestone tyres, who were required to sign an "agreement with Akron. A copy of an agreement made between "a Swedish corporation" (Aktiebolaget A. Wiklunds Maskin & Velocipedfabrik, carrying on business (inter alia) as a distributor of tyres at Stockholm, Sweden, and hereafter referred to as "Sweden") "and Akron . . . is attached to and forms part of "this case. Under this agreement dated May 20, 1935, Akron "granted to the Swedish distributor the exclusive right to sell "Firestone tyres and accessories in Sweden and the latter under-"took to buy, sell and distribute such Firestone branded products "exclusively; to keep on hand reasonable stocks of these products; "and to use its best efforts to sell these products in Sweden but "not elsewhere . . . Akron undertook to make deliveries f.a.s. "vessel . . ."

Paragraph 7 of the case stated set out that, following negotiations between Akron and Brentford, "an agreement was drawn "up on February 8, 1936, regulating the fulfilment by Brentford "on behalf of Akron of orders obtained in Europe and elsewhere "by Akron."

Paragraph 16 (*d*) set out the following finding of the Special Commissioners: ". . . It seems to us that the effect of the "agreement of February 8, 1936, and the course of the dealings "between Akron and Brentford was to set up standing arrange-"ments whereby Brentford agreed to hold goods of its own at "the disposal of Akron and to sell the same on Akron's behalf to "customers approved of by Akron; and, further, to account to "Akron for the proceeds of the sales less the cost of the goods "sold plus 5 per cent."

The facts summarized in the headnote are fully set out in the report below.[1]

George Honeyman Q.C. and *David Wilson* for the appellant company.

Sir Frank Soskice Q.C. and *Sir Reginald Hills* for the Crown.

[1] [1956] 1 W.L.R. 352, 353–358; [1956] 1 All E.R. 693.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Sulley* v. *Attorney-General*[2]; *The Moorcock*[3]; *Cassaboglou* v. *Gibb*[4]; *Maclaine & Co.* v. *Eccott*[5]; *Great Northern Railway Co.* v. *Witham*[6]; *Household Fire and Carriage Accident Insurance Co. Ltd.* v. *Grant*[7]; *Gramophone and Typewriter Ltd.* v. *Stanley*[8]; *Grainger & Son* v. *Gough*[9]; *W. H. Muller & Co. (London) Ltd.* v. *Lethem* and *Neilson, Anderson & Co.* v. *Collins*[10]; *Scales* v. *Atalanta Steamship Co. of Copenhagen*[11]; *Absalom* v. *Talbot*,[12] and *Hughes* v. *Bank of New Zealand Ltd.*[13]

Their Lordships took time for consideration.

Feb. 14, 1957. LORD MORTON OF HENRYTON. My Lords, in this case I agree with the conclusions successively reached by the Special Commissioners, Harman J. and the Court of Appeal, and I can state my reasons very briefly.

Three companies were concerned in the transactions giving rise to this appeal. They are: (1) the Firestone Tyre and Rubber Co. Ltd., which carries on the business of tyre and rubber manufacturers at Great West Road, Brentford, Middlesex; (2) the Firestone Tire and Rubber Co. of Akron, Ohio, in the United States of America; (3) a company named Aktiebolaget A. Wiklunds Maskin & Velocipedfabrik, carrying on business (inter alia) as a distributor of tyres at Stockholm, Sweden. These three companies have been referred to in the courts below as "Brentford," "Akron" and "Sweden," and I shall adopt the same convenient course.

The events giving rise to this appeal are fully set out in the case stated and are summarized in the judgment of the Master of the Rolls. I gratefully accept his summary and shall not repeat it. The questions for determination before the Special Commissioners were: "(*a*) whether Brentford itself was carrying on a trade on its own behalf of selling tyres to persons outside the United Kingdom; and, if not, (*b*) whether Akron was exercising within the United Kingdom a trade of selling tyres to persons outside the United Kingdom, and, if so, (*c*) whether that trade was carried on by Akron through the agency of Brentford." The Special Commissioners answered question (*a*) in the negative and the Crown has not sought to contest this decision, so your Lordships are only concerned with questions (*b*) and (*c*).

[2] (1860) 5 H. & N. 711.
[3] (1889) 14 P.D. 64; 5 T.L.R. 316.
[4] (1883) 11 Q.B.D. 797.
[5] [1926] A.C. 424; 42 T.L.R. 416.
[6] (1873) L.R. 9 C.P. 16.
[7] (1879) 4 Ex.D. 216.
[8] [1908] 2 K.B. 89; 24 T.L.R. 480.
[9] [1896] A.C. 325; 12 T.L.R. 364.
[10] [1928] A.C. 34; 44 T.L.R. 53.
[11] (1925) 134 L.T. 411; 41 T.L.R. 591.
[12] [1944] A.C. 204; 60 T.L.R. 434; [1944] 1 All E.R. 642.
[13] [1938] A.C. 366; 54 T.L.R. 542; [1938] 1 All E.R. 778.

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The relevant provisions of the Income Tax Act, 1918, are as follows:—

The Income Tax Act, 1918, Sch. D, para. (1), provides: "Tax "under this Schedule shall be charged in respect of—(*a*) The "annual profits or gains arising or accruing— . . . (iii) to any per-"son, whether a British subject or not, although not resident in "the United Kingdom, . . . from any trade, profession, employ-"ment, or vocation exercised within the United Kingdom; . . ."

General Rule 5 provides: "A person not resident in the "United Kingdom, whether a British subject or not, shall be "assessable and chargeable in the name of . . . any factor, agent, "receiver, branch, or manager, whether such factor, agent, "receiver, branch, or manager has the receipt of the profits or "gains or not, in like manner and to the like amount as such "non-resident person would be assessed and charged if he were "resident in the United Kingdom and in the actual receipt of "such profits or gains."

General Rule 10 provides: "Nothing in these rules shall "render a non-resident person chargeable in the name of a broker "or general commission agent, or in the name of an agent not "being an authorised person carrying on the regular agency of "the non-resident person or a person chargeable as if he were an "agent in pursuance of these rules, in respect of profits or gains "arising from sales or transactions carried out through such a "broker or agent."

It is clear that if Akron was carrying on the trade in question through the agency of Brentford, the agency was a "regular" one within the meaning of General Rule 10, and counsel for the appellant did not seek to rely upon that rule.

The first stage in considering questions (*b*) and (*c*) is to determine whether the trade in selling tyres to persons outside the United Kingdom, with which this appeal is concerned, was exercised within the United Kingdom. My Lords, I cannot doubt that it was so exercised, in view of the facts as to the course of dealing set out in the case stated and in particular in paragraphs 6 to 12 inclusive.

Jenkins L.J. states the result of this course of dealing, in language which I entirely accept, as follows[1]: "An order placed "by a distributor direct with Brentford as one of the listed manu-"facturers of Firestone tyres could at most only create a contract "between the distributor and Akron to the effect that the distri-"butor would purchase, and Akron would cause the manufacturer "to sell to the distributor, the tyres ordered on the terms and "conditions of the distributor agreement. There was no privity "of contract between distributor and manufacturer quoad the "distributor agreement, and it is, I think quite impossible to "hold that the mere placing of an order with any one of the listed "manufacturers would, without more, oblige that manufacturer

[1] [1956] 1 W.L.R. 352, 371–372; [1956] 1 All E.R. 693.

"to deliver the tyres ordered. As between the distributor and "the listed manufacturer the matter must have been one of offer "and acceptance, that is to say, an order placed by the distributor "with the manufacturer and accepted by the latter. The order "and its acceptance would alone constitute the effective contract "under which the distributor could call upon the manufacturer "to deliver the tyres ordered, and would be bound on his own "part to take and pay for them. Such contracts in the case of "Brentford would be made in England as the place of acceptance. "On applying this view of the contractual position to the facts "found, it appears that during the material period Brentford "was selling to distributors abroad, under contracts made in the "United Kingdom, tyres manufactured by Brentford in the United "Kingdom, and deliverable in the United Kingdom to the pur-"chasers thereof against payment in the United Kingdom of the "contract price; and, furthermore, was in fact effecting delivery of "and receiving payment for such tyres in the United Kingdom."

The next stage is to consider whether there was evidence to justify the Special Commissioners in finding that during the relevant years Akron was exercising the trade in question through Brentford as its agent.

My Lords, in my view this question must be answered in the affirmative. Having regard to the course of dealing pursued by the parties there were only two views open for consideration by the Special Commissioners. One was that Brentford was exercising the trade on its own behalf; the other was that Akron was exercising the trade through Brentford as its agent. The Special Commissioners rejected the first view and accepted the second and, in my opinion, they were right. It is true that the goods sold belonged to Brentford and not to Akron, but this fact does not show conclusively that Brentford was selling the goods on its own behalf and not as agent: see *Weiss, Biheller & Brooks Ltd.* v. *Farmer.*[2] Each case has to be determined having regard to all the facts, and the other facts in the present case were strongly in favour of the view expressed by the Special Commissioners. I agree with their summary of the position, as set out in paragraph 16 (*d*) of the case stated: "It seems to us that the effect of the "agreement of February 8, 1936, and the course of the dealings "between Akron and Brentford was to set up standing arrange-"ments whereby Brentford agreed to hold goods of its own at "the disposal of Akron and to sell the same on Akron's behalf to "customers approved of by Akron and subject to terms imposed "by Akron; and, further, to account to Akron for the proceeds "of the sales less the cost of the goods sold plus 5 per cent."

In his helpful argument for the appellant Mr. Honeyman rightly referred your Lordships to a number of other cases, but the view that I take makes it unnecessary to refer to any of them. I can see no good reason for disturbing the determination of the Special Commissioners, and I would dismiss the appeal with costs.

[2] [1923] 1 K.B. 226; 39 T.L.R. 118.

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Lord Radcliffe. My Lords, I agree that the appeal ought to be dismissed. I believe that all your Lordships are of the same opinion. Since the assessments in question cover the revenue years 1940–1941 to 1944–1945, it is perhaps time that the litigation with regard to them should come to an end. It will be some consolation to the appellants, when the tax is paid, to know that none of the four courts by whom their case has been heard has differed from the others in the decision given, nor has there been a dissentient voice here or in the Court of Appeal: and this despite a full and careful presentation on the appellants' behalf of all the arguments that might lead to a contrary result.

In my view, what needs to be said has already been said in the other courts and in the speech of my noble and learned friend on the Woolsack. I propose to say, therefore, only in the briefest way where it is that I think that the appellants' argument breaks down.

The question before the Special Commissioners was whether the American company, styled Akron in the case stated, was exercising a trade within the United Kingdom. I omit for the moment the subsidiary question whether, if so, the English company styled Brentford was its regular agent for the purpose of assessment.

The question whether a trade has been exercised within the United Kingdom is a question of fact in this sense, that, although the law must rule whether any given set of facts can amount to such an exercise or cannot but amount to such an exercise, it is for the Special Commissioners, within those limits, to decide in the particular case before them whether a trade has or has not been so exercised. That done, there remains only the question whether they made any error of law in the decision that they came to. I do not myself take the view that this distinction is of any special importance in the present case, since the weight of the appellants' argument rested in any event on a legal proposition, the proposition that, where the trade sought to be assessed was what was called a "pure" merchanting business, the place at or in which the goods merchanted were "sold" determined in law the site of the exercise of the merchanting trade itself. The second step in the argument was that the sales the profits of which were now being assessed were made outside the United Kingdom because the master agreement between Akron and its Swedish distributor, out of which arose the orders given to Brentford by the latter, was not itself made within the United Kingdom or, alternatively, because those orders, originating in Sweden, brought about American/Swedish sales despite the not unimportant part allotted to Brentford in the course of dealing.

My Lords, no one can doubt that in considering what are the legal requirements of the phrase "trade . . . exercised within the "United Kingdom" courts of law have ruled that the place where sales or contracts of sale are made is of great importance when it is a merchanting business that is in question. They have not

gone so far as to seek to substitute this test (which under the conditions of international business and modern facilities of communication is capable of proving a somewhat ingenuous one) for the statutory duty to inquire whether a trade is or is not exercised within the kingdom. I should be doing an injustice to the arguments of the counsel for the appellants if I said that he submitted that they had. But he rightly reminded us that more than once the place where the contract is made has been spoken of as the "crucial" test or, again, as the "most vital" element.

Speaking for myself I do not find great assistance in the use of a descriptive adjective such as "crucial" in this connexion. It cannot be intended to mean that the place of contract is itself conclusive. That would be to rewrite the words of the taxing Act, and could only be justified if there was nothing more in trading than the act of sale itself. There is, of course, much more. But, if "crucial" does not mean as much as this, it cannot mean more than that the law requires that great importance should be attached to the circumstance of the place of sale. It follows then that the place of sale will not be the determining factor if there are other circumstances present that outweigh its importance or unless there are no other circumstances that can. Since the courts have not attempted to lay down what those other circumstances are or may be, singly or in combination, and it would be, I believe, neither right nor possible to try to do so, I think it true to say that, within wide limits which determine what is a permissible conclusion, the question whether a trade is exercised within the United Kingdom remains, as it began, a question of fact for the Special Commissioners. In my opinion, therefore, Harman J. in the High Court and the Master of the Rolls in the Court of Appeal were well founded in laying stress on the observation of Atkin L.J. in *F. L. Smidth & Co.* v. *Greenwood*[3]: "The contracts in this case were made abroad. But I am not "prepared to hold that this test is decisive. I can imagine cases "where the contract of resale is made abroad, and yet the "manufacture of the goods, some negotiation of the terms, and "complete execution of the contract take place here under such "circumstances that the trade was in truth exercised here. I "think that the question is, where do the operations take place "from which the profits in substance arise?"

Now, in the present case the sales from which trading arose were the dealings by virtue of which Brentford disposed of Firestone tyres to the Swedish distributor in response to the orders received from the latter. It is, I think, the major fallacy of the appellants' argument that it seeks to determine the locality of this trading by the locality which the law would attribute to the master agreement between Akron and that distributor. In my opinion the master agreement has very little, if any, significance for this purpose. It was important, of course, for other purposes.

[3] [1921] 3 K.B. 583, 593; 37 T.L.R. 949 (C.A.); *Greenwood* v. *F. L. Smidth & Co.* [1922] 1 A.C. 417; 38 T.L.R. 421 (H.L.)

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Lord Radcliffe.

It was one of the basic treaties upon which the international organization of Akron was built up. It settled many particulars of the terms of trade upon which would take place the dealings of those who were to come within the operational range of that organization. But it did not itself constitute the contracts of sale the locality of which was to be so important in deciding whether Akron was carrying on any trade inside the United Kingdom. The sales to look at for that purpose were the dealings which took place in the course of trade between Brentford and the Swedish distributor: and those dealings consisted of invitations to trade received by Brentford in England, the manufacture or appropriation of stock in England in response to those invitations, the delivery of the stock free alongside vessel in England in discharge of the order, and the receipt of the payment in a bank in England. Those operations constituted the exercising of a trade in England. The Special Commissioners thought that it was Akron's trade, not Brentford's: and I do not see why we should disagree with them.

I think that the trading situation is accurately described by the Special Commissioners in paragraph 16 (*d*) of the case stated: "It seems to us that the effect of the agreement of February 8, "1936, and the course of the dealings between Akron and Brent-"ford was to set up standing arrangements whereby Brentford "agreed to hold goods of its own at the disposal of Akron and "to sell the same on Akron's behalf to customers approved of "by Akron and subject to terms imposed by Akron; and, further, "to account to Akron for the proceeds of the sales less the cost "of the goods sold plus 5 per cent."

There is nothing in law that prevents such a finding being made. It is a very natural description of the course of trading that was pursued. But, if so, the Special Commissioners were fully entitled to their conclusion that Akron was trading in the United Kingdom during the years of assessment and that Brentford had constituted themselves their regular agents for the purpose of this trade. The latter point seems to me to be involved almost of necessity in the reading of the facts which I have set out above.

I would dismiss the appeal.

Lord Tucker. My Lords, I agree that the appeal should be dismissed for the reasons which have been stated by my noble and learned friends.

Lord Cohen. My Lords, I agree that the appeal should be dismissed, and cannot usefully add any further reasons of my own.

Appeal dismissed.

Solicitors: *Lovell, White & King; Solicitor of Inland Revenue.*

F. C.

[PROBATE, ETC., DIVISION.]

* HAYFIELD *v.* HAYFIELD.

1957
Jan. 25.

Sachs J.

Husband and Wife — Maintenance — Divorce — Remarriage — Wife's affidavit concealing remarriage — "Conduct of the parties" — "Circumstances of the case" — Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 19 (2) (3) *and* 28 (3).
Perjured Evidence—Discretion to refuse order.

On a husband's application on December 12, 1955, to vary a maintenance order of December 29, 1944, made in favour of the wife for £5 a week less tax, the wife swore an affidavit from which any court would infer that it was being asked to accept as true that the wife had not remarried and that since 1950 she had been neither able to nor had undertaken any work.

In fact the wife had, on February 6, 1951, remarried a husband who, on the evidence, was probably paying her £5 a week for "housekeeping." She had, moreover, since 1950, been managing a café which had been sold in 1956, from which facts the court inferred that she had been managing it or had shortly previously been managing it when she swore her affidavit.

On January 11, 1957, the registrar made an order reducing the amount of maintenance as from August 13, 1956, to £1 10s. 0d. On the husband's appeal from that order, contending that it should be discharged or that maintenance thereunder should be reduced to a nominal sum, the court, finding that the wife's affidavit afforded an instance not merely of lack of candour but of deliberate perjury:—

Held, (1) that neither by the rules nor the practice of the Divorce Division was a wife in whose favour a maintenance order had been made under a duty, unless expressly ordered, to make disclosure of a change in her status or means.

(2) That the words "the conduct of the parties" in section 19 (2) of the Matrimonial Causes Act, 1950,[1] referred to matters which had occurred at any time up to the making of the original order, and the same or similar conduct could properly be taken into account as part of the "circumstances of the case" with regard to proceedings for variation under section 28 (3) of the Act.[1]

(3) That the way in which the wife had, during the course of the proceedings for variation started by the husband's application

[1] Matrimonial Causes Act, 1950, s. 19: "(2) On any decree for divorce "or nullity of marriage, the court "may, if it thinks fit, order that the "husband shall, to the satisfaction "of the court, secure to the wife "such gross sum of money or annual "sum of money for any term, not "exceeding her life, as, having regard "to her fortune, if any, to the ability "of her husband and to the conduct "of the parties, the court may deem "to be reasonable; . . .

"(3) On any decree for divorce or "nullity of marriage, the court may, "if it thinks fit, by order direct the "husband to pay to the wife, during "their joint lives, such monthly or "weekly sum for the maintenance "and support of the wife as the "court may think reasonable, and "any such order may either be in "addition to or be instead of an order "made under the last foregoing sub-"section."

S. 28: "(1) Where the court has "made an order under section nine-"teen . . . of this Act, the court "shall have power to discharge or "vary the order or to suspend any "provision thereof temporarily and "to revive the operation of any pro-"visions so suspended."

"(3) In exercising the powers con-"ferred by this section, the court "shall have regard to all the circum-"stances of the case, including any "increase or decrease in the means "of either of the parties to the "marriage."

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of December 12, 1955, produced a prolongation of the period in which she was receiving £5 a week fell within the ambit of the "circumstances" referred to in section 28 (3).

(4) That the justice of the case would be met if the wife were not permitted to be in a better position than she would have been if her affidavit were a proper one and, as, on the respective means of the parties, the wife was entitled to an order of £1 *a* week, the reduction to that amount would be effective as from December 12, 1955.

Appeal from registrar's variation of maintenance order.

The marriage between the parties was dissolved by a decree dated January 27, 1944, which was made absolute on August 9, 1944. On December 29, 1944, an order was made that the wife be paid maintenance at the rate of £5 a week. Such sum was duly paid to the wife until December 12, 1955, in the name which she bore as petitioner—viz., Vera Irene Hayfield—and the husband throughout that period was unaware that the wife had come to use any other name. On December 12, 1955, the husband issued an application to vary the order on the ground that his average income for the three relevant years had dropped well below the figure at which it stood when the order of 1944 was made.

In reply to that application, the wife on January 16, 1956, swore an affidavit beginning with the words:—"I, Vera Irene "Hayfield of 23, Waverley Avenue, Twickenham in the County "of Middlesex Feme Sole. . . ." By paragraph 4 she swore that she had been employed on general duties at the King's Head, Rudgwick in the County of Sussex until 1950, when the business was sold, and continued with these words: "Since then "I have been engaged in looking after my invalid mother and "unable to undertake any employment. I am therefore entirely "dependent upon the maintenance which I receive from the "respondent." By paragraph 6 of the affidavit she asked that the amount payable by the husband should be increased.

Later in 1956 the husband, upon employing an inquiry agent, found out that the wife had in fact remarried, that she had had two children by her second husband, and that the second husband and the wife had been living for periods together at 23, Waverley Avenue, Twickenham. By further affidavits filed for the wife it then appeared that the second marriage took place on February 6, 1951, when she had still given her address as being The King's Head, Rudgwick. It was also stated by the affidavits that the second husband was a coach-driver. The court was asked to accept that his main employment was in summer at some undisclosed remuneration, and that from November, 1956, he had been employed as a lorry driver at £9 10s. a week. The second husband, however, filed no affidavit of his income, and no figures as to what the wife actually received from him were mentioned in any affidavit of hers.

It was suggested in those affidavits that the marriage between the wife and her second husband was not a success, but it was

apparent that he and the wife were, in fact, living under the same roof, and there was evidence that he was likely to be paying over to her £5 a week for "the housekeeping." There was also evidence, on the wife's own admission, that at some period or periods since 1950 she had been managing a café known as "the Scotch Café" at Grayshott. She stated that that was sold in March, 1956, and the prima facie inference was drawn that she was still managing it or had shortly previously been managing it when she swore her affidavit of January 16, 1956.

After the inquiry agent had reported to the husband, certain correspondence passed between the solicitors for the respective parties. The wife's solicitors by letter of August 28, 1956, disclaimed all previous knowledge of her remarriage, and stated that it came to them as "a complete surprise." In that letter they said: "We have impressed upon our client the seriousness "of her failure to disclose to us the fact of her remarriage."

On January 11, 1957, Mr. Registrar Kinsey made an order reducing the maintenance to be paid to the wife to £1 10s. a week as from August 13, 1956. From that order the husband appealed and at the hearing of the appeal it was contended on his behalf that the order should be discharged or the maintenance thereunder reduced to a nominal sum. The registrar's assessment of the means of the parties was accepted by both sides for the purpose of the appeal. Counsel for the wife conceded that the word "conduct" in section 19 of the Matrimonial Causes Act, 1950, included conduct in relation to financial matters. The matter was, at the request of counsel for the wife, adjourned into open court for further argument.

R. J. A. Temple Q.C. and *J. Llewellyn* for the husband.
Derek Wheatley for the wife.

SACHS J. referred to the facts substantially as set out above, remarking that from the wife's affidavit of January 16, 1956, any court would infer that it was being asked to accept as true that the wife had not remarried and that since 1950 she had been neither able to nor had undertaken any work. His Lordship continued: Some attempts have been made on behalf of the wife to justify the contents and tenor of the affidavit of January 16, 1956, and various points have been urged at one time or another, in correspondence, in affidavits and in argument, to uphold its nature, and at one time even to suggest that there was nothing much to be criticised about the way in which she insisted for so long on being paid her £5 a week under the old order. Further, neither the wife in her affidavits nor anyone on her behalf has apologised to this court for the deceptive words in that affidavit. I confess that I look with but little favour on the way this aspect of the matter has been conducted. Having considered the offending passages in the affidavit of January 16,

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1956, in the context of all the circumstances, I have no doubt that they afford an instance not merely of lack of candour but of flat and deliberate perjury. As regards the later affidavits filed on behalf of the wife, they naturally have to be scanned with great caution, and with due regard to matters on which they are silent.

I will now consider the main contentions put forward by Mr. Temple for the husband in relation to how these factors should be taken into account. He took as his first point that in deciding the appropriate figure for a new order allowance should be made, first, for the way in which the wife had concealed or refrained from disclosing her remarriage to husband no. 2, at all times prior to the making of the application of December 12, 1955, and that, accordingly, account should be taken of what he suggested were "over-payments" from the date of her remarriage in February, 1951, to the date upon which the husband made this application. Secondly, he argued that the way in which the wife had at the outset of the present proceedings by her first affidavit not only concealed her remarriage from her husband and from the court, but had also attempted generally to mislead the court was a matter of which account should be taken.

Those matters, he argued, came under the heading of "conduct of the parties" which under section 19 (2) and (3) can be taken into account. That conduct, of course, refers to matters which have occurred at any time up to the making of the original order for maintenance; but it was submitted, and I think rightly, that that same conduct, or conduct of the same type, can properly be taken into account as being part of "all the circumstances of the case" referred to in section 28 (3) which relates to variations of maintenance, and Mr. Wheatley concedes, again I think rightly, that "conduct" in section 19 includes conduct in relation to financial matters.

As regards Mr. Temple's first point, there is nothing in the rules or practice of this Division which requires a wife unless expressly so ordered to make disclosure during the currency of a maintenance order of a change in her status or means. Similarly, no such obligation is laid upon the husband. It is true, unfortunately, that this may on occasions provide a premium for some artifice which avoids attracting the attention of the opposite spouse to changes in circumstances. Nevertheless I do not think that anything which the wife did before the application date (December 12, 1955) can be taken to be conduct that falls within the ambit of the relevant words in sections 19 (2) or 28 (3)—whatever criticism may be levelled at those who take advantage of the legal position to extract or evade the payment of moneys without moral justification in circumstances where frankness on their part would result in a quite different position as to those payments.

As regards, however, the course of the proceedings started by this application of the husband, the way in which this wife

by her affidavit produced in practice a prolongation up to August, 1956, of the period in which she was receiving £5 a week, certainly, to my mind, falls within the ambit of "conduct" in section 19 and of "the circumstances" referred to in section 28 (3). I would have taken the same view if I had been able to use the words "lack of candour" instead of "perjury" in relation to the relevant affidavit.

Returning now to the order appealed from, it is clear from what both counsel agreed in the course of argument that the registrar applied in a rigid form what used to be called the one-third rule to the figures which I have mentioned. To my mind, however, cases of remarriage, such as the present one, are inherently not cases to which the one-third rule ought to be applied as a yardstick. Using the wide discretion which the court has in such matters, I have come to the conclusion that the wife should as from the date of the husband's application have £1 a week, a figure arrived at before making any allowance for what I might call the "conduct" point.

The fact being, as wife's counsel conceded, that this wife had received money to which she would not have been entitled if she had been candid in her original affidavit, I was at one stage inclined by reason of that conduct to discharge the registrar's order absolutely, and on other occasions may well be persuaded to take that course when a wife displays a lack of candour which results in her extracting sums of money which she would otherwise not have received. The justice of this case will, however, be met if I do not permit her to be in a better position in any shape or form by reason of that affidavit of hers than she would have been if it had been a proper one. That course meets the practical situation in which due regard must be had to the relatively substantial payments made since the date of the relevant application which she is unable to refund.

It may be that I am being too lenient in not visiting on her some other financial consequences for the way in which she has wrongly obtained money, but, as I have stated, in all the circumstances I will do no more than date the reduction to £1 a week to start from December 12, 1955, and order credit to be given for any payments made since that date.

That leaves me with one other unpleasant duty. When once a court has given consideration to an affidavit such as that of January 16, 1956, when it then appears from further affidavits filed on behalf of the wife herself that its nature is as above stated, and when payment of money was actually secured by the wife by aid of that affidavit, I do not think I have any alternative but to send the papers to the Director of Public Prosecutions.

Appeal allowed.

Solicitors: *Young, Jones & Co. for Heckford, Norton & Co., Letchworth; How Davey & Lewis.*

E. J.

[PROBATE, ETC., DIVISION.]

1957
Jan. 23.

Sachs J.

* GRIFFITH *v.* GRIFFITH.

Husband and Wife—Alimony pendente lite—Assessment of amount—Wife's earning capacity.

A wife, who was not in employment and had not so been while living with her husband, petitioned for restitution of conjugal rights and applied for alimony pending suit. It was contended on behalf of the husband, who earned some £1,750 a year, that the court, in assessing the amount, should have regard to her earning capacity:—

Held, (1) that although any rules of common law as to a husband's duty to maintain his wife may to an extent provide assistance to the court as a guide, they cannot burden it as a fetter.

(2) That the tendency of the courts, during the subsistence of a marriage where the husband is fully capable of supporting his wife, is to have regard to what she is receiving, rather than to her potential earning capacities; and in few cases is the contention that a wife should go out to work less likely to prevail than where she is seeking restitution and the husband's financial circumstances are such that she would not normally expect to work if they were living together.

Le Roy-Lewis v. *Le Roy-Lewis* [1955] P. 1; [1954] 3 W.L.R. 549; [1954] 3 All E.R. 57 applied.

(3) That the proper award would be £350 a year less tax.

Summons (adjourned into court).

The wife came to England from Canada in the summer of 1953 and married the husband in January, 1954. In the interval she had earned £5 17s. 6d. a week as a typist. The parties separated in June, 1956; the wife returned to Canada for a short time, but came back to England and in November, 1956, filed a petition for restitution of conjugal rights and applied for alimony pending suit.

Mr. Registrar Townley Millars, in a written judgment, referred to the facts above and continued: "The husband is well-to-do "and I think that the figures put forward by counsel are reason-"able, namely, if the wife is to be deemed to have an earning "capacity she should receive about £100 a year, while if it were "held that she should not be called upon to earn then the proper "figure would be about £350.

"The [wife] is a Canadian and is not in the same position as "an English girl. She has, however, earned money in this "country and no doubt could do so again, though to get a good "wage it might be necessary for her to have some tuition first "of all.

"There are no children of the marriage and I have the "impression that she is quite young [she was in fact 28].

"The case is not governed, I think, by *Rose* v. *Rose*,[1] because "the wife is asking for restitution of conjugal rights. I am "assuming, as I must, that she is genuine and for the purpose "of this application she will succeed.

[1] [1951] P. 29; 66 T.L.R. (Pt. 2) 440; [1950] 2 All E.R. 311.

"If the husband obeys the expected order, and the marriage "is resumed, should the wife be expected to maintain herself in "the interval?

"This has given me the real difficulty; but on reflection I "have come to the conclusion that she should.

"I therefore order that the husband pay the wife the sum "of £2 a week, which with the money she is able to earn will "give her a reasonable standard of living, which is the intention "of alimony orders."

The wife appealed. At the hearing of the appeal the husband's net income was agreed to be some £1,750, and the alternative figures of £350 or £100 a year, according to the decision of the court whether the wife's earning capacity (which it was accepted that she had), should be taken into account, were also agreed.

Geoffrey Crispin for the appellant wife.
F. S. Laskey for the respondent husband.

Welton v. *Welton*[2] and *Eaton* v. *Eaton and Campbell*[3] were cited in argument in addition to the cases cited in the judgment, and reference was also made to Latey on Divorce, 14th ed., at pp. 229 and 230. To the contention on behalf of the husband that the passage in Denning L.J.'s judgment in *Rose* v. *Rose*[4] ". . . if she [the wife] is a young woman with no children, and "obviously ought to go out to work in her own interest, but does "not, then her potential earning capacity ought to be taken into "account" should be applied in the husband's favour, counsel for the wife (who emphasised the temporary nature of alimony pending suit) submitted in reply that if those observations, which were in a judgment upon a wife's application for maintenance, were applicable to alimony pending suit, they did not apply in a case such as the present, but to a situation where the husband was earning only a small weekly wage, when it would be "in the "wife's own interest" to supplement a very small award. In this case it was not in her interests, but in her husband's, that she should find employment.

SACHS J. Mr. Crispin argued that when the only issue for the court was assessment of the amount which should be granted to a wife for alimony pendente lite, she had, as it were, a right to have it assessed on the basis of her common law entitlement to be maintained by the husband. That submission was founded on a passage in Latey on Divorce, 14th ed., p. 229, where it is stated that: "Alimony pending suit is a substitute for provision "which a husband is bound to make for his wife under the "common law," coupled with the authority cited of *Dewe* v. *Dewe*.[1] Mr. Crispin went on to submit that largely for this

[2] [1927] P. 162, 172–173, 178, 180; 43 T.L.R. 174.
[3] (1870) L.R. 2 P. & D. 51.
[4] [1951] P. 29, 31.
[1] [1928] P. 113; 44 T.L.R. 274.

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reason the authorities which relate to the taking into account of a wife's earnings, and her earning capacity in maintenance proceedings after decree absolute, did not apply.

On that basis the wife's appeal raised in a somewhat acute form an issue of some general concern in relation to her earning capacity. This was because there was agreement between counsel, both before the registrar and upon this appeal, first, that the wife was not working; secondly, that she had an earning capacity and, thirdly, that the figure to be awarded by way of alimony pendente lite should be either £7 a week or £2 a week according to whether or not that earning capacity should be taken into account.

As regards the points raised by Mr. Crispin, my views are as follows: When dealing with the question as to the circumstances in which a court could hold a wife justly entitled to be granted alimony pendente lite, Jenkins L.J. in *Waller* v. *Waller*,[2] after quoting the actual words of section 19 (1) of the Matrimonial Causes Act, 1950, with particular reference to the phrase "as the "court thinks just," said[3]: "It will be seen, therefore, that, so "far as the statute is concerned, the amplest discretion, as the "law now stands, is conferred on the court in the matter of "alimony pendente lite whether the case be one of petition for "judicial separation or one of a petition for divorce or nullity of "marriage." Hodson L.J. put it in this way[4]: "The power of "the court is entirely at large." In that case, on an issue as to the eligibility of the wife to be granted alimony pendente lite, the court repudiated the suggestion that it was in any way bound by the old common law rules with regard to the husband's liability to support his wife.

To my mind the discretion of the court in assessing the amount which "the court thinks just" is no less wide. Any rules of common law as to the husband's duty to maintain his wife (rules which are discussed in *Jones* v. *Newton and Llanidloes Guardians*[5]) may to an extent provide assistance for the court as a guide, but they certainly cannot burden the court as a fetter.

Turning next to the authorities relating to the value of the earnings or earning capacity of a wife on the amount that a guilty husband should be ordered to pay after decree absolute, these again, when dealing with alimony pendente lite, are of assistance within the same framework of wide discretion and are regularly applied in practice. It should however be noted that so long as the marriage subsists a husband may have often more difficulty on the particular facts in establishing that his wife ought to go out and work than he would have after that marriage had terminated. The tendency of the courts, during the subsistence of a marriage where the husband is fully capable of supporting his wife, to have regard for what she is actually receiving, rather than to her

[2] [1956] P. 300; [1956] 2 W.L.R. 1071; [1956] 2 All E.R. 234.

[3] [1956] P. 303.

[4] Ibid. 310.

[5] [1920] 3 K.B. 381; 36 T.L.R. 758.

potential capacities, is apparent from a series of authorities, new and old, going as far back as *Goodheim* v. *Goodheim and Frankinson.*[6]

Further, in few instances is the contention of the husband that his wife ought to go out and work less likely to prevail than in a case where a wife is seeking restitution of conjugal rights and the husband's financial circumstances are such that she would not normally expect to have to work if they were living together; but everything must, of course, depend on the particular facts of the case.

In the present case the wife did work in Canada before the marriage; the husband's income, as I have said, is in the area of £1,700 a year; and his position was such that there was no financial or other reason why he should expect his wife to work whilst they were living together. In fact, she did not so work at any time whilst they were together. Indeed, if she is to earn some reasonably sized salary, she would probably at this stage have to take some further tuition.

In those circumstances I find assistance from the judgment of Barnard J. in a case under section 23 of the Matrimonial Causes Act, 1950. That case is *Le Roy Lewis* v. *Le Roy Lewis*,[7] where a young wife's earning capacity had to be considered in the case of a husband who had deserted her; and it was also one in which there were no children. Barnard J. said[8]: "It has been "suggested that because she was working before the marriage "and is still young, and as there are no children of the marriage, "she ought at once to go back into the position she was in before "the marriage and start earning her living, with as far as I can "see only one object, to reduce the amount of money which the "husband should pay to her, his wife. I do not accept that "view." Later he says[9]: "I see no reason whatever why the "wife should go back to earning in order to reduce her husband's "liability to maintain her."

That line of reasoning, which clearly derives from what was said by Somervell L.J. with the agreement of Jenkins L.J. in *Rose* v. *Rose*,[10] as to the prima facie way to approach this matter, appears to have added force in the present case where the petition is one for restitution of conjugal rights.

In the above circumstances I have come to the conclusion that this appeal should be allowed and that the order of the registrar should be varied making it £350 a year payable monthly less tax.

Appeal allowed.

Solicitors: *Joynson-Hicks & Co.; Harry Myers & Sons.*

J. B. G.

[6] (1861) 2 Sw. & Tr. 250.
[7] [1955] P. 1; [1954] 3 W.L.R. 549; [1954] 3 All E.R. 57.
[8] [1955] P. 1, 3.
[9] Ibid.
[10] [1951] P. 29.

[CHANCERY DIVISION.]

1957
Feb. 7, 8.

Wynn-Parry J.

* INLAND REVENUE COMMISSIONERS *v.* THORNTON, KELLEY & CO. LTD.

Revenue—Surtax—Company—Undistributed profits—Shares issued out of surplus assets—Redemption of shares—Shares issued for consideration but not adequate consideration—Deemed to be income of the members of the company—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 31 (1) —*Finance Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 19 (4).
Company—Shares—Bonus shares—Consideration—Benefit to company.

A company in 1920 by way of capitalization applied £10,000 of its surplus assets in the issue of 10,000 ordinary shares to the holders of the company's ordinary shares. In 1951 the company redeemed the shares. The Inland Revenue Commissioners alleged that the issue of the shares in 1920 was not for adequate consideration within the meaning of section 21 (1) of the Finance Act, 1922, as amended, and that accordingly the amount of £10,000 applied in 1951 in repayment of the amount credited as paid up on the shares had by virtue of the subsection to be treated as income of the members of the company and apportioned among them:—

Held, (1) that there being no suggestion that the shares issued in 1920 were other than wholly paid, the transaction resulted in some benefit to the company.

Inland Revenue Commissioners v. *Blott* [1921] 2 A.C. 171; 37 T.L.R. 762; 8 T.C. 101 applied.

(2) That the mere fact that the transaction contained an element of consideration did not mean that the consideration was adequate, and that, in the circumstances, it was not possible to say that the consideration for which the shares were issued was adequate within the meaning of section 21 (1) as amended.

CASE STATED by the Board of Referees.

The case stated so far as material provided: At a meeting of the Board of Referees held on July 29, 1955, and October 28, 1955, the board reheard an appeal by Thornton, Kelley & Co. Ltd. (hereinafter called "the company") against directions made by the Commissioners for the Special Purposes of the Income Tax Acts under section 21 of the Finance Act, 1922,[1] as amended,

[1] Finance Act, 1922, s. 21 (1) (as amended by s. 31 (1) of the Finance Act, 1927, and s. 19 (4) of the Finance Act, 1936): "For the "purpose of this subsection any such "sum as is hereinafter described shall "be regarded as income available for "distribution among the members of "the company and not as having been "applied or being applicable to the "current requirements of the com- "pany's business or to such other "requirements as may be necessary "or advisable for the maintenance "and development of that business, "that is to say:—(*a*) Any sum "expended or applied, or intended to "be expended or applied, out of the "income of the company, otherwise "than in pursuance of an obligation "entered into by the company before "August 4, 1914—. . . (iv) in redemp- "tion or repayment of any share or "loan capital or debt (including any "premium in such share or loan "capital or debt) issued or incurred "otherwise than for adequate con- "sideration. . . . For the purposes of "this subsection share or loan capital "or debt shall be deemed to be issued "or incurred otherwise than for "adequate consideration if—(A) it is "issued or incurred for consideration "the value of which to the company "is substantially less than the "amount of the capital or debt "(including any premium there- "on) . . ."

whereby they directed that the actual income of the company from all sources for the years ended June 30, 1951, and June 30, 1952, be deemed to be the income of the members of the company and the amount thereof apportioned among the members.

The company had appealed against the directions in the first instance to the Special Commissioners who on March 8 and 29, 1955, heard the said appeal and discharged the said directions. The Inland Revenue Commissioners being dissatisfied with that determination required the said appeal to be reheard by the Board of Referees, who reheard it as stated above.

The board found the following particular facts admitted or proved on the evidence adduced at the hearing of the appeal:

The company was incorporated in 1913 with an original capital of £10,000 divided into 10,000 ordinary shares of £1 each.

In 1920 the company caused a revaluation of its fixed assets to be made and applied part of the surplus shown on such revaluation in paying up in full 10,000 new 7½ per cent. cumulative preference shares of £1 each, which it issued by way of capitalization to the holders of its ordinary shares. In 1930 the said new shares were converted into 5 per cent. cumulative preference shares.

By virtue of a special resolution passed by the company in 1951, and with the confirmation of an order of the High Court of Justice dated May 7, 1951, the capital of the company was reduced from £20,000 to £10,000 by the repayment of the whole amount credited as paid up on the preference shares. At the same time the nominal capital of the company was again increased to £20,000 by the creation of 10,000 new ordinary shares of £1 each.

In March, 1952, the company caused a further revaluation of its fixed assets to be made and applied part of the surplus shown on such revaluation in paying up in full 10,000 new ordinary shares of £1 each which it issued by way of capitalization to the holders of its existing ordinary shares or their respective nominees.

At June 30, 1950, the company had a balance of £35,135 to the credit of profit and loss account.

The profit of the company for the years ended June 30, 1951 and 1952 (after provision for taxation), amounted respectively to £13,690 and £8,457, and on those dates the surplus of the company's liquid assets over its liabilities was £62,361 and £64,610 respectively. In respect of those years the company distributed by way of dividend the net sums of £531 and £525 respectively.

At the hearing of the appeal before the Special Commissioners the company admitted that the 10,000 preference shares issued in 1920, having been issued by way of capitalization, must on that account be treated as having been issued "otherwise than "for adequate consideration" within the meaning of the final paragraph of section 21 (1) of the Finance Act, 1922, as amended.

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The determination of the Special Commissioners in favour of the company was made on the footing of that admission and from that decision the Inland Revenue Commissioners appealed to the Board of Referees.

At the hearing before the board the company, with the consent of the Inland Revenue Commissioners, was given leave to withdraw their original admission under section 21 and substituted the following submission:

"The . . . [company] admit that in this year the company "expended or applied out of its resources the sum of £10,000 in "redemption of share capital but do not admit that the share "capital was issued otherwise than for adequate consideration."

The Inland Revenue Commissioners did not challenge the propriety or efficiency of the capitalization made by the company in 1920, but they contended that the admission made by the company at the hearing before the Special Commissioners represented a correct view of the law, and that no or no adequate consideration had moved from those to whom the shares had been issued.

The Board of Referees found, as a matter of law, that the 10,000 preference shares issued in 1920 were not issued "otherwise than for adequate consideration" within the meaning of the final paragraph of section 21 (1) of the Finance Act, 1922, as amended, with the consequence that that paragraph had no application to the sum of £10,000 applied in 1951 in repayment of the amount credited as paid up on the said shares.

The only authority cited to the Board of Referees on this point was *Inland Revenue Commissioners* v. *Blott*,[2] which did not appear to them to afford any support to the contention of the Inland Revenue Commissioners that a share issued by way of capitalization had to be regarded as issued otherwise than for adequate consideration within the meaning of section 21 (1).

On the footing of the finding of law indicated above the board found that the Inland Revenue Commissioners had failed in respect of either of the two years in question to discharge the burden of proving as a fact that the company had not within a reasonable time after the end of such year distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of their total income for the purposes of surtax a reasonable part of its actual income from all sources for the said year. They accordingly confirmed the determination of the Special Commissioners that the said directions be discharged.

Geoffrey Cross Q.C., *Sir Reginald Hills* and *E. Blanshard Stamp* for the Crown.

F. Heyworth Talbot Q.C. and *G. B. Graham* for the company.

Case cited in argument is referred to in the judgment.

[2] [1921] 2 A.C. 171; 37 T.L.R. 762; 8 T.C. 101.

WYNN-PARRY J. In this appeal I am concerned with one short question of law, which is stated in the case by the Board of Referees.

[His Lordship read the finding of law and continued:] Two points must be kept quite distinct. First of all, the aspect of the matter considered in relation to company law, and the aspect of the matter considered in relation to section 21 (1) of the Finance Act, 1922, to which I will refer later. Mr. Heyworth Talbot's argument proceeded on the basis that when a transaction such as this, namely a capitalization of the profits of a company and their application in paying up shares, has to be considered, there is necessarily involved in that transaction consideration moving to the company and from the shareholder, and Mr. Cross was inclined to accept that there must be an element of consideration. If there were not it would be difficult to see how the shares could be regarded as fully paid, and nobody doubts that shares which are issued pursuant to such a transaction are for all purposes to be regarded as fully paid up. Mr. Heyworth Talbot in developing his argument referred to a number of passages in the speeches of Lord Haldane and Lord Finlay in *Inland Revenue Commissioners* v. *Blott.*[1] I will refer shortly to one or two of them. In the course of his speech Lord Haldane said[2]: "My "Lords, the questions so raised are of much importance. Speak- "ing for myself, I think that they can only be answered if the "relation of a shareholder to a company incorporated under the "relevant Companies Acts, as they stood both before and after "their consolidation in 1908, has been determined." Then, having developed that point, Lord Haldane said[3]: "The com- "pany, acting with the assent so given of the shareholders, can "decide conclusively what is to be done with accumulated "profits." That makes it clear that, however artificial it may appear, the matter must be regarded as one in which there are two parties, the shareholders on the one side and the company on the other. But what is the benefit which the company gets? Mr. Heyworth Talbot sought to establish that the company got a benefit by relying on certain other observations in *Blott's* case,[4] in particular by Lord Haldane and Lord Finlay. Lord Haldane said[5]: "The new shares simply confer a title to a larger propor- "tion of the surplus assets, if and when a general distribution "takes place as in a winding up. In these assets the undis- "tributed profits now allocated to capital will be included, profits "which will be used by the company for its business but hence- "forth as part of its issued share capital." Mr. Heyworth Talbot relied on that passage as showing that the company got a benefit, and with that contention I am not disposed to disagree. Then he cited the following from the speech of Lord Finlay[6]: "The

[1] [1921] 2 A.C. 171; 37 T.L.R. 762; 8 T.C. 101.
[2] [1921] 2 A.C. 171, 181.
[3] Ibid. 182.
[4] [1921] 2 A.C. 171.
[5] Ibid. 185.
[6] Ibid. 194.

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Wynn-Parry J.

"effect of this operation was that the amount of the bonus was "retained by the company as additional capital, and that the "shareholders got the new preference shares." Later Lord Finlay said[7]: "Instead of his [the shareholder] getting any "dividend, or anything in the nature of a dividend, the fund "which might have been divided was impounded to increase the "capital of the business."

Those are the types of benefit to the company which Mr. Heyworth Talbot was able to extract from the speeches in *Blott's* case,[8] and I am in agreement with Mr. Heyworth Talbot, that purely from the point of view of company law the transaction in question resulted in some benefit to the company. But that does not end the matter, because I have to consider the question in the light of the relevant part of section 21 (1) of the Finance Act, 1922, as amended. [His Lordship read the relevant part of section 21 (1) as amended.]

It follows that the mere circumstance that there is shown to have been a benefit to the company as part of the consideration involved in the transaction which enables one to say that the shares are fully paid up, does not necessarily mean that the requirements of section 21 of the Finance Act, 1922, are complied with, and on the material before me I find it quite impossible to say that the provision at the end of subsection (1), which I have just read, has been fulfilled. For those short reasons, I am of opinion that the Board of Referees was wrong in its conclusion of law, that the appeal must be allowed, and that the matter must be referred back to the Board of Referees to deal with the matter on that basis. I will declare that the shares in question were not issued for adequate consideration within the meaning of section 21 (1) of the Finance Act, 1922, as amended; and the £10,000 has to be written back and treated as available for distribution.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Hatchett Jones & Co.*

I. G. R. M.

[7] [1921] 2 A.C. 171, 194. [8] [1921] 2 A.C. 171.

[PROBATE, ETC., DIVISION.]

1957
Jan. 28, 29.

Barnard J.

* CORBETT *v.* CORBETT.

Husband and Wife—Nullity—Conflict of jurisdiction—Void marriage—Foreign decree—Jurisdiction—Court of the lex loci celebrationis—Residence.

Conflict of Laws—Jurisdiction—Nullity of marriage.

Husband and Wife—Desertion—Termination—Jewish bill of divorcement—Not necessarily terminating desertion.

A wife went through a ceremony of marriage in 1936 with a man of unknown domicile in that part of Palestine which later became

Israel and where the parties to that marriage thereafter resided. In 1940 that marriage was purported to have been annulled and, in 1942, the wife remarried. On it appearing that the purported annulment was invalid, the District Court of Jerusalem, which, according to the law of Israel, had, in the circumstances, jurisdiction in a suit for nullity, on January 16, 1946, declared the marriage celebrated in 1936 to be invalid on grounds one of which would have rendered the marriage void according to English law.

The parties to the 1942 marriage later came to England where the husband left the wife, who subsequently, at the instigation of the husband, agreed to the obtaining of a *get* or Jewish bill of divorcement. According to the evidence the wife did not at any time really consent to the husband's leaving her. In 1956 the wife filed a petition in which she sought a declaration that the marriage of 1942 was a valid marriage and its dissolution on the ground of the husband's desertion:—

Held, (1) that it was well established that the celebration of a void, as distinct from a voidable, marriage in England was sufficient to confer nullity jurisdiction upon the English courts; it would, therefore, be wholly illogical to refuse to recognize a similar jurisdiction exercised by the courts of a foreign country.

(2) That the residence of the parties was a test of jurisdiction in nullity suits; the English courts would, therefore, recognize the annulment of January 16, 1946, and the marriage of December 13, 1942, should be declared valid.

Mitford v. *Mitford and Von Kuhlmann* [1923] P. 130; 39 T.L.R. 350 considered.

(3) That according to the law of England a *get* did not operate as a legal agreement to live apart; it had merely a religious effect. In considering, therefore, whether the obtaining of a *get* terminated desertion the court should have regard to all the surrounding circumstances happening both before and after the obtaining of the *get*. In the circumstances the *get* had not terminated the husband's desertion and the wife was entitled to a decree nisi.

Joseph v. *Joseph* [1953] 1 W.L.R. 1182; [1953] 2 All E.R. 710 distinguished.

UNDEFENDED PETITION for a declaration of the validity of a marriage and for the dissolution of that marriage.

The parties were married on December 13, 1942, in the part of Jerusalem which is now in the State of Israel. The marriage was according to the rites of the Jewish faith.

Before that marriage took place, the wife had married a man called Craig on April 1, 1936, at the Latin Patriarchate in Jerusalem. Both she and Craig thereafter resided in Jerusalem, and there was no doubt that the wife, at the time she went through that ceremony of marriage was domiciled in Palestine. The domicile of her then husband was not known.

Early in 1940, according to the evidence of the wife, the 1936 ceremony of marriage was purported to have been annulled by an ecclesiastical court, the Latin Patriarchate, and, on the strength of that annulment, the wife married her second husband in December, 1942. It appeared to have been realized at some time after the second marriage that the purported annulment of the first marriage was ineffective, and on January 16, 1946, the District Court of Jerusalem declared the marriage of 1936 to be

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invalid on grounds which, according to English law, would have rendered the marriage void.

Expert evidence was given that the certificate of the marriage which took place in 1942 would be received as prima facie evidence of the marriage in the courts in Israel; and the same applied to the certificate relating to the ceremony of marriage in 1936. According to the expert the purported annulment of the ceremony in 1936 before the Latin Patriarchate would not be regarded as a valid annulment by the law of Israel; but on the other hand, the judgment of the District Court in 1946 would be so regarded as the District Court, according to the law of Israel, has jurisdiction in nullity suits.

There was one child of the second marriage, a girl, born on October 5, 1943. The parties left Palestine and the husband obtained a post in Kuwait in the Persian Gulf. In about 1947 there was trouble between the parties because the husband was associating with another woman, but the wife seemed to have forgiven him. He gave up that appointment and apparently obtained some government post, where there was again trouble over another woman, who was his secretary. In June, 1952, the family sailed for England; and, from the evidence of the wife, after they had arrived in England, the husband took her and the child to an hotel near Victoria, in London, and left them there, having made it clear that he was leaving them for good. On December 18, 1952, both husband and wife being of the Jewish faith, the husband obtained a *get* or Jewish bill of divorcement from the Beth Din in London. This certified that the wife had received her *get* on December 18, 1952, and that she was free to marry again in accordance with Jewish religious law after 90 clear days from the aforementioned date.

As to the circumstances leading up to the obtaining of the *get* the wife said in her evidence that soon after being deposited by her husband in the hotel in London she found a flat where she moved with her child, and both she and her husband remained in touch with one another. She did her utmost to persuade him to rejoin her and try to make a success of the marriage, but the husband was adamant, and it was not very long before he was trying to persuade her to agree to a Jewish bill of divorcement. She said that this went on for two or three months, covering his visits to her and possibly her meetings with him, and finally she agreed as part of a policy of appeasement. She wanted to remain on friendly terms with her husband, and apparently still thought that, even in spite of her consenting to this bill of divorcement, there was a chance of their getting together again. Her evidence was that she did not think that the bill of divorcement would be of much use to the husband, who had told her that he wanted it because he wished to go to Canada, and it would help him with the Canadian authorities if he were able to say that he was a single man.

The wife saw the husband off when he sailed for Canada, and

she then suggested that if he got settled in Canada, he might consider sending for her and the child, but he replied that he did not intend to do so. Even after the husband arrived in Canada she corresponded with him in friendly letters up to the summer of 1954, when she wrote a letter suggesting that they should try life together again in Canada. She received an answer which was an emphatic "No."

On July 20, 1956, the wife filed a petition asking for a declaration that the marriage of December 13, 1942, was a valid marriage and seeking the dissolution of that marriage on the ground of the husband's desertion.

The husband was duly served with the petition and given notice to produce the wife's letter in which she had suggested a resumption of cohabitation in Canada. This he acknowledged adding: "I confirm that I have kept none of the correspondence "received from my former wife, Rita Veronica, nor do I "remember having received a letter from her requesting that she "and my daughter join me in Canada."

The matter came before the court as an undefended suit.

J. B. Latey for the wife.

The following cases and authorities were cited in argument: *Mitford* v. *Mitford and Von Kuhlmann* [1]; *Joseph* v. *Joseph* [2]; *Rayden on Divorce* [3]; *Dicey's Conflict of Laws* [4]; *Cheshire, Private International Law.* [5]

BARNARD J. stated the facts and continued: The first problem—and I do not find any difficulty in solving it—is whether or not the English courts can recognize the validity of the decree of annulment pronounced by the District Court in Jerusalem.

I have been referred by Mr. Latey to Dicey's Conflict of Laws, 6th ed., p. 381, r. 73, which reads: " . . . The courts of a foreign "country have jurisdiction to pronounce a decree of nullity of "marriage if— . . . (2) *semble*, if the marriage was celebrated in "such foreign country. . . ." Then there is a note to that at p. 383 which reads: "The second part of this rule means that the "courts of a foreign country where the marriage was celebrated "have, according to English law, a right to determine whether "the ceremony constituted a valid marriage according to the laws "of that country. This jurisdiction is independent of the "domicile of the parties. Our rule cannot, however, be laid down "as absolutely certain. English courts have assumed jurisdiction "for themselves to determine the validity of a marriage "celebrated in England, even in the case of parties not domiciled "in England, and as long as they continue to do so, there is no "apparent reason why they should not concede an analogous

[1] [1923] P. 130; 39 T.L.R. 350.
[2] [1953] 1 W.L.R. 1182; [1953] 2 All E.R. 710.
[3] 6th ed., pp. 634–635.
[4] 6th ed., pp. 244, 381, 383.
[5] 4th ed., pp. 353–354, 356–357.

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"jurisdiction to the courts of a foreign country. The distinction "between void and voidable marriages has not been discussed in "relation to the jurisdiction of foreign courts, and, in *Mitford* "v. *Mitford*,[1] the only modern case in which a decree of the "forum celebrationis was recognized, a voidable marriage appears "to have been treated as though it was void."

If we were to apply the English distinction between void and voidable marriages the marriage in question would obviously be regarded as void. I say that because of what appears towards the end of the judgment. The judge who decided the present case in the District Court of Jerusalem said: "In this case, therefore, I "hold that the marriage was invalid according to the canon law of "the petitioner, the law of the church that celebrated the "marriage, and as also according to the religious law of the "respondent she had not the capacity to contract a marriage with "a Christian, therefore the marriage is invalid." Undoubtedly a marriage to which one of the parties had not the capacity to contract would be regarded as a void marriage by English law.

I need not say anything about incapacity, which was the ground for the annulment, because it is well established that if the English courts recognize the jurisdiction of a foreign court to annul a marriage, then the ground on which that marriage was annulled by the foreign court is wholly immaterial.

It is also well established that the celebration of a void marriage in England, as distinct from a voidable marriage, is sufficient to confer nullity jurisdiction upon the English courts, and in my view, which is also the view of the editor of the sixth edition of Dicey's Conflict of Laws, it would be wholly illogical in those circumstances to refuse to recognize a similar jurisdiction exercised by the courts of a foreign country.

I need only say one word about *Mitford* v. *Mitford and Von Kuhlmann*,[2] which was also brought to my notice by Mr. Latey. It is a well-known decision by Sir Henry Duke P., and was a case in which an Englishman married a German woman in Germany. The marriage was a valid marriage, at the time, according to the law of Germany, but the German court annulled the marriage on a ground which was not a ground by English law but which English law would regard as rendering a marriage voidable. Sir Henry Duke P. based his decision on two grounds: first, that the marriage in question was celebrated in Germany and, therefore, the courts of Germany had jurisdiction to annul the marriage; and, secondly, on the ground that both parties were resident in Germany after the ceremony and, I think, up to the time that proceedings were taken in Germany. I say that because Sir Henry Duke P. is referring[3] to what Sir Edward Simpson said in *Scrimshire* v. *Scrimshire*[4]: "As both the parties "by celebrating the marriage in France, have subjected them-"selves to the law of that country relating to marriage; and as

[1] [1923] P. 130.
[2] [1923] P. 130.
[3] Ibid. 140.
[4] (1752) 2 Hag.Con. 395.

"their mutual intention must be presumed to be, that it should "be a marriage, or not, according to the laws of France, I appre- "hend it is not in the power of one of the parties, by leaving "the place, to draw the question of the marriage, or contract, "'ad aliud examen,' to be tried by different laws than those of "the place where the parties contracted." Then Sir Henry Duke P. adds[5]: "The reasons of the conclusion thus expressed "seem to me to apply with full force in the present case."

On the other ground, as regards residence, at the very beginning of the judgment Sir Henry Duke P. refers[6] to what Sir Francis Jeune P. said in the case of *Roberts (falsely called Brennan)* v. *Brennan*[7]: "In my view, residence—not domicil— "is the test of jurisdiction in a nullity case. The jurisdiction of "the ecclesiastical courts was based on the residence of the "parties, and in suits for nullity this court follows the practice "of the ecclesiastical courts, as prescribed by section 22 of the "Matrimonial Causes Act, 1857."

There is some criticism of Sir Henry Duke P.'s judgment, because he did not distinguish between a void and a voidable marriage. It would be difficult for me, in the light of more recent authorities, to say that there is no such distinction as regards jurisdiction. Logically there should be no such distinction, for the decree is precisely the same, whether the marriage be void or voidable, and I have little doubt that that was Sir Henry Duke P.'s view.

I have therefore no hesitation in coming to the conclusion that the English courts should recognize the decree of the District Court in Jerusalem. That means that this ceremony of marriage entered into between the wife and Craig on April 1, 1936, was an invalid marriage and therefore there was nothing to prevent her marrying the present husband, as she did, on December 13, 1942.

I am also satisfied that the husband could not have obtained the *get* or bill of divorcement without the consent of the wife.

The next problem is whether or not the wife, by consenting to that bill of divorcement, terminated the husband's desertion. Now there is a recent authority on this problem, the case of *Joseph* v. *Joseph*,[8] which was a case in which the Court of Appeal upheld an order made by Mr. Commissioner Grazebrook Q.C. dismissing a petition on the ground of desertion, on the ground that the wife had consented to a bill of divorcement and had brought the desertion to an end. But, as was pointed out to me by Mr. Latey, the facts in that case are totally different from the facts in the case now before me. In the case of *Joseph* v. *Joseph*[9] it is abundantly clear that it was the wife who wanted the divorce, and it was the wife who stirred the husband into

[5] [1923] P. 130, 140.
[6] Ibid. 135.
[7] [1902] P. 143, 144; sub nom. *Brennan (orse. Roberts)* v. *Brennan*, 18 T.L.R. 467.
[8] [1953] 1 W.L.R. 1182; [1953] 2 All E.R. 710.
[9] Ibid.

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going to the Beth Din in London and obtaining a bill of divorcement, because she wanted it for a very special purpose. She had made up her mind to go to Shanghai, and she appeared to think, and it may have been on good grounds, that this bill of divorcement would be recognized as valid in Shanghai, and she desired to go there as a single woman. Subsequently she changed her mind and remained in England, and then took proceedings against her husband on the ground of desertion.

All the Lords Justices refer to the fact that it was really the wife who initiated the proceedings, although the bill of divorcement could only actually be obtained by the husband.

[His Lordship referred to the facts leading up and subsequent to the obtaining of the *get*, holding that they were totally different from those in *Joseph* v. *Joseph*,[10] and to the fact that the husband had stated that he did not "remember" receiving the wife's letter, and continued:] It is an odd way of putting it. In my view it adds credence to what the wife has told me. It does not confirm the receipt of this particular letter, but it is very obvious, I think, that her evidence must be right, that she had been suggesting a reconciliation and building up the marriage afresh, otherwise I do not think he would have answered in that way: "nor do I remember having received a letter." If there had never been any suggestion at any time from the wife about joining him in Canada, I think he would have been quite emphatic about it, that he had never received any such letter.

Although the wife was not in any sense the instigator of this bill of divorcement, there can be no doubt that she agreed to it, and by agreeing to it was the husband's desertion terminated?

I have come to the conclusion, on the facts of this case, that it was not, because I notice that Jenkins L.J. says this in his judgment[11]: "Mr. Quass invited us to ignore the *get* given to the "wife as a mere nullity having no effect in English law, either "as a decree of divorce or as an agreement to separate. I agree "with him that the *get* has neither operation." It seems to me quite clear from that statement by Jenkins L.J. that the Court of Appeal was not saying that in every case where there is a *get* desertion must terminate, otherwise their separation from then onwards would be, in a sense, a legal separation, an agreement between them to live apart, and Jenkins L.J. says that the *get* has no such effect.

I have come to the conclusion that where you have desertion running and then a bill of divorcement, the parties to the suit being of the Jewish faith, the court must consider the effect of the *get* in the light of all the surrounding circumstances of the particular case before the court.

It is clear from the evidence that the wife in this case never really consented to the husband leaving her and remaining separate from her. With a bill of divorcement which can only have a religious effect and no possible legal effect in this country

[10] [1953] 1 W.L.R. 1182. [11] [1953] 1 W.L.R. 1182, 1184.

the court has to look at the facts of the case before it, and consider the circumstances in which the bill of divorcement came into existence. The court is also entitled to take into consideration what followed the bill of divorcement.

I have, therefore, come to the conclusion that in this particular case, in which I wholly accept the evidence given by the wife, and in which the facts are so totally different from the facts in *Joseph* v. *Joseph*,[12] I am able to hold that in spite of this bill of divorcement the husband continued in desertion.

This is a discretion case, and I think the matters referred to in the discretion statement, after I had expressly asked the wife a few questions, bear out the contention that she was never really willing that this marriage should break up and that her husband should remain apart from her, because she told me—and she appears to have only committed adultery in the summer of 1954, with a friend whom she knew out in the Persian Gulf, and who had come home on leave and got in touch with her—that she only spent three nights with him at a hotel in London after she had heard from her husband that he emphatically refused to consider the proposition that she and the child should join him in Canada. She further told me that she was feeling very unhappy and that was how she came to commit adultery.

In those circumstances this would obviously be a proper case to exercise discretion in her favour, and the wife is therefore entitled to a decree nisi on the ground of desertion.

Order accordingly.

Solicitors: *Mead & Darby.*

E. J.

[12] [1953] 1 W.L.R. 1182.

[CHANCERY DIVISION.]

1956
Dec. 19.
Danckwerts J.

* *In re* GOUK, DECD.
ALLEN *v.* ALLEN AND OTHERS.

[1956 G. 1364.]

Will—Construction—Absolute or life interest—Gift of residuary estate to A "and thereafter to her issue"—Effect of words "thereafter to "her issue."

A testatrix by her will gave pecuniary legacies and gave her residuary estate to A "and thereafter to her issue":—

Held, that A took the residuary estate absolutely.

Byng v. *Strafford* (*Lord*) (1843) 5 Beav. 558; affirmed sub nom. *Hoare* v. *Byng* (1844) 10 Cl. & Fin. 508 and *In re Percy* (1883) 24 Ch.D. 616 followed.

ADJOURNED SUMMONS.

By her will dated November 28, 1953, and made on a will form

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Gouk, decd., *In re.* Allen *v.* Allen.

a testatrix, Edith Mary Gouk, gave pecuniary legacies to a niece and nephew and continued: "and all the remainder of which I "am possessed to my sister, Mrs. Florence Elizabeth Allen, also "of No. 6, Highgrove Way, Ruislip, Middlesex, and thereafter "to her issue." On April 17, 1956, the testatrix died: and by this summons, to which the defendants were the daughter, her daughter Doris Florence, and her grandchildren Stewart and Christine, the sole executor and trustee of the will asked whether the sister was absolutely entitled to the residuary estate or whether she was entitled only to a life interest in it, subject whereto the residuary estate was held on trust for the daughter's children and remoter issue, or on what other trusts the residuary estate ought to be held.

Maurice Berkeley for the plaintiff.
A. C. Sparrow for the sister.
L. H. L. Cohen for the sister's child and grandchildren.

Cases cited in argument not referred to in the judgment: *In re Adam's Trusts* *; *Sherratt* v. *Bentley* †; *In re Russell* ‡; *In re Lupton's Estate.* § Reference was made also to Jarman on Wills, 8th ed., vol. 2, p. 1182, note (*g*).

Danckwerts J. The testatrix made her will on a will form on November 28, 1953, and she died on April 17, 1956. The language of the will is that of the testatrix, no doubt without any legal assistance. She gave and bequeathed unto her niece, Miss Doris Allen, and to her nephew, Leslie Greenwood Allen, the sum of £250 each, and then she proceeded as follows: "and all the "remainder of which I am possessed to my sister, Mrs. Florence "Elizabeth Allen, also of No. 6, Highgrove Way, Ruislip, Middle-"sex, and thereafter to her issue." The first gift plainly, unless it is cut down, is an absolute gift to the sister. The question is: What is the effect of the gift beginning with the words "and "thereafter"? There is no reference to death, though perhaps many people might think that it must mean "after the death of "the sister"; but there are two authorities, not actually on the words "and thereafter" but on the word "afterwards," which seems to me a word which is really indistinguishable in meaning from "thereafter," and I think I should follow those cases rather than the other series of cases to which Mr. Cohen has called my attention which all contain a reference to the death of the person who was held to be a life tenant. I propose, therefore, to apply *Byng* v. *Lord Strafford*,[1] and *In re Percy*,[2] to the present case, and to hold that Mrs. Florence Elizabeth Allen takes the residuary estate absolutely. After all, as Knight Bruce L.J. said in *Lowe* v. *Thomas*[3]: ". . . the numerous class of persons who, in wills

* (1865) 14 W.R. 18.
† (1834) 2 My. & K. 149.
‡ (1885) 52 L.T. 559.
§ [1905] P. 321.

[1] (1843) 5 Beav. 558.
[2] (1883) 24 Ch.D. 616.
[3] (1854) 5 De G.M. & G. 315, 317.

"and otherwise speak as if the office of language were to conceal "their thoughts, have no right to complain of being taken to "mean what their language expresses."

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GOUK, DECD., *In re.* ALLEN *v.* ALLEN.

Declaration accordingly.

Solicitors for all parties: *Enever, Strong, Freeman & Co.*

K. R. A. H.

[CHANCERY DIVISION.]

* BERRY *v.* ST. MARYLEBONE BOROUGH COUNCIL.

1957 *Feb.* 22.

Wynn-Parry J.

[1956 B. 3765.]

Rates and Rating—"Social welfare"—Theosophical Society—Objects of society not wholly charitable—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.

The plaintiff, on behalf of the Theosophical Society in England, asked whether or not that society was, under section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, an organization ". . . which is not established or conducted for profit "and whose main objects are charitable or otherwise concerned "with the advancement of religion, education or social welfare." An "organization" within the meaning of the subsection is entitled to a measure of relief from rates. According to its rules the main objects of the society were: "(1) To form a nucleus of the Universal "Brotherhood of Humanity without distinction of race, creed, sex, "caste or colour. (2) To encourage the study of comparative "religion, philosophy and science. (3) To investigate unexplained "laws of nature and the powers latent in man":—

Held (it being clear that the society was not established or conducted for profit), that the society was not an organization within the meaning of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, since the first of its three objects was not charitable and of too wide a scope to fall within the term "social welfare." That term, although too vague for accurate definition, must involve some direct impact on the proposed beneficiary.

Observations of Lord Tucker in *Inland Revenue Commissioners* v. *Baddeley* [1955] A.C. 572, 613; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525 applied.

Per curiam. "Concerned with . . . social welfare" means "wholly concerned" therewith. The phrase "social welfare" is virtually impossible to define, but it would appear to comprehend the provision of benefits or facilities which tend directly to improve the health and condition of life of the class of proposed beneficiaries.

ADJOURNED SUMMONS.

The Theosophical Society in England ("the society") through its general secretary, Alice Lilian Berry, a widow ("the

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[Reported by JENNIFER WEST, Barrister-at-Law.]

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"plaintiff") brought this summons to determine whether or not the society was an organization within the provisions of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,* and accordingly entitled to a measure of relief from liability for payment of the rates demanded by the Borough Council of St. Marylebone the rating authority for the Borough of St. Marylebone ("the defendants").

The objects of the society and the relevant facts are set out in the judgment.

G. G. Honeyman Q.C. and *Dick Taverne* for the plaintiff.
Geoffrey Cross Q.C. and *John L. Arnold* for the defendants.

Cases cited in argument and not referred to in the judgment: *Allen* v. *Emmerson* †; *Anderson* v. *Anderson* ‡; *In re Strakosch.* §

Wynn-Parry J. The question which is raised by this summons is whether on the true construction of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the society is an organization "which is not established or "conducted for profit and whose main objects are charitable or "are otherwise concerned with the advancement of religion, "education or social welfare." Those latter words are taken from the section which, so far as material, reads as follows: [His Lordship read the relevant part of the section and continued:] In the first place it is clear that the society is not established or conducted for profit. It is equally clear that its main objects are the three objects which are set out in paragraph 2 of its constitution which reads as follows: "(I) To form a "nucleus of the Universal Brotherhood of Humanity without "distinction of race, creed, sex, caste or colour. (II) To encour-"age the study of comparative religion, philosophy and science. "(III) To investigate unexplained laws of nature and the powers "latent in man."

Those objects have been the subject of consideration by the courts, including the House of Lords, in *In re Macaulay's Estate*,[1] which will be found reported as a note at the end of *In re Price*.[2] It is clear from the two speeches reported that those three objects are separate and distinct. In the course of his speech Lord Buckmaster said[3]: "This by itself, however wise and estimable "it may be, is certainly no charitable purpose, nor can I see

* Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to . . . "(*a*) any hereditament occupied for "the purposes of an organisation . . . "which is not established or con-"ducted for profit and whose main "objects are charitable or are other-"wise concerned with the advance-"ment of religion, education or social "welfare; . . ."

† [1944] 1 K.B. 362; [1944] 1 All E.R. 344.

‡ [1895] 1 Q.B. 749; 11 T.L.R. 253.

§ [1949] Ch. 529; 65 T.L.R. 383; [1949] 2 All E.R. 6.

[1] [1943] Ch. 435, n.

[2] [1943] Ch. 422; 59 T.L.R. 367; [1943] 2 All E.R. 505.

[3] [1943] Ch. 435, 437.

"that it is so connected with others which are stated as separate "and distinct objects as to connect it into a charitable object, "even if the latter objects could themselves be regarded as "charitable", and Lord Tomlin said[4]: "Each clause, in my "opinion, expresses a distinct and independent object." The House of Lords held as the ground of their decision that the first object was not charitable.

It becomes necessary, therefore, to examine object (I) with a view to considering whether or not it is within the relief provided by section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Object (I) is explained in paragraph 5 of the affidavit in support of the summons sworn by the plaintiff which states: "Theosophists explain the meaning of "object (I) in paragraph 2 hereof as follows: To form an ever-"expanding group of persons who are aware of the Universal "Brotherhood of Man which is implied by the Fatherhood of "God and who believe in working for the diminution and final "abolition of all intolerance and discrimination relating to race, "creed, sex, social class and colour." They seek, therefore, to form an ever-expanding body of persons who have certain beliefs and desire to work together to maintain them. As I have said, the House of Lords held that object (I) was not charitable, and I think that it must follow from that that they did not regard that object as being solely for the advancement of religion and education. It is, as Mr. Cross pointed out, at first sight somewhat curious that after the first class of objects mentioned in section 8 (1) (*a*), namely, those charitable, there are repeated two of the subjects of good charitable gifts, namely, religion and education. There is good ground, however, in my opinion, for agreeing with his suggestion that they were probably included in order that the benefit of the section might enure to bodies which, though concerned with religion or education, did not qualify as charities or charitable bodies within the legal meaning of charity because they were of a private nature. At any rate, there is no question of any private element in this case.

On that reasoning it follows that in order that the plaintiff should succeed she must demonstrate that the first object is for social welfare purposes. Mr. Honeyman in his argument laid stress on the word "concerned" and submitted that the effect of the introduction of that word was that each object need not be wholly concerned with, for instance, religion or education or social welfare. But I cannot accept that argument because, to my mind, it introduces such an element of uncertainty as would make the provision in the Act of 1955 quite unworkable. Since no test could be devised to establish when a degree had been reached beyond which it would not be proper to allow an applicant the benefit of the section.

The phrase "social welfare" is one the exact scope of which no judge has yet attempted to define, and I do not propose to

[4] [1943] Ch. 435, 437, 438.

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make the attempt myself. I share with Lynskey J. the view expressed by him in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[5] that it would be impossible to do so. There are, of course, some indications to be found in the decided cases. There is, for instance, the statement of Jenkins L.J. in *Baddeley* v. *Inland Revenue Commissioners*,[6] which was the subject of favourable comment, but criticized later in the House of Lords.[7] There is also the passage from the speech of Lord Tucker in *Inland Revenue Commissioners* v. *Baddeley* which reads[8]: "In considering whether they fall within "the fourth class of *Pemsel's* case,[9] as the Court of Appeal have "held, or within class 2—trusts for the advancement of educa-"tion—as was submitted in the alternative for the first time "before your Lordships, the words which, in my view, create "the difficulty are 'the promotion of social well-being.' This "is an extremely vague phrase which may have different mean-"ings to different minds and may include things considered by "some, but not by others, to be advantageous. It would appear "to cover many of the activities of the so-called 'welfare state' "and to include material benefits and advantages which have "little or no relation to social ethics or good citizenship, concepts "which are themselves not easily definable. I find it impossible "to construe these trusts in such a way as to restrict the opera-"tion of this language to promoting or inculcating 'those "'standards of secular conduct or behaviour . . . expected of a "'good neighbour and a good citizen' as the Court of Appeal "have done."

It is true that the problem which the court had to consider in that case was whether the provision in question was charitable or not, but it seems to me that the reasoning of Lord Tucker in the passage which I have just read is applicable to such a provision as the one I have to consider in this case, namely, section 8 (1) (*a*) of the Act of 1955.

Object (I) as explained in paragraph 5 of the plaintiff's affidavit is extremely wide and, as pointed out by Mr. Cross, would justify operations which could not by any stretch of the imagination be considered as within the phrase "social welfare," however wide a construction were reasonably placed upon that phrase. He gave two examples. One was that it would be perfectly legitimate under object (I) to further propaganda for the purposes of encouraging intermarriage between members of different races and that again it would be perfectly proper to conduct a propaganda campaign to break down the caste rules which obtain in India. As I have said, it would appear to me virtually impossible to attempt a definition of this phrase, but I am inclined to agree with Mr. Cross that it is necessary to discover in the

[5] [1957] 2 W.L.R. 322, 328; [1957] 1 All E.R. 407.

[6] [1953] Ch. 504; [1953] 3 W.L.R. 135; [1953] 2 All E.R. 233.

[7] [1955] A.C. 572, 585; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525.

[8] [1955] A.C. 572, 613.

[9] [1891] A.C. 531, 583.

operation of the undertaking some direct impact on the proposed beneficiary, his example being a social centre established in Liverpool with a view to encouraging better relations among the various races which are to be found from time to time in that great port. While regarding it as no more than an indication and not a definition of what should properly be regarded as the content of the phrase "social welfare," I would be content to adopt the sentence which Mr. Cross put forward in argument, namely, the provision of benefits or facilities which tend directly to improve the health and condition of life of the class of persons concerned.

Accordingly, I come to the conclusion that even accepting that every activity which might be undertaken under object (I) could be described as a good object, and that as has been observed in the House of Lords different minds might differ upon that matter, that, whatever be the true scope of the phrase "social "welfare," object (I) is too wide to cover no more than the activities which might reasonably be said to fall within that phrase.

For those reasons, therefore, I come to the conclusion that the main objects of the society are not concerned with the advancement of social welfare.

Declaration accordingly.

Solicitors: *Gibson & Weldon for Berry & Berry, Tunbridge Wells; Sharpe, Pritchard & Co.*

[CHANCERY DIVISION.]

* HAYES *v.* BRISTOL PLANT HIRE LTD. AND OTHERS.

[1956 H. No. 638.]

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Feb. 14, 15, 19, 20, 21.
Wynn-Parry J.

Company—Director—Removal—Proprietary interest—Director's action alleging removal wrongful—Preliminary point that action misconceived—Whether plaintiff having sufficient proprietary interest to maintain action.

The articles of a company did not require the directors to have any qualifying shareholding in the company. Article 26 of the company's articles provided: "Subject to the terms of any agree-"ment between them and the company, the directors shall be paid "out of the funds of the company by way of remuneration for "their services, such sums as the company, in general meeting, may "from time to time prescribe."

The plaintiff, who was a director and shareholder of the company, brought an action against the company and three of its directors claiming that at meetings of the board of directors at which he was not present he had been wrongfully expelled from his office of director by the three defendant directors and that another of the defendants had been appointed director in his place.

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He asked for declarations that the resolutions were invalid and inoperative, and consequential injunctions. The defendants took a preliminary point of law that the action was misconceived on the ground that the plaintiff had not a sufficient proprietary interest in the company to maintain the action:—

Held, that although the articles did not require a director to have any shareholding in the company or confer on a director any stipulated amount of remuneration in any year, as the plaintiff was in fact a shareholder and the rights of a director under article 26 amounted to more than a mere spes successionis, and constituted a sufficient proprietary interest, the preliminary point failed.

Pulbrook v. *Richmond Consolidated Mining Co.* (1878) 9 Ch.D. 610 applied.

Action.

The defendants in the action took a preliminary point of law, that the action was misconceived, and that the court had no jurisdiction to hear it on the ground that the plaintiff had not a sufficient proprietary interest in the company which entitled him to the relief claimed therein.

The case is reported on that point alone, and for that purpose the facts were assumed by the court to be as set out in the statement of claim.

The following alleged facts appear from the statement of claim: The defendant company, Bristol Plant Hire Ltd., was a private limited company, incorporated in 1950, to which the regulations contained in Part II of Table A in the First Schedule to the Companies Act, 1948, applied with modifications and variations. Special article 18 provided that the directors of the company should be not less than two nor more than five.

The plaintiff held 1,000 shares of £1 each out of an issued capital of 3,400 shares.

The directors were at all material times the plaintiff, his brother (who was not a party to the action) and the defendants, Davison, Warne and Lyons. At a meeting of the board of directors held on December 22, 1955, at which the three defendant directors (but not the plaintiff) were present, it was resolved that the plaintiff's exclusion from the board by reason of his absence from board meetings be confirmed.

At a purported adjourned meeting of the board held on January 3, 1956, the defendants, Davison, Warne and Lyons purported to appoint the defendant Thomas Harvey Simmonds a director to the board and to allot him 800 shares for which he offered to subscribe £5 each, provided he was appointed to the board.

The plaintiff claimed, inter alia, declarations that the resolutions of December 22, 1955, and January 3, 1956, were invalid and inoperative; he also asked for injunctions to restrain the defendants from carrying them into effect.

The relevant provisions in the articles are set out in the judgment.

Charles Russell Q.C. and *Nigel Warren* for the plaintiff.
J. B. Lindon Q.C. and *Michael Wheeler* for the defendants.

Cases cited in argument not referred to in the judgment: *Pickering* v. *Bishop of Ely* [1]; *Stocker* v. *Brockelbank* [2]; *Johnson* v. *Shrewsbury and Birmingham Railway Co.* [3]; *Rigby* v. *Connol* [4]; *Baird* v. *Wells* [5]; *Harben* v. *Phillips* [6]; *Bainbridge* v. *Smith.* [7]

WYNN-PARRY J., having stated the question, continued: For the purpose of considering the preliminary point that the action is misconceived and that I have no jurisdiction to entertain it further, or, alternatively, that at the end of it it will necessarily be the position that I should not grant either the declarations or the injunctions asked for, I am bound to consider only the statement of claim and the documents referred to in the statement of claim. Further, I am bound to proceed upon the basis that every statement in the statement of claim and every assertion in the documents therein referred to are true.

In the statement of claim the plaintiff asserts that he is, and has at all material times, been a director. I must therefore proceed on that basis. Mr. Lindon argued that, even if that be assumed, in favour of the plaintiff, he is not in a position to maintain this action because the relevant articles of association disclose no such proprietary interest as, having regard to the authorities, will allow him to invoke this equitable jurisdiction, namely, of asking for a declaration and a consequential injunction.

It is quite true that under the articles of association directors of this company need not be shareholders, and it is also true that they do not confer on the directors any direct right to a stipulated amount of remuneration in any year, but they provide in article 26 that "Subject to the terms of any agreement "between them and the company, the directors shall be paid out "of the funds of the company, by way of remuneration for their "services, such sums as the company, in general meeting, may "from time to time prescribe." The article also refers to the payment of expenses subject to the sanction of the board.

On those facts Mr. Lindon contended that there is no or no sufficient proprietary interest vested in the plaintiff as director. He cited to me a number of cases the principles underlying which, of course, I wholly accept. It is perfectly clear that in the case of any relationship which involves a personal relationship this court will not intervene by way of injunction to enforce on a person in the position of an employer or on a limited company a person to whom the employer or the company, expressing its view through the shareholders, does not want; and it is perfectly true also to say that the cases establish that the basis

[1] (1843) 2 Y. & C.Ch.Cas. 249.
[2] (1851) 3 Mac. & G. 250.
[3] (1853) 3 De G.M. & G. 914.
[4] (1880) 14 Ch.D. 482.
[5] (1890) 44 Ch.D. 661; 6 T.L.R. 229.
[6] (1883) 23 Ch.D. 14.
[7] (1889) 41 Ch.D. 462; 5 T.L.R. 375.

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of the court's interference is the existence of some right of property in the person seeking the relief.

In this case I have necessarily no information, considering this as a preliminary point, which enables me to proceed on the basis that the majority of the members of this company do not want the plaintiff to continue as a director, and I therefore shut that consideration and the authorities relevant thereto out of my mind. For the purpose of deciding this preliminary point, it is proper to concentrate on the question whether or not the plaintiff has a sufficient property interest.

The nearest case to the present is *Pulbrook* v. *Richmond Consolidated Mining Co.*[1] That was a case in which an individual director sued the company in question and the other directors; the basis of his action being that he was being improperly excluded from the board room and from otherwise discharging his duties as a director, as the other directors treated him as not being a director at all. I think that the solution to the problem presented by this preliminary point is to be found in a proper appreciation of certain passages in the judgment of Jessel M.R. The matter came before him on a motion, and he said[2]: "This "is a motion which raises some points of great importance. The "first question is, whether a director who is improperly and "without cause excluded by his brother directors from the board "from which they claim the right to exclude him, is entitled to "an order restraining his brother directors from so excluding "him." That is exactly the question which arises here, because I must proceed upon the basis that the plaintiff is a director and that those who seek to treat him as not being a director are not acting properly. Sir George Jessel continued[2]: "In this case "a man is necessarily a shareholder in order to be a director, and "as a director he is entitled to fees and remuneration for his "services, and it might be a question whether he would be "entitled to the fees if he did not attend meetings of the board."

Mr. Lindon founded his argument for distinguishing that case from the present case on the two statements in the sentence that I have just read, namely, that in that case a man was necessarily a shareholder in order to be a director because the articles required that he should hold that qualification, and secondly that the Master of the Rolls said[3]: "he is entitled to fees and remunera-"tion for his services." Unfortunately, the statement of facts and, indeed, also the arguments, are silent as to the form which the article relating to remuneration of directors took in that case, and one does not know whether it provided for the payment of a specific sum to each of the directors, or was in the form of article 76 of the present Table A and article 26 of the special articles of this company. I shall have to consider further that question later in this judgment.

[1] (1878) 9 Ch.D. 610.
[2] Ibid. 612.
[3] Ibid.

The Master of the Rolls went on[4]: "He has been excluded. "Now, it appears to me that this is an individual wrong, or a "wrong that has been done to an individual. It is a deprivation "of his legal rights for which the directors are personally and "individually liable." That sentence establishes beyond doubt that, other things being equal, and the director having a sufficient property interest, he is in a position, so far as procedure is concerned, to maintain an action by himself in his own name. The Master of the Rolls continued[4]: "He has a right by the "constitution of the company to take a part in its management, "to be present, and to vote at the meetings of the board of "directors. He has a perfect right to know what is going on at "these meetings. It may affect his individual interest as a "shareholder as well as his liability as a director, because it has "been sometimes held that even a director who does not attend "board meetings is bound to know what is done in his absence. "Besides that, he is in the position of a shareholder. . . ." I pause there in order to give full effect to the statement of the Master of the Rolls[4]: "It may affect his individual interest as a "shareholder as well as his liability as a director," it must be observed that he is contrasting two capacities, and when he said[5]: "Besides that, he is in the position of a shareholder," he is treating the position of the plaintiff as a shareholder separately from his position as a director.

Those two passages throw light on the effect which is properly to be given to the previous statement in the judgment,[6] "In this "case a man is necessarily a shareholder." I think that all that the Master of the Rolls meant in saying that was as a result of the framework of the articles of association a director was also a shareholder, but that his reasoning must equally apply where the articles do not require that a director should hold a qualification, but as a matter of fact in that case he was, as well as being a director, a shareholder, and that if he was a shareholder then he must as such be entitled to the degree of protection which was mentioned by the Master of the Rolls in the passages from his judgment which I have already read.

I will continue his judgment from where I broke off[7]: "Besides "that, he is in the position of a shareholder, of a managing "partner in the affairs of the company, and he has a right to "remain managing partner, and to receive remuneration for his "services." I pause there to remind myself that I am considering a preliminary point on jurisdiction. It is open to the court to stop an action such as this in limine if, on a point being properly taken, it thinks right to do so, and generally speaking, if a point as to jurisdiction is taken, it is the duty of a court to bring the proceedings to as early an end as possible. At the same time, it is quite clearly established that it is a jurisdiction which should only

[4] 9 Ch.D. 612.
[5] Ibid. 613.
[6] Ibid. 612.
[7] Ibid. 613.

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be used very carefully and in circumstances where there is no possibility of doubt as to the lack of jurisdiction.

It is against that background that I proceed to consider what is perhaps the most vital aspect of this matter reflected in the language of the Master of the Rolls where he said [7]: "he has a "right to remain a managing partner, and to receive remuneration "for his services." Mr. Lindon has urged on me that that phrase should be construed as applying only where the articles in question give an express right, for instance by reference to a specific sum, to a director to receive remuneration in each year; but, in my view, particularly on a point such as this, it would be wrong to give such a narrow meaning to the phrase. I am not prepared to accede to the suggestion that an article such as article 26 gives no more than what was described as a spes successionis. It gives a director a right, if the company decide to pay the directors in any year for their services, to share in that remuneration, and that seems to me to be more than what can properly be described as a spes successionis. It is, for the purposes of the problem which I have to consider, a sufficient property interest, and I cannot help feeling, having regard to what would be the consequences had I taken a different view, that it would be really a denial of justice to prevent a person in the position of this plaintiff from pursuing what otherwise is a proper right of action, because the Master of the Rolls goes on [8]: "He has what is commonly called a right of action, and those "decisions which say that, where a wrong is done to the com-"pany by the exclusion of a director from board meetings, the "company may sue and must sue for that wrong, do not apply "to the case of wrong done simply to an individual."

I should not in those circumstances be justified in bringing this action to an end at this stage, and it must therefore proceed.

[The hearing of the action continued.]

Preliminary objection not allowed.

Solicitors: *Robins, Hay & Waters for Burges, Salmon & Co., Bristol; Ralph Bond & Rutherford for Veale & Co., Bristol.*

I. G. R. M.

[7] 9 Ch.D. 613. [8] Ibid.

[CHESTER AUTUMN ASSIZE.]

1956 *Nov.* 7, 8, 9.

Streatfeild J.

* CARRINGTON *v.* JOHN SUMMERS & SONS LTD.

Factory — Crane or lifting machine — "Travelling crane" — Crane working overhead but running on rails at ground level—Whether "overhead travelling crane" — Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *ss.* 14 (1), 24 (7).

The plaintiff was employed by the defendants as a crane attendant

[Reported by H. Eifion Roberts, Esq., Barrister-at-Law.]

at their steelworks. The crane in question (known as a "Goliath "crane") consisted of a large transverse girder about 94 feet long and some 30 feet from the ground which spanned a shallow pit used as a scrap dump and travelled on wheels along single rails. On the girder travelled a crab containing the winches on which the crane worked. The rails rested on sleepers laid a few inches above ground level along the sides of the dump. The girder was supported by two pairs of legs at the base of which was a wheelbox. For a distance of about 20 yards the ground level had been raised incidentally to the provision of a drainage system. In consequence there was a space of only 3¾ inches between the top of the chair upon which the rail was mounted and the underside of the side-member of the wheelbox.

In the course of his employment the plaintiff slipped inadvertently on a piece of scrap metal, whereupon his left foot shot forth and was caught in the narrow space between the underside of the wheelbox and the ground.

The plaintiff alleged, inter alia, that the defendants were in breach of their statutory duty under sections 14 (1) and 24 (7) of the Factories Act, 1937:—

Held, (1) that the general provisions of section 14 as to the fencing of dangerous machinery applied to cranes and lifting machines in appropriate cases, notwithstanding the special provisions relating to the same contained in section 24; but that the defendants were not in breach of section 14.

(2) That the expression "overhead travelling crane" as used in section 24 (7) did not mean an overhead crane which travels but a crane which travels overhead; that the "Goliath crane" was not such a crane in that although the crab travelled transversely on the girder overhead, nevertheless the crane as a whole travelled on rails at or about ground level; and that accordingly the defendants were not in breach of their statutory duty under section 24 (7).

ACTION.

The plaintiff, William John Carrington, who was employed by the defendants, John Summers and Sons Ltd., as a crane attendant, brought an action for damages against them on the ground of their alleged negligence and breaches of statutory duty under sections 5 (1), 14 (1) and 24 (7) of the Factories Act, 1937.

The plaintiff's claim arose out of an accident which he sustained during the hours of darkness in the course of his employment on December 1, 1954. On that day he was attending to a Goliath crane used for the purpose of removing metal to and from a scrap dump. The dump was in the form of a shallow pit about 100 yards long and 50 feet wide. Each side of it was flanked by a wall which extended for about 8 feet below and a few inches above ground level.

The crane consisted of a large transverse girder which allowed a traverse of about 94 feet from side to side. On the girder travelled a crab containing the winches on which the crane worked. This girder spanned the scrap dump about 30 feet above the ground and was supported by two pairs of legs which were spreadeagled out. The bottom ends of these legs were joined together by means of a wheelbox which had two side-members, was roofed in on top and carried an ordinary flanged wheel at

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either end. These wheels moved on a single rail mounted on a line of sleepers which ran longitudinally along the wall on either side of the scrap dump.

On one side of the scrap dump there was a set of railway lines which bifurcated. One line, upon which trucks loaded with scrap travelled, ran close to the dump. The other line, which ran parallel with it, held the trucks into which pig iron was deposited from the "pig machine." This machine required a great deal of water for cooling purposes. Consequently, a number of drain holes had been cut in the ground on the set of lines immediately adjacent to this machine. But this did not prove wholly satisfactory and so the defendants covered the ground with cinders which in time became consolidated to such an extent that the ground was raised. The new ground level for a distance of about 20 yards resulted in there being a space of only 3¾ inches between the top of the chair upon which the rail was mounted and the underside of the side-member of the wheelbox.

At one time the wheelbox was boxed in, sides, top and bottom, the underplate being fastened to angle irons with flanges 3 inches wide riveted to the bottom of the wheelbox. But some months before the accident a section of the underplate and angle iron about 9 feet in length had been removed, with the result that (a) the section which remained created a 3-inch projection from the bottom side of the wheelbox and (b) the space of 9 feet formerly covered by the underplate constituted a hole extending to the hollow interior of the wheelbox.

At the time of the accident, the position was as follows:—(i) the gap between the top of the chair and the underside of the side-member of the wheelbox was 3¾ inches, and (ii) the gap between the chair and the underside of the remaining underplate was only 3 inches. In these circumstances, a man's feet might be caught if he slipped. His toe might catch against one of the rivets holding the underplate to the flange. His ankle might catch against the projection of the angle iron. Again, if his foot went up into the hollow of the wheelbox, it might catch against the edge of the underplate as the crane moved towards it.

The scrap delivered to the dump was normally compressed into solid blocks which sometimes disintegrated in the process of being lifted by the crane. When that happened the detached bits of scrap would fall onto the walkway and would have to be removed.

On the night of the accident there had been a good deal of spillage of scrap onto the walkway. Consequently the plaintiff, as crane attendant, saw fit to remove altogether the two trucks containing the defective blocks. The magnet of the crane was fastened to these trucks and they were dragged away. The plaintiff accompanied the crane in its movement, scotched the wheels of the trucks further down the line and returned with the crane to the place where work had been going on just opposite the "pig machine," where the ground level had been raised and

where there was an accumulation of scrap which had fallen from the blocks.

As the crane approached this place, the plaintiff, who had been walking alongside it, crossed over from the four-foot way and stepped on some of the spillage of scrap lying on the ground. When he was going to get his shunter's pole from the top of the wheelbox, he slipped on a piece of scrap and his left foot shot out in front of him: at the same moment the driver of the crane put it in reverse, as he had slightly overshot the mark and the plaintiff's left foot was turned over in the $3\frac{3}{4}$-inch gap at the precise point where the angle iron and the underplate began again. As the result of his injuries the plaintiff lost his foot.

The report is confined to the issue raised in connexion with sections 14 (1) and 24 (7) of the Factories Act, 1937.

Norman Richards Q.C. and *Geoffrey Howe* for the plaintiff.

H. V. Lloyd-Jones Q.C. and *W. L. Mars-Jones* for the defendants.

The following cases were cited in argument: *Atkinson* v. *Tyne-Tees S.S. Co.*[1]; *Lotinga* v. *North Eastern Marine Engineering Co. (1938) Ltd.*[2]; *Fowler* v. *Yorkshire Electric Power Co. Ltd.*[3]; *Holmes* v. *Hadfields Ltd.*[4]; *Smithwick* v. *National Coal Board*[5]; *Parvin* v. *Morton Machine Co. Ltd.*[6]; *Summers (John) & Sons* v. *Frost.*[7]

STREATFEILD J., after stating the facts, continued: The question was raised by counsel for the defendants whether section 14 of the Factories Act, 1937, applied to this crane in view of the existence of section 24, upon which reliance was also placed by the plaintiff. Counsel's argument is that, on a comparison of the wording of section 10 of the Factory and Workshop Act, 1901, and sections 12, 13 and 14 as well as section 24 of the Factories Act, 1937, section 24 lays down a complete set of rules applicable to cranes and other lifting machines, and, therefore, supersedes, so far as cranes and lifting machines are concerned, the general provisions with regard to the fencing of dangerous machinery laid down in section 14.

I cannot accept that argument. Section 14 applies in general to the fencing of dangerous parts of machinery. Section 24 deals specially with cranes and lifting machines, but deals with them from the point of view of their construction, their rails in so far as they are travelling cranes, the loads which they are to carry, their inspection, and, in the case of overhead travelling cranes,

[1] [1956] 1 Lloyd's Rep. 244.

[2] [1941] 2 K.B. 399; 57 T.L.R. 670; [1941] 3 All E.R. 1.

[3] [1939] 1 All E.R. 407; 55 T.L.R. 375.

[4] [1944] 1 K.B. 275; 60 T.L.R. 256; [1944] 1 All E.R. 235.

[5] [1950] 2 K.B. 335; 66 T.L.R. (Pt. 2) 173.

[6] [1952] A.C. 515; [1952] 1 T.L.R. 682; [1952] 1 All E.R. 670.

[7] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.

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their method of operation, and that is all. Neither in the authorities nor in section 24 itself, comparing it with section 10 of the Act of 1901 or otherwise, can I find any justification for the submission that section 24 cannot exist side by side with section 14 and I do not think that the existence of section 24 prevents the operation of section 14 if section 14 is otherwise appropriate.

[His Lordship then considered whether the defendants were in breach of section 14 (1) of the Factories Act, 1937, and held that they were not. He continued:] The next allegation in the statement of claim is that there was a breach of section 24 (7) of the Factories Act because this crane was an overhead travelling crane. Subsection (7) provides: "If any person is employed or "working on or near the wheel-track of an overhead travelling "crane in any place where he would be liable to be struck by "the crane, effective measures shall be taken by warning the "driver of the crane or otherwise to ensure that the crane does "not approach within twenty feet of that place."

It was submitted that this is an overhead crane which travels and that so long as it is an overhead crane and it travels it is an "overhead travelling crane," and it matters not where it travels, whether on an overhead gantry rail or on the ground. And counsel for the plaintiff advanced the somewhat ingenious argument that whatever may be said of men who are walking level with the rail of this crane along the walkway, from the point of view of those occasional workers who may have to get down six or eight feet into the sump of the scrap dump the rail is over their heads. Therefore it was argued that although it might not be overhead from the point of view of the people on ground level, it is overhead from the point of view of the people on the lower level in the sump.

I cannot accept that argument and do not think that from the point of view of one person it is an overhead travelling crane and from the point of view of another person it is not. It either is or is not for everyone and I do not attach importance to the fact that people very occasionally may work with their heads below the level of the road when the defendants are short of scrap stock, whereas normally there is something like a mountain of scrap in this dump. I do not think that would make this crane an overhead travelling crane.

The question is: what is an overhead travelling crane? I would be inclined to accept, if I had to decide the point, which I do not think I have, that Mr. Martin, who was called for the plaintiff, has hit upon a useful definition of an "overhead "crane"—without the word "travelling." He defined an "overhead crane" as one where the lifting mechanism is mounted at a height greater than that to which the load can be raised. In other words, if the drum or winch which winds the load is situated above and the hook is suspended below it so that, in any event, the load cannot be raised above the height of the winch, that is an "overhead crane" and it would rule out what is

called a "tower crane" with which one is familiar in docks, where a jib crane is situated often very high up and with long legs which run on rails on the sides of the dock. The winch of a "tower crane" is below the head of the jib and, therefore, it is not an "overhead crane," although it is very much over one's head when one is on the ground.

If there were in law such a thing as an "overhead crane," I would be prepared to accept Mr. Martin's definition of it, but section 24 nowhere refers to an "overhead crane." What it does refer to is interesting. In subsection (1) the word is the all-embracing one, a "lifting machine." Section 24 (1) reads: "All "parts and working gear whether fixed or movable, including the "anchoring and fixing appliances, of every lifting machine shall "be of good construction, sound material, adequate strength and "free from patent defect, and shall be properly maintained." That subsection deals with any device for lifting and covers both what Mr. Martin calls an "overhead travelling crane" and a jib crane, a mobile crane, and any other crane. Section 24 (2) merely provides for the examination of the same kind of machine. Then in subsection (3) there is a different phrase: "All rails on which "a travelling crane moves . . ."—not a "travelling overhead "crane" or an "overhead travelling crane," but simply a "travelling crane." The subsection reads: "All rails on which "a travelling crane moves and every track . . . shall be of proper "size and adequate strength and have an even running surface; "and any such rails . . . shall be properly laid . . ."

Therefore, a travelling crane is any crane which moves on rails. It would clearly apply to a jib crane mounted on top of a tower on the dock side because that moves on rails. It would not apply to a mobile crane which is mounted on pneumatic tyres and is capable of being steered. Subsection (3) says nothing about "overhead" or otherwise.

There follow provisions in subsections (4) and (5) dealing with the safe working loads of lifting machines—again the same general term—and in subsection (4) there is a particular reference to a jib crane, as to the sort of indicator it should have. Subsection (5) contains a provision that no lifting machine shall be loaded beyond the safe working load and subsection (6) provides that "No "lifting machine shall be taken into use . . . unless it has been "tested . . ." So far, therefore, section 24 refers only to "lifting machines" and to a "travelling crane," that is to say, any crane that travels on rails.

Then, for the first time, in subsection (7) there comes the phrase "overhead travelling crane." There is no definition of that phrase. It has been submitted on behalf of the plaintiff that it means an overhead crane which travels—whether up aloft or down below does not matter so long as it is an overhead crane and it travels. On the other hand, it is contended by the defendants that an overhead travelling crane is a crane which travels overhead.

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In construing those words I must take them in their natural meaning and in the order in which they appear. The subsection does not say "an overhead crane which travels," and, indeed, there is no reference to an overhead crane anywhere else in section 24, but it says an "overhead travelling "crane" and it seems to me that upon the ordinary principles of construction the word "overhead" qualifies the word which follows immediately afterwards, namely, the word "travelling," rather than the word "crane." If I were to construe it as the plaintiff invites me to do, I should be transposing the word "travelling" from the place where it is in this phrase and interposing it again afterwards: I should be saying "an overhead "crane travelling" and not "an overhead travelling crane." In my judgment, therefore, an overhead travelling crane, within the meaning of subsection (7), is a crane which travels overhead.

An example of that is that which is given in Chambers' Technical Dictionary, to which my attention was drawn, and which refers to an overhead crane such as one gets in power stations and factories which travels on a gantry rail situated at a height, built up on stanchions. That is "an overhead "travelling crane," and I cannot apply that same criterion to one which, although it may work overhead, in fact runs along the ground.

I am confirmed in that view by the obvious intention of the legislature in subsection (7). It is referring to the protection of men who are required to work in a place from which ordinarily there is difficulty in escaping in case of emergency. Where men are working on or near the track of an overhead travelling crane, whether up a ladder or on a staging which is erected there, but have small opportunty of escape because they are working in a position where the crane may strike them, it is clearly necessary that there shall be a statutory regulation that the crane must not be brought within 20 feet of where they are working.

On the other hand, if the crane is running along the ground and is in full view of the workmen, there is no difficulty in people stepping out of the way; they can do so on the ground where they are standing. Therefore, there is not the same need for protection against a crane which runs along the ground where there is ample space to get away as there is in the case of a man working on a raised up gantry rail.

In my view that is the intention of the legislature. I have gone into the matter with some particularity because it has been strenuously argued by counsel on both sides, but I am unable to accept the view that section 24 (7) applies to this Goliath crane which in fact runs along the ground.

[His Lordship proceeded to consider the issue of negligence and held that the defendants were liable to the plaintiff in damages for negligence at common law in that, instead of providing proper drainage, they had permitted the level of the walkway to be built up, at or near the place of the accident, to a level which was only

a few inches below the base of the wheelbox and girder, thus removing the protection which the depth of the sleeper elsewhere afforded to anyone walking along the walkway. His Lordship further held that the plaintiff had not been guilty of contributory negligence and he assessed the general damages to which the plaintiff was entitled at £3,500, which, with the sum of £720 special damages, made a total of £4,220.]

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Judgment for the defendants on the issues of breach of statutory duty.
Judgment for the plaintiff on the issue of negligence.

Solicitors: *Russell Jones & Walker; Laces & Co., Liverpool.*

[QUEEN'S BENCH DIVISION.]

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[1955 G. No. 680.]

Negligence—Safe system of work—Standard of care—Injurious dust—Dermatitis from West African hardwood dust—Danger from West African hardwood recent discovery—No knowledge by employers of danger—Duty of employers to keep abreast of modern discoveries—Employers in receipt of trade bulletins and material the equal of that commonly received by employers in the trade—Employers' lack of knowledge of danger not negligence.

Factory—Dust—Elimination—Accumulation of dust—Dangerous wood dust given off by sanding machine—Ventilation adequate for ordinary purposes—Ventilation insufficient to remove injurious dust—Settlement of dust on skin of workman—Whether an accumulation—"Provision . . . for . . . adequate ventilation . . . and for "rendering harmless . . . dust . . . that may be injurious" applicable to impurities circulating in the air—No requirement for provision of extractors to prevent injurious dust from entering into circulation—Whether dust "accumulating . . . in workroom"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 4 (1), 47 (1).

Factory—Ventilation or fumes—Dust.

The plaintiff, a cabinet maker, was employed by the defendants in a furniture factory where, about 15 yards from his place of work, a sanding machine gave off a quantity of fine wood dust into the air. Extractors had been fitted to the machine and a hessian curtain placed round it but enough dust escaped from the cubicle to settle on the plaintiff's skin. In February, 1954, as a result of the settlement on his skin of dust from West African hardwoods passing through the sanding machine, the plaintiff contracted dermatitis. The ventilation in the factory was adequate for ordinary purposes but it did not remove enough of the wood dust to prevent the remainder from being a source of danger. West African hardwoods only began to be used in any substantial quantity in this country after 1945, when the defendants first started to use them, but by 1953 about 80 per cent. of the wood

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passing through the sanding machine in the defendants' factory was West African hardwood. Suspicion of West African hardwoods as a source of dermatitis did not begin to be aroused until 1952, and the defendants did not know that the wood was a source of danger; they got bulletins issued by the Furniture Trade Development Council and also circulars from Government Departments and laboratories, which material was the equal of that commonly received in the trade, but there was no evidence whether or not that material contained any reference to West African hardwoods as a source of dermatitis. The plaintiff, alleging negligence and breach by the defendants of their statutory duty under sections 4 (1) and 47 (1) of the Factories Act, 1937,[1] claimed damages:—

Held, (1) that it was the duty of an employer to take reasonable steps to keep up to date his knowledge of new developments and discoveries which might reveal hitherto unsuspected sources of danger to his workmen, and that the test to be applied in ascertaining whether or not the defendants were negligent in not knowing of the recent discovery of the danger from West African hardwoods was whether or not they had failed to acquire information that was commonly known in the trade, or had been guilty of obvious neglect. Applying that test, the defendants had fulfilled their duty at common law for they had got the material which was the equal of that commonly got in the trade and, in the absence of evidence that it contained something which they had missed which would have put them on their guard, it could not be assumed against them that they had not read that material with due attention, nor, on the facts, had they been guilty of obvious neglect.

(2) That section 4 (1) of the Factories Act, 1937, on its proper construction, referred only to the provision of adequate ventilation for ordinary purposes by the circulation of fresh air, by means of windows and vents, which got rid of impurities circulating in the air, and did not require the provision of exhaust appliances at the point of egress of a particular impurity so as to prevent it from entering the air.

Ebbs v. *James Whitson & Co. Ltd.* [1952] 2 Q.B. 877; [1952] 1 T.L.R. 1428; [1948] 2 All E.R. 192 applied.

(3) That the accumulation of dust referred to in section 47 (1) of the Factories Act, 1937, meant not an accumulation in the air but an accumulation of deposited dust and that, as it was not from an accumulation of dust in that sense but from the settlement of dust upon his skin that the plaintiff had contracted dermatitis, that section had no application. Accordingly, the defendants had not been shown to be in breach of any statutory duty.

[1] Factories Act, 1937, s. 4 (1): "Effective and suitable provision shall be made for securing and maintaining by the circulation of fresh air in each workroom the adequate ventilation of the room, and for rendering harmless, so far as practicable, all fumes, dust and other impurities that may be injurious to health generated in the course of any process or work carried on in the factory."

S. 47 (1): "In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom."

ACTION.

The plaintiff, Thomas Walter Graham, was employed by the defendants, the Co-operative Wholesale Society Ltd., as a cabinet maker at their furniture factory at Enfield. He worked in a large workshop about 75 by 25 yards in area in which, about 10 or 15 yards from his place of work, was an electrically driven sanding machine which gave off a quantity of fine wood dust into the air. Originally the machine had two extractors fixed in position so as to remove a quantity of the dust, but after complaint by the workmen in 1947 two more abstractors were fitted and a high hessian curtain put round three sides of the machine. Subsequently, because the dust was blowing into the face of the operator, an air line was fixed which blew the dust away. The machine was in use for about 40 per cent., 18 hours, of the working week. A certain amount of the dust was kept in by the hessian but it was not completely dustproof and enough escaped from the cubicle to reach the place where the plaintiff worked and to settle on his skin; an appreciable quantity, enough to be brushed or shaken off, settled on his coat, which he kept not far away. In February, 1954, the plaintiff, as a result of the settlement on his skin of wood dust from West African hardwoods used in the factory, contracted dermatitis.

Before 1939 West African hardwoods were not used in this country in any substantial quantities, but after 1945 they did begin to be used. Up to 1952 the defendants used only obeche wood, but West African mahogany, particularly a type called sapele, was introduced in April, 1953. In 1953 about 80 per cent. of the wood used in the workshop and passing through the sanding machine was West African hardwood, and of that 80 per cent., 80 per cent. was obeche wood and the remaining 20 per cent. West African mahogany.

About one or two per cent. of the population are sensitive to wood dust and it is possible for a person belonging to that one per cent. to go for many years in contact with it without developing dermatitis and then suddenly to contract it; that is what happened in the plaintiff's case, for he had worked in the workshop with the wood dust about for eight or nine years and suddenly contracted dermatitis in February, 1954. West African hardwood had only comparatively recently been detected as a cause of industrial dermatitis, and suspicion began to be aroused about 1952 or the end of 1951; in 1935 and 1936, however, two references had been made in reports by the Chief Inspector of Factories to monsonia, a type of West African hardwood not used by the defendants, as having noxious properties. The defendants' assistant works manager, to whom had been delegated the duty of seeing that proper precautions were taken for their workmen, did not in fact know that the dust from West African mahogany was a source of danger; he received bulletins issued by the Furniture Trade Development Council and also circulars from Government Departments and laboratories

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and other public bodies, which material was the equal of that commonly got by the trade, but it was not proved that that material contained any reference to the danger. He did not get the annual report of the Chief Inspector of Factories, and there was no evidence one way or the other as to whether the material he received included bulletins issued by the Royal Society for the Prevention of Accidents.

The ventilation in the factory was adequate for ordinary purposes but it was not adequate as a means of removing dust with a specifically injurious quality and it did not in fact remove enough of the wood dust to prevent the remainder from being a cause of injury.

The plaintiff, alleging, inter alia, negligence by the defendants, their servants or agents, and/or breach by them of their statutory duty under sections 4 (1) and 47 (1) of the Factories Act, 1937,[1] claimed damages. The defendants denied liability.

Charles Doughty Q.C. and *R. T. Monier-Williams* for the plaintiff.

John Thompson Q.C. and *Colin Fawcett* for the defendants.

The following cases were referred to in argument: *Gregson* v. *Hick Hargreaves & Co. Ltd.**; *Kilgollan* v. *William Cooke & Co. Ltd.*†; and *Ebbs* v. *James Whitson & Co. Ltd.*‡

Devlin J. This is a case in which the plaintiff alleges that in the course of his employment as a cabinet maker he contracted industrial dermatitis caused by wood dust that was given off in the workshop in which he worked. Wood dust appears from the evidence to have been only comparatively recently detected as being a cause of industrial dermatitis. Industrial dermatitis as a hazard in the woodworking industry is, of course, well known, but the substances from which it has hitherto been supposed to come have been things like synthetic glue; and the first reference to wood dust as a source of danger which appears in the material I have got is in a report of the Chief Inspector of Factories and Workshops made in 1935. I say in the material I have got, but I have not in fact got the report of the chief factory inspector, and, whether or not it is strictly admissible for the purpose, what has been referred to is a reference to that report in *Ebbs* v. *James Whitson & Co. Ltd.*[1] That was a case in which a plaintiff, an employee in a coach-building factory, contracted dermatitis from contact with dust produced by scraping and sandpapering a West African hardwood called monsonia. The plaintiff had worked in the woodworking industry for about 20 years and had not had any skin trouble. It was found, however, that he was idiosyncratic to monsonia wood dust and that the dermatitis was undoubtedly

* [1955] 1 W.L.R. 1252; [1955] 3 All E.R. 507.

† [1956] 1 W.L.R. 527; [1956] 2 All E.R. 294.

‡ [1952] 2 Q.B. 877; [1952] 1 T.L.R. 1428; [1952] 2 All E.R. 192.

[1] [1952] 2 Q.B. 877; [1952] 1 T.L.R. 1428; [1952] 2 All E.R. 192.

caused by it. Monsonia wood dust was not at that time—April, 1950—a recognized cause of dermatitis and the defendants had not taken any precautions in working it. The evidence was that this wood is not used in this country in substantial quantities until after the war and that only two cases of dermatitis were attributed to it, although there were two references in reports of the Chief Inspector of Factories and Workshops in 1935 and 1936 respectively to the wood as having noxious properties, and in the later report it was said that the skin of some people might be sensitive to the dust. I take that reference to the wood as being a reference to monsonia wood and not to West African hardwood generally. It is a little difficult to judge of the value of it without seeing the report itself, which has not been produced; it does not seem to have been followed up in any way. No later report of the chief inspector has been produced which makes any reference to this subject. It may be that it was left alone because monsonia wood was not used in large quantities even now, but it seems clear that that report did not at the time make any impact upon those people who have to deal with this subject, because the evidence I have is that it is only comparatively recently that it has been recognized, even by consulting dermatologists, specialists, that West African hardwood and other wood dust may be an appreciable source of danger from the dermatitis point of view. As I have said, the evidence is that before the war these West African hardwoods were not really used in any substantial quantities, but after the war they began to be used, and in particular they were used in the defendants' factory at Enfield.

I think that the true position is that it was probably about 1952, or the end of 1951, that suspicion of West African hardwood was beginning to be aroused. It was, of course, in the early part of 1952 that *Ebbs* v. *James Whitson & Co. Ltd.*[2] was heard in the courts, but again that, so far as the evidence goes, does not seem to have made any impact on the world of dermatologists and industrial consultants and people whose business it is to consider the conditions in woodworking factories. At least, I have not been referred to any literature either at the time or later which drew the attention of that sort of public to it, and, of course, that sort of public does not read the Law Reports and cannot be expected to find out about the facts there. It may be, as I have said, that it was because monsonia is used in very small quantities and its particularly noxious properties were thought to be restricted to monsonia and not to affect other West African hardwoods, but whatever the reason I have not been referred to anything in which it was discussed or brought to the notice of the public. Indeed, I have only been referred to two documents in the case which refer to wood dust as a source of dermatitis. When I say documents in the case I mean circulars and other documents of that sort that people interested in the matter may be expected to read, and both of them—one of them

[2] [1952] 2 Q.B. 877.

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certainly and the other I should suspect—came into existence after February, 1954, when this accident occurred. The first is a circular issued by the Factory Department of the Ministry of Labour and National Service in January, 1956, marked "Form "1863," headed "The Prevention of Dermatitis," in which hardwood is included only in a general clause and is not put as one of the chief causes of dermatitis. The other document is an industrial booklet issued by a firm of manufacturers making barrier cream, which deals with a number of sources of dermatitis and the dangers in woodworking establishments arising from the use of machines. It contains a list of "known irritant woods "more commonly used in the industry," which includes practically every tree known in the course of nature. Those, then, are the two documents, and the only two, which have been produced in the case as written evidence of what was or might have been expected to be common knowledge in the trade.

The plaintiff's case is that it was the wood dust from this West African mahogany, which did not include obeche, which was injurious; there is some evidence to show that obeche is not a wood which is injurious so far as dermatitis is concerned, though it may possibly have deleterious effects on people who are liable to asthma, and it was the plaintiff's view, not, I think, based on anything very specific, that it was the introduction of this new West African mahogany in April of 1953 which was the cause of the trouble. The case, however, has not been fought on a narrow basis, and I think that is probably right because, if the defendants had any reason to suspect West African hardwood generally as being the cause of dermatitis, they would no doubt have taken some action. Their case is that they had no reason at all to suspect any wood and certainly not any West African hardwood.

I shall consider first the plaintiff's claim at common law. The first question is, to whom was delegated by the defendants the duty of seeing that proper precautions were taken for the health of their workmen. That person in relation to this workshop was the assistant works manager. Having identified him I next have to ask myself, did he know that the dust from this wood that was being used in the sanding machine was a source of danger? If not, ought he as a reasonably prudent man to have known about it? And if he either knew or ought to have known, did he take reasonable precautions for the safety of those who were working near the sanding machine?

He has given evidence before me, and he says that in fact he did not know. I accept that evidence, which has not seriously been challenged. The next question, whether he ought to have known, raises a question of some general importance as to just what it is that an employer ought to do by way of keeping pace with the new developments and discoveries which may reveal hitherto unsuspected sources of danger to his workmen. The assistant works manager is a man of great experience in the industry, who has been through the shop himself; for 12 years

he was a foreman, and he has spent his life in woodworking. He did not in fact know, and this was a comparatively recent development. How far, then, is it the duty of an employer to keep abreast of developments of this sort and to acquaint himself with new discoveries?

In my judgment he is not entitled to wait until the matter is forcibly brought to his attention either by an outbreak of disease in his factory or something of that sort. I think that, at any rate in trades where there are known hazards, such as dermatitis, something more is required and would be accepted by reasonably good employers as being required. He must take reasonable steps to keep his knowledge on the matter up to date. I do not think that this includes, except perhaps in exceptional cases, making independent researches of his own, but he must not allow himself to fall below the standard that is adopted by reasonably good employers in the industry. I adopt as the test which I think ought to be applied the very well-known passage from the judgment of Lord Dunedin, Lord President, in *Morton* v. *William Dixon Ltd.*,[3] nearly 50 years ago, which has many times since been adopted; most recently it has been referred to in *Morris* v. *West Hartlepool Steam Navigation Co.*[4] in the House of Lords. The words that Lord Dunedin used were these[5]: "Where the negligence of the employer consists of what "I may call a fault of omission, I think it is absolutely necessary "that the proof of that fault of omission should be one of two "kinds, either to show that the thing which he did not do was "a thing which was commonly done by other persons in like "circumstances, or to show that it was a thing which was so "obviously wanted that it would be folly in anyone to neglect to "provide it." Subject to a gloss upon the word "folly" which appears in the case to which I have referred, that passage has been constantly approved as being a correct statement of the law in cases of faults of omission, and I think that I can properly apply it to a case of this sort where the fault, if it exists, is a fault of omission, being a failure to make reasonable inquiries or to keep abreast of contemporary sources of information. I would, therefore, paraphrase it in this way for my purposes, that I have to ask myself whether the assistant works manager failed to acquire information that was commonly known in the trade—that is, in the furniture trade—or (and that is the second limb of the test) whether he was guilty of obvious neglect.

Having taken that as the test which I shall apply, I must first, in applying it, ask myself what on the evidence I have heard was the knowledge that was common in the furniture trade about wood dust, specifically West African hardwood dust, as a source of dermatitis. The evidence on that point which I accept is that of an industrial consultant who was called by the

[3] 1909 S.C. 807.

[4] [1956] A.C. 552; [1956] 1 W.L.R. 177, 180; [1956] 1 All E.R. 385.

[5] 1909 S.C. 807, 809.

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defendants. What he says can be put under two heads. He spoke about the sort of information that was available to employers in the trade and which, according to his experience, good employers made themselves familiar with. It consisted chiefly of bulletins that are issued by the Furniture Development Council, which is in fact a trade body consisting of employers in the furniture trade, and they issue a series of bulletins dealing, amongst other things, with all questions of risk. The other thing that he referred to was bulletins that were issued by the Royal Society for the Prevention of Accidents. That was the material which he thought employers commonly had in order to keep themselves up to date in these matters.

The part of his evidence on which the defendants naturally rely was that his experience in the furniture trade showed that no precautions are in fact taken against disease from wood dust. He instanced fifteen, I think, or at any rate quite a considerable number of concerns, which he named which are accepted as being large concerns with whose arrangements in this respect he was familiar by reason of his professional duties, and he said that he had investigated the precautions taken in those factories against dermatitis and that they did not include precautions against wood dust. He said that he was unaware of any suggestion that wood dust was recognized as a source of dermatitis, and I accept his evidence as to what was common knowledge among employers in this trade.

The next question is, to what extent did the defendants' works manager familiarize himself with that? His evidence was that he got the bulletins from the Furniture Development Council, and also circulars from Government Departments, laboratories and other public bodies whose business it was to keep up to date with these rules. He did not get, he said, the annual report of the Chief Inspector of Factories, and I do not think that there is any positive evidence—I do not think he was asked one way or the other—as to whether included among the miscellania to which he referred were the bulletins issued by the Royal Society for the Prevention of Accidents. But I am satisfied by that evidence, which I accept, that he did get the material which was the equal of that which was commonly got in the trade. It is not necessary that there should be complete uniformity in the matter. I think it is fair to infer from the evidence that he got what was the principal bit of material that employers generally rely upon, namely, the bulletins of their own organization dealing expressly with these matters, and he got other material as well.

Now those being the facts, what is it that under the first limb of Lord Dunedin's principle as I have adapted it the plaintiff has to prove in order to succeed? I think he must show either that the works manager did not get the information which was commonly got in the trade, and I have just held that that has not been shown, or, alternatively that, having got it, he either did not read it or did not pay sufficient attention to what he read.

On that second part of the case I think that the plaintiff is in some difficulty. I do not think that he can discharge the burden of proof upon him in this matter by inviting me, as Mr. Doughty in effect invited me, to speculate from answers which the works manager gave on other parts of the case, that it is likely or probable that he did not read these bulletins with proper attention. The way, after all, to find that out is to get hold of the bulletins, see if they contain anything about wood dust and then see what it is, if anything, that the defendants have missed and call for an explanation from them as to how it came that they missed it. I should have thought that this type of case might be one in which interrogatories can usefully be asked for before the trial, the type of case in which the defendants are interrogated as to the grounds of their belief in material matters. If the defendants had been asked whether they believed that wood dust was not injurious and, if so, what were the grounds for that belief, the material would perhaps have been collected in a convenient form which could have been examined and scrutinized at the trial. However that may be, I cannot concern myself except with the evidence I have got, and the fact that the Furniture Development Council bulletins are not here and have not been scrutinized, whatever else might be done by way of granting the plaintiff relief, does not entitle me to assume that they contain things which there is no evidence that they did contain. The evidence, so far as it goes, is that they made no reference to diseases from wood dust. What is surprising is that they contained no reference to the monsonia case to which I have referred. I have already suggested one or two reasons why it may be that that was not thought of any general importance, or it may be that, as the works manager said, it was in fact referred to but it did not register on his mind because he knew that monsonia wood was not a wood that he was in the habit of using. It is impossible for me to assume that they did in fact say something which, if read carefully, would have put the defendants on their guard. It is the more impossible because no material has been produced to me from any source, whether the Furniture Development Council or any other source, which was proved to be in existence at the time of the accident and which referred to wood dust as a cause of this disease. In my judgment, therefore, the plaintiff has failed to bring himself within the first limb of Lord Dunedin's principle.

The second limb is that of obvious neglect. [His Lordship considered the evidence and continued:] In my judgment the claim at common law fails on the ground that the plaintiff has not proved that the defendants knew or ought to have known that the wood dust was a source of danger.

I turn now to the two sections of the Factories Act, 1937, upon which the plaintiff relied. They are sections 4 and 47. Mr. Thompson's first answer, the one that comes logically first to section 4, is that it is not a section which gives the plaintiff a

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right to sue. That question is one which has now been twice reserved for future consideration in the Court of Appeal,[6] and I am happy, therefore, to think that the view I take of Mr. Thompson's other submissions in relation to section 4 is such that it makes it unnecessary for me to determine that obviously difficult point. I shall pass therefore to his next submission on the assumption that the section does impose obligations on the defendants for the benefit of the plaintiff. The section deals with ventilation and reads as follows: "Effective and suitable "provision shall be made for securing and maintaining by the "circulation of fresh air in each workroom the adequate ventila-"tion of the room, and for rendering harmless, so far as "practicable, all fumes, dust and other impurities that may be "injurious to health generated in the course of any process or "work carried on in the factory."

That section would appear, upon a superficial reading of it, to be in two parts, and to impose two separate and distinct obligations, one, the obligation of maintaining adequate ventilation by the circulation of fresh air in each workroom, and secondly, the obligation of rendering harmless so far as practicable dust that might be injurious to health. But that point has already been considered and determined by the Court of Appeal in *Ebbs* v. *James Whitson & Co. Ltd.*,[7] where it is laid down that that is not the proper construction, and that the section is to be regarded as a whole and as dealing with ventilation. Had it been otherwise it might well have been argued that there was an absolute duty independently of ventilation to render the dust in this case harmless, and interpreted literally in that way I should have been compelled to hold that the dust had not been rendered harmless; in fact it did harm to the plaintiff. But the construction adopted by the Court of Appeal is that both limbs of the section are in effect governed by the words "by the circulation "of fresh air," a limitation is therefore to be put upon the obligation to render harmless and it is an obligation to render harmless only so far as harmlessness can be secured by the circulation of fresh air. Does it, then, apply to the provision of exhaust appliances? If one looked simply at the section itself, there is no reason why it should not. Mr. Doughty submits that exhaust appliances for the extraction of stale air with other impurities, including dust and so forth, is one of the means of securing ventilation: that is one of the means of securing a circulation of fresh air, and therefore it must mean that exhaust appliances must be provided and that they must be such as will render harmless so far as practicable the dust in this case. If that submission is right, I should no doubt have to consider the scope of the words "so far as practicable."

[6] *Ebbs* v. *James Whitson & Co. Ltd.* [1952] 2 Q.B. 877 and *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.* [1923] 2 K.B. 832.

[7] [1952] 2 Q.B. 877.

Mr. Thompson submits that that is not the right view to take, and that it is a section dealing with adequate ventilation in the ordinary sense of the term, "secure adequate ventila-"tion by the circulation of fresh air" as that is ordinarily understood by vents and windows and doors and so on, and not with the provision of exhaust appliances for the removing of a particular impurity. He fortifies that submission by reference to section 47 of the Act, where exhaust appliances are specifically dealt with. The last part of section 47 (1) provides that, "where the nature of the process makes it practicable, "exhaust appliances shall be provided and maintained, as near "as possible to the point of origin of the dust or fume or other "impurity, so as to prevent it entering the air of any work-"room." That, he says, is a provision which is specifically concerned with the sort of situation that these extractors were provided for, and the obligation is based under section 47. Mr. Doughty also relies upon section 47, which I shall have to consider next, but for the moment I am dealing with section 4, and Mr. Thompson says that the proper construction of section 4 is that it should not be held to apply to matters that are covered by section 47.

In my judgment that submission is right, and section 4 should not be treated as requiring the provision of exhaust appliances. While they did not say so in so many words, I think that the reasoning which the Court of Appeal in *Ebbs* v. *James Whitson & Co. Ltd.*[8] adopted in the construction of section 4 inevitably leads to that conclusion. For the basis of Mr. Thompson's argument (and it was also, I think, the basis of the reasoning in the Court of Appeal) is that, if section 4 were available, it would impose a so much more stringent duty than that imposed by section 47 that there would be really no room for section 47 at all. It is true that it may be said that section 47 applies to a substantial quantity of dust, whether it is likely to be injurious or not. But taking, for the purpose of comparison of the two sections, a small quantity of dust, then section 47 requires that a small quantity of dust which is likely to be injurious should be removed by exhaust appliances, but section 4, on the reading which the plaintiff would desire to give to it, would already have provided that a small quantity of dust which might be injurious would have to be removed by exhaust appliances; and "might be "injurious" is a more stringent obligation than "that which "is likely to be injurious." That is the reasoning specifically adopted in the Court of Appeal, and it applies equally on the point which I am considering.

Another point something to the same effect is that, whereas the obligation under section 47 to provide exhaust appliances is only where the nature of the process makes it practicable, it is an unrestricted obligation under the first part of section 4, and

[8] [1952] 2 Q.B. 877.

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an obligation so far as practicable under the second part. Whichever be the part that is relevant, the term, "where the nature "of the process makes it practicable" is a more favourable limitation from the employers' point of view than anything that is, I think, contained in section 4. That, therefore, again means that section 47 would be unnecessary if section 4 were given the wider meaning of application to exhaust appliances. The only scope that would be left for section 47 would be in relation to substantial quantities of dust that were not likely to be injurious, and even then, as I have said, the provision in relation to exhaust appliances would be a narrower one than that which is to be found in section 4 on the wider reading.

For these reasons, not merely because I respectfully adopt the nature of the reasoning that is given in the Court of Appeal in *Ebbs* v. *James Whitson & Co. Ltd.*,[9] but also in order to put a proper construction on section 4 in its place in the Factories Act as a whole, I am satisfied that on its proper construction section 4 refers only to adequate ventilation for ordinary purposes by the circulation of fresh air and does not include any requirement which would mean that exhaust appliances would have to be provided to remove dust from the point of egress so as to prevent it entering the air. Section 4 is dealing with the circulation of fresh air which gets rid of impurities which come into the air, whereas section 47 is dealing with the methods of stopping impurities from ever getting into circulation at all.

That leaves, then, only section 47 itself as the other section on which the plaintiff relies. That section as to its first part—I have read the last part—reads as follows: "In every factory in "which, in connection with any process carried on, there is given "off any dust or fume or other impurity of such a character "and to such extent as to be likely to be injurious or offensive "to the persons employed, or any substantial quantity of dust "of any kind, all practicable measures shall be taken to protect "the persons employed against the inhalation of the dust or "fume or other impurity and to prevent its accumulating in any "workroom."

Mr. Thompson submits that this dust was not likely to be injurious within the meaning of those words as they have been interpreted in the decided cases. "Likely to be injurious" involves a knowledge of the possibility of injury which takes one back in effect to the common law test that I have already considered. But I think there is a simpler answer; it is an answer, of course, that Mr. Thompson gave as well, and it is one that I find it simpler to decide. The section imposes two duties: the first is that the employer shall take practicable measures to protect employees against inhalation; that plainly does not apply in this case, because there was no inhalation of dust, and, indeed, it is not argued by Mr. Doughty that it does apply. What Mr.

[9] [1952] 2 Q.B. 877.

Doughty relied upon was the other obligation, to take practicable measures to prevent the dust accumulating in any workroom. He submitted that in this case the dust accumulated in the air. I do not think that that is the meaning of accumulation within this section. I think that accumulation means accumulation of deposited dust. It has the same sort of meaning as is indicated by the use of the same term in section 1 (*a*), which requires that accumulations of dirt and refuse should be removed daily by a suitable method from the floors and benches of workrooms and so on. Nor do I think that it can be said, without an abuse of language, that this dust which settled on the plaintiff can be regarded as accumulating upon him, and it was from the settlement of dust upon him that he acquired this disease. One has only to test it by this simple question: how does one prevent the accumulation of dust? The answer, I think is, if you are old fashioned, you take a duster and dust it away, but no one would suggest that a settlement of dust on the skin of a workman was something that could be dusted away in that sense, and in my judgment that second part of the section does not apply.

The result is, therefore, that the plaintiff's claim fails and there must be judgment for the defendants.

I should like to add this word: this is now the second reported case of dermatitis that has arisen from West African hardwood, and, although the incidence of sensitivity to it may be small it seems to me nevertheless to be plain enough that there is a proportion of people working in these woodworking industries who may be put in danger as a result of it. The defendants are a very well known body and I have no doubt that they will take steps to see that the facts of this case are brought to the notice of the Furniture Trade Development Council so that that council can circulate the industry on the matter as it thinks right, and I have no doubt also that they will have regard to the last paragraph of Form 1863, in which the Factory Department of the Ministry of Labour and National Service expresses the wish to be kept informed where dermatitis has occurred in factories and employers are asked to assist in the prevention of disease by voluntary notifications.

Judgment for the defendants.

Solicitors: *Shaen, Roscoe & Co.; H. Smith for N. C. Wright, Manchester.*

J. F. L.

[CHANCERY DIVISION.]

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* *In re* GOLDSCHMIDT, DECD.
COMMERCIAL UNION ASSURANCE CO. LTD. *v.* CENTRAL BRITISH FUND FOR JEWISH RELIEF AND REHABILITATION.

[1956 G. 580.]

Charity—Cy-près doctrine—Residuary gift—Gift to charitable institution—Institution not identifiable—Residuary gift to another charity—No general charitable intention.

A testatrix, by clause 10 of her will, dated August 20, 1950, bequeathed out of her residuary estate £5,000 to the "Fund for "the Relief of Distressed German Jews in England." Then followed bequests of various sums to 16 other named institutions and the clause closed with a direction to the trustees "to hold any "balance of my residuary estate which may remain after the "payment of the said sums upon trust for the Hospital for Sick "Children Great Ormond Street W.C.1." There was no fund answering to the above description and it had not been possible to discover what fund the testatrix intended to benefit, but the bequest was claimed by two organizations with a somewhat similar object to that described.

On a summons taken out by the executor of the will to determine (a) what institution was entitled to the bequest and (b) in the alternative, whether it (i) was a good charitable bequest and should be applied *cy-près* or (ii) fell into the balance of the residuary estate of the testatrix:—

Held, that the legacy fell into the ultimate residue and passed to the hospital for sick children, for the testatrix had failed to identify the object of her bounty, and accordingly, since she plainly intended to give the £5,000 to a particular institution and not for a special object or purpose and the residuary legatee was also a charity, it was not possible to infer a general charitable intent and apply the bequest *cy-près*.

In re Harwood [1936] Ch. 285 and *In re Davis* [1902] 1 Ch. 876 distinguished.

ADJOURNED SUMMONS.

By clause 10 of her will, dated August 20, 1950, Victoria Rebecca Goldschmidt devised, bequeathed and appointed her residue to the trustee of her will "upon trust to make the "following payments to the following institutions namely to the "Fund for the Relief of Distressed German Jews in England "the sum of £5,000 [and various sums to 16 other named "institutions] and to hold any balance of my residuary estate "which may remain after the payment of the said sums upon "trust for the Hospital for Sick Children Great Ormond Street "W.C.1."

The testatrix died on February 5, 1954. Doubts having arisen as to the destination of the fund, the executors of the will (Commercial Union Assurance Co. Ltd.) took out a summons to determine (1) whether (a) the Central British Fund for Jewish

Relief and Rehabilitation or the trustees of the Association of Jewish Refugees in Great Britain Benevolent Society, or any other and, if so, what society, institution, persons or body of persons were entitled to the legacy of £5,000 given by clause 10 "To the Fund for the Relief of Distressed German Jews in "England"; (2) in the alternative, whether such bequest (a) was a good charitable bequest and should be applied *cy-près*, or (b) fell into the balance of the residuary estate; (3) that, if necessary, directions might be given for a scheme to be settled.

J. E. Vinelott for the plaintiffs.

L. H. L. Cohen, *Victor Coen*, *Nathaniel Micklem* for various defendants.

H. R. Williams for the Attorney-General.

Cases cited in argument and not referred to in the judgment: *In re The Clergy Society* [1]; *Loscombe* v. *Wintringham* [2]; *Lyons (Mayor of)* v. *Advocate-General of Bengal* [3]; *In re Raine* [4]; *In re Knox* [5]; *In re Wilson.* [6]

HARMAN J. This case raises a rather peculiar point. It was said by Buckley J. in *In re Davis*,* that the court will lean towards finding a general charitable intent in the circumstances which he there mentioned. The court has been doing so ever since, and it has leaned so far over that it has become almost prone. I have always had a preference for an upright posture. Be that as it may, I cannot think that there can be any leaning when the residue itself is given to charity, because there is no question of favouring charity against the rest of the world. To lean one way or the other would be to favour one charity against another charity, and there is no injunction that I know of to make the court do that. This is, therefore, a mere question of construction.

The testatrix, Victoria Rebecca Goldschmidt, died on February 5, 1954, leaving a considerable estate. By her will dated August 20, 1950, she appointed the plaintiffs, the Commercial Union Assurance Co. Ltd., to be her executors and gave certain pecuniary legacies, an annuity, and legacies of her chattels to friends, god-children, a nurse, servants, and so forth. She then came to bequeath her residuary estate, and, having no further obligation to her family or friends, as she conceived it, she devoted the whole of the rest of her money to charitable objects. She gave it to her trustees to convert in the usual way, to pay her debts out of the proceeds and to pay also the legacies, which she had already given. That left her with what

[1] (1856) 2 K. & J. 615.
[2] (1856) 13 Beav. 87.
[3] (1876) 1 App.Cas. 91.
[4] [1956] 2 W.L.R. 449; [1956] 1 All E.R. 355.
[5] [1937] Ch. 109; [1936] 3 All E.R. 623.
[6] [1913] 1 Ch. 314.
* [1902] 1 Ch. 876, 884.

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she described as "my residuary estate," and out of that she directed her trustees "to make the following payments to the "following institutions." Prima facie, "Institutions" means "organized bodies of one sort or another." There are then set out a long list of different institutions. At the end she provides: "And to hold any balance of my residuary estate which may "remain after the payment of the said sums upon trust for the "Hospital for Sick Children Great Ormond Street W.C.1." That institution, therefore, is the ultimate residuary legatee.

Most of the institutions named in this clause are easily identifiable. Leaving out the first one, which is a controversial one, there are the Royal Society for the Prevention of Cruelty to Animals, Our Dumb Friends' League, the Fund for the Prevention of the Exportation of Horses, the National Society for the Prevention of Cruelty to Children, the National Adoption Society, and then one which I will leave out. Then The Sunshine Home for Babies: that is not a description exactly of any institution, but it is easily identifiable with a well-known institution of which it forms part. Then there is the Distressed Gentlewomen's Association, which is also a well-known association. Then I leave out one, and next are the National Trust, the National Art Collections' Fund, and the British Provident Association for Hospital and Additional Services, then the Blinded Soldiers' and Sailors' Hostel, which is well known as St. Dunstans, and then the Star and Garter Home for Disabled Sailors and Soldiers, King George's Fund for Sailors, and, finally, the Soldiers', Sailors' and Airmen's Families Association. There is no difficulty about those. There are, however, three of a different kind. The first is this: "To the Fund for the Relief "of Distressed German Jews in England the sum of £5,000." Secondly, there is a gift to "Lady Islington, President of the "Pro Patria Day Nurseries, the sum of £1,000." Thirdly, there is a gift to "The School of Medical Psychology of the sum of "£100."

It appears that Lady Islington's Fund and the School of Medical Psychology had ceased to exist before the testatrix died in 1954. Nobody seems to doubt that their legacies lapse and that the ultimate residuary legatee benefits proportionately.

With regard to the first of these institutions, the position is this: It has not been possible to find out exactly what fund it was that the testatrix intended to benefit. I have no doubt, having regard to the form of this will, that there was in her mind one fund which she intended to benefit, and it is very difficult to suppose that she meant any other. There are two extremely reputable institutions, which have come before me, both claiming to be persona designata under the will, and there are mentioned two others which have been found by the plaintiffs in the course of their researches, who do not wish to claim to be persona designata, but would like not to be forgotten if there is a share out. I sympathize with them entirely in that desire.

The question is: Why, if the other two legacies lapse, this one should not lapse? It is said that there is a difference in principle between a case where a named legatee, being a charity, has ceased to exist before the death, in which case the ordinary rule of lapse applies, and a case where the institution as named has never existed at all, or rather where, though the institution is named, the court is unable to find it because of conflicting claims of equal, or more or less equal, probability. That distinction seems to me to be a very fine one—in fact I am not sure that it is not a distinction without a difference.

The nearest case that has been cited to me is a decision of Farwell J. in *In re Harwood.*[2] The headnote states the case very well: "Where a testator selects a particular charity and "takes some care to identify it, it is very difficult for the court "to find a general charitable intent, if the named society ceases "to exist before the testator's death; but a general charitable "intent may be inferred where no charitable institution as "described in the will has ever existed." That is a very remarkable case, because there were two societies involved. One was a society called the Wisbech Peace Society, Cambridge, and the other was the Peace Society of Belfast. There was also the Peace Society of Dublin. There had been a Wisbech Peace Society, but that had ceased to exist, and the learned judge held that there was no general charitable intent. The testatrix meant that society and gave it only as she gave any other legacy. But there was no evidence to show that there had ever been a Peace Society of Belfast. In the case of Dublin it was said that there had been one, but it had been changed to the Irish Peace Society. The judge held in the case of the Belfast society that there was a general charitable intention. The contrast is striking. The judge, after rejecting the claimant for the legacy, which was the Belfast Branch of the League of Nations Union, saying that he could not believe that the lady intended to benefit that particular society, continued[3]: "I doubt whether the lady herself knew "exactly what society she did mean to benefit. I think she had "a desire to benefit any society which was formed for the "purpose of promoting peace and was connected with Belfast. "Beyond that, I do not think that she had any very clear idea "in her mind." Then he says: "At any rate I cannot say that "by the description, 'the Peace Society of Belfast,' the lady "meant the Belfast Branch of the League of Nations Union; "but there is enough in this case to enable me to say that, "although there is no gift to any existing society, the gift does "not fail. It is a good charitable gift and must be applied "*cy-près.*" There the residuary legatee was a non-charity, and the judge, as a matter of construction, came to the conclusion that the lady really had not any definite idea what society she

[2] [1936] Ch. 285.

[3] Ibid. 288.

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did intend to benefit. What she intended to benefit was the cause of peace as propagated in Belfast. That being so, he held that there was a general charitable intent.

Does the same principle emerge here? I cannot doubt that the lady thought that she was giving these specific sums to certain institutions because she called them "the following institutions." It has been pointed out to me in argument that in the well-known case of *In re Davis*,[4] the Homes for the Homeless case, institutions were also named as the objects of charity. Nevertheless, it was held that the gift to the Homes for the Homeless was a gift for a purpose and not for a person. The residue was given to the same charities as those which were receiving legacies, and, therefore, it was argued that it was charity against charity. In fact, however, if the legacy had to fall into residue, the disposition of a share of residue would also fail and would go to the next-of-kin no less than the legacy would, and, therefore, the competing persons were really people outside the ring of charity.

Here the testatrix gave a number of legacies to a number of institutions. She then wished to exhaust her estate and she gave whatever is left to another institution. I do not feel that I can stop at the Fund for the Relief of Distressed German Jews in England and say "In this case, and this case only," she was intending to give to an object and not an institution. I feel sure that she was not. She was intending to give to a particular institution, which was in her mind, but I have been unable to find out which one of several it may have been. I cannot see why in that case I am at liberty to find a specialized general charitable intent. If it were a matter of residue being undisposed of, or even going to some legatee outside the charitable rank, I think that the case might be different, but I conceive this clause, on the true construction of the will, to have been deliberately designed so that the last charity should catch up whatever fell through the net. In my judgment, this £5,000 does fall through the net, because she has failed to identify the object of her bounty, and I must therefore hold that the residuary legatee succeeds, and this fund goes to the Great Ormond Street Hospital.

Solicitors: *J. C. Fox Gamble & Son; Bartlett & Gluckstein; F. G. Boas; Waterhouse & Co.; Treasury Solicitor.*

J. L. D.

[4] [1902] 1 Ch. 876.

[HOUSE OF LORDS.]

* HOOD BARRS . . . . . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

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1957
Jan. 23, 29, 30;
Mar. 14.

Revenue — Income tax — Capital or income expenditure — Timber merchant—Purchase of standing timber—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

A timber merchant, soon after commencing business, entered into two agreements with a company of which he owned 49 per cent. of the capital, undertaking to pay £24,275 and £24,900 respectively, in respect of a large number of trees growing on the company's land. He acquired the right to "mark, fell and carry "away all the said trees and complete all the operations authorized "at such times as he . . . shall consider convenient," no time limit being fixed. The trees had not been selected or identified. In the first agreement the only indication how the price was arrived at was a reference to S.R. & O. No. 2209 of 1946 which regulated maximum prices for the sale of timber. In the second agreement it was calculated by assuming a selection of trees, which had not been made, and fixing an average price.

Held, (Lord Oaksey dissenting) that in computing the timber merchant's income tax liability the sums payable should be treated as capital expenditure and not as the price for stock-in-trade and accordingly should not be debited in calculating his trading profits. His only right was to fell and carry away the trees which remained the vendor's property till severance.

Per Viscount Simonds: It does not follow from this decision that whenever a timber merchant buys standing timber he cannot debit his profit and loss account with the cost. It may be that until he has reduced the trees into possession, the right to do so, rather than the trees themselves, should be shown as an asset, particularly when the trees are not even identified. An important factor in determining whether the expenditure was capital or revenue would be whether the purchase was of one tree or several thousand trees.

Stow Bardolph Gravel Co. Ltd. v. *Poole* [1954] 1 W.L.R. 1503; [1954] 3 All E.R. 637; 35 T.C. 459 followed.

Decision of the First Division of the Court of Session, 1955 S.L.T. 259 affirmed.

APPEAL from the First Division of the Court of Session.

This was an appeal from an order of the First Division of the Court of Session (Exchequer Cause) (Lord President Clyde, Lord Carmont, Lord Russell and Lord Sorn) dated December 21, 1955, dismissing an appeal by the appellant, Henry Rupert Hood Barrs, by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax for the Division of Mull given on November 27, 1952, against assessments made on him under Case I of Schedule D of the Income

† *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD COHEN and LORD KEITH OF AVONHOLM.

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Tax Act, 1918, in the sums appearing in the case (which do not need to be here recited) for the chargeable accounting periods 1947/8 to 1951/2, both inclusive.

The facts are fully stated in the opinion of Lord Keith of Avonholm.

Roy Borneman Q.C. and *Charles Lawson* (both of the English Bar) for the appellant.

Lord Advocate Milligan Q.C., *Sir Reginald Hills* (of the English Bar) and *W. Grieve* (of the Scottish Bar) for the Crown.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Vallambrosa Rubber Co. Ltd.* v. *Farmer*[1]; *Mohanlal Hargovind of Jubbulpore* v. *Commissioner of Income Tax for Central Provinces and Berar, Nagpur*[2]; *Inland Revenue Commissioners* v. *Pilcher*[3]; *Murray* v. *Inland Revenue Commissioners*[4]; *Macklow Brothers* v. *Frear*[5]; *James Jones & Sons Ltd.* v. *Earl of Tankerville*[6]; *Kursell* v. *Timber Operators & Contractors Ltd.*[7]

Their Lordships took time for consideration.

Mar. 14. Viscount Simonds. My Lords, the facts of this case are fully stated in the opinion of my noble and learned friend, Lord Keith of Avonholm, which I have had the privilege of reading and I will not occupy time by stating them at length myself.

Apart from some confusion which has arisen from the manner in which the Commissioners for the General Purposes of the Income Tax for the Division of Mull originally stated a case for the opinion of the Court of Session and, upon a remit, made further so called "findings in fact," I do not think that the case would have presented any difficulty.

The appellant in the year 1947 began to trade in the name of "Killiechronan Sawmills and Joinery Works." In that and the following year he entered into agreements with a company called the Chalmers Property Investment Co. Ltd., of which he owned 49 per cent. of the capital. By these agreements he agreed to pay the sums of £24,275 and £24,900 in respect of a large quantity of trees then growing on the company's estates in the Island of Mull. The first agreement related to 10,000 large and 1,000 small larches, 500 sitka and 500 pinus silvestris, the latter to 20,000 large and 1,000 small larch, 200 common ash and 100 common oak. In the first agreement no indication was given how the price was arrived at, unless it was to be found

[1] 1910 S.C. 519; 5 T.C. 529.
[2] [1949] A.C. 521; 65 T.L.R. 518; [1949] 2 All E.R. 652.
[3] [1949] 2 All E.R. 1097; 31 T.C. 314.
[4] (1951) 52 T.C. 238.
[5] (1914) 33 N.Z.L.R. 264.
[6] [1909] 2 Ch. 440; 25 T.L.R. 714.
[7] [1927] 1 K.B. 298; 42 T.L.R. 435.

in a reference to S.R. & O. No. 2209 of 1946,[1] which regulated maximum prices for the sale of timber; in the second agreement the price was apparently arrived at by assuming a selection of trees which had not yet been made and fixing an average price.

I have used the vague words "in respect of" and "related "to," because, though in each agreement there purported to be a sale and purchase of "all the timber specified in the first part of "the schedule now standing and growing" in the forests therein mentioned, it is clear that the trees had not been selected and identified. On the contrary, the primary right of the appellant, the purchaser, was to "mark, fell and carry away all the said "trees and complete all the operations authorized at such times "as he, the purchaser, shall consider convenient." From this it follows that he did not purchase the trees, for they remained the property of the company until severance: *Morison* v. *A. & D. F. Lockhart*.[2]

It was under these circumstances that he was assessed in an arbitrary or conventional figure in respect of his trade for the years 1947–48 to 1951–52 inclusive for the purpose of determining, as was said, the question of principle whether the two sums that I have mentioned of £24,275 and £24,900 could be taken into account for the purpose of computing his trading profits for the years in question. The appellant alleged that they could, as representing the purchase price of stock in trade; the respondent denied it, saying that these were capital sums paid for an enduring right to cut timber. The Commissioners held that the payments were in the nature of capital expenditure and this was the question submitted for the opinion of the court. The proceedings before the court, the remit to the Commissioners and their further findings are fully stated in the opinion of my noble and learned friend and I refer to what he will say.

It appears that when the matter came before the Commissioners, whether originally or at a later stage, they had no other accounts of the trade than a profit and loss account and a balance sheet for the year ended March 31, 1948, together with a stock valuation as at the same date. It is worth while to glance at these documents, for it is possible that the Commissioners may have been misled by them into making a statement much relied on by the appellant for which there was no possible justification, that the payments in question "constituted the "purchase of stock in trade of the business of timber merchants "and that this stock is represented in the sales of the business." The stock valuation, which is reflected in the other documents to which I have referred, states the "cost price of timber" at £24,275, adds "annual appreciation of growth at 80/90 year "maturity 1·17 say 1 per cent. £242.15.0," deducts "deprecia-"tion attributable to gale damage, blown trees, damaged trees

[1] Growing Trees and Home-Grown Round Timber in the Log (No. 3) Order, 1946.

[2] 1912 S.C. 1017.

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"and extra costs lumbering 10 per cent. £2,451," thus arriving at a figure of £22,065.19.6. To this figure there is added the net value of "blown trees" and the ultimate amount of £23,061.5.0 is reached.

My Lords, it is not putting it too high to say that this statement is sheer nonsense. The appellant had not by selection and marking, much less by felling and carrying away, appropriated any trees. Yet he claims that already by March 31, 1948, he had an identifiable stock of trees of which some had grown and others had been blown down. It is hardly to be supposed that having a right of selection he deliberately selected trees that had been blown down. That there was no such scarcity as to require him to do so is plain from the fact that six months later he agreed to purchase a larger number of trees from the same forests. The Commissioners do not seem to have had any other accounts for later years and I am not prepared to assume in their absence that they would have assisted the appellant. It is obvious that at this date the only relevant asset possessed by the appellant was a valuable right to cut timber for which he had paid a large sum, and that, when the Commissioners upon a remit made the finding to which I have referred, they were proceeding upon a wholly false basis and their finding must be disregarded. There was, it is true, a statement that, at a date unknown after the appellant made the agreements to which I have referred, he acted as contractor to the company and supplied some of the fencing stobs in respect of a certain large hill farming scheme and a later statement identifying the stobs with the timber which was the subject of the agreements. But these statements, vague as to time and quantity, cannot displace what is ex facie the plain character of the asset that was purchased.

This being the position as far as it can be ascertained from the case stated, the further findings of the Commissioners, and their somewhat contradictory conclusions, I do not doubt that the sums payable under the agreements were (to answer the question of law as put in the case) of the nature of capital expenditure, and the Court of Session was right in so holding.

My Lords, I think it right to add, in view of the argument at the Bar, that, in my opinion, this appeal does not raise any broad question of principle nor do I think it relevant to discuss the impact of the Sale of Goods Act upon a purchase of an ascertained tree or trees. Though the agreements are in certain respects unusual and though the manner in which the case has been presented to the court is probably unprecedented, in essence this case raises once more the familiar question which from *Alianza Co. Ltd.* v. *Bell*[3] onwards has been the subject of so many judicial decisions. But, unlike many cases where it is difficult to say on which side of the line the case falls, here

[3] [1904] 2 K.B. 666, 673; 20 T.L.R. 634; (C.A.) [1905] 1 K.B. 184; 21 T.L.R. 134; (H.L.) [1906] A.C. 18; 22 T.L.R. 94.

I can find no factor which does not lead inescapably to the conclusion that the payments were in the nature of capital expenditure. I will not repeat what has been said by the Lord President and Lord Sorn upon this point. I agree with them.

I will only make two further observations. In the first place, it does not follow from this decision that, whenever a timber merchant buys standing timber in small or large quantities, he cannot debit his profit and loss account with the cost. It may well be that, until he has reduced the trees into possession, it would be correct to shown the right to do so rather than the trees themselves as an asset, particularly when the trees are not even identified. But I doubt whether this would be regarded as necessary for the purpose of the administration of the income tax law, and it is not a very material factor. The issue will be determined by a consideration of all the factors to which the Lord President and Lord Sorn refer. Not the least important of them will be whether the purchase is of one tree or thirty thousand.

Lastly, I must refer to a contention put forward at a late hour by learned counsel for the appellant. I cannot find that it was advanced to the Court of Session and I do not think that he was entitled to raise it in this House. It appeared to be founded on what was said in this House in the recent case of *Sharkey* v. *Wernher*[4] and it was to the effect that as and when he cut down the trees and made the timber available for his business he was entitled to debit his trading account with the market value of such timber. I will only say that this may or may not be so. I express no opinion, for it has nothing whatever to do with the case stated for the opinion of the court or the appeal before this House.

The appeal should, in my opinion, be dismissed with costs.

LORD OAKSEY. My Lords, I have the misfortune to differ from your Lordships in this case.

The question is whether two payments made by the appellant, a timber merchant and sawmiller, for standing timber were capital or revenue payments. It was settled by agreement between the parties approved by the Commissioners for Mull that this question should be decided in principle in the first place and the facts were therefore not fully gone into. The Commissioners in the first instance upheld the nominal assessments made by the respondents for the five years in question, holding that the two payments were capital payments and that in any event they were not satisfied that the sums were proper commercial prices for the timber in question. On appeal on July 2, 1954, the Court of Session remitted the case to the Commissioners to amplify and amend the case and if so moved by either party to take further evidence.

[4] [1956] A.C. 58; [1955] 3 W.L.R. 671; [1955] 3 All E.R. 493.

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The Commissioners, on May 26, 1955, without further hearing, made the following further findings: "(1) The words 'capital "'payments' were used by us to denote payments made from "the capital of the business and were intended so to indicate "that the payments under the contracts referred to were sub-"stantial sums and therefore represented capital in the ordinary "meaning of the word. But as these payments did not purchase "what can be regarded as fixed capital assets we must regard "them as having been made from the circulating capital of the "business. We further find in fact that the payments in "question referred to in our previous decision constituted the "purchase of stock in trade of the business of timber merchants "and that this stock is represented in the sales of the business. "(2) In our decision we said that we 'were not satisfied that "'the said sums were proper commercial prices.' By this we "meant to say that we were unable to state what the proper "commercial prices should be rather than that we had any "reason to assume that the prices were wrong." And on August 9, 1955, the Commissioners issued further findings of fact as follows: "1. That the timber specified in the case "stated was in fact stock in trade of the appellant's business. "They relied on evidence that such timber was being sold and "used for a hill farming scheme. 2. That the prices for the "said timber specified in the case stated could not be considered "by them from the evidence submitted to be other than correct. "They relied on the evidence of the district valuer dealing with "values of timber in the Isle of Mull."

In my opinion, the Commissioners of Mull are open to no criticism for their change of view. Lord President Cooper had pointed out in his judgment of July 2, 1954, that the Court of Session did not know whether the appellant had availed himself of the rights he enjoyed under the agreements. The Commissioners thereupon found as a fact that the timber in question was stock in trade and relied for that finding on evidence that such timber was being sold and used for a hill farming scheme. The Commissioners also explained the sense in which they had used the word "capital" and are not, I think, open to criticism for a change of view upon a question of such difficulty.

The respondents then appealed to the First Division of the Court of Session, who said that in view of the confusion which had emerged as to the Commissioners' findings they would not answer the questions stated in the case, but held that the two payments did not fall to be taken into account in computing the appellant's trading profit for the years under appeal.

The facts stated by the Commissioners are that the appellant, in pursuance of written contracts, had paid to a company which owned certain forests in the Island of Mull the sums of £24,275 and £24,900 for standing timber in certain named forests which was to be felled and carried away by the appellant at such times as he considered convenient, the number and categories of trees

being stated and the price arrived at in accordance with the maximum prices permitted by S.R. & O. No. 2209 of 1946, although in one contract the Statutory Rule price was not referred to. A licence from the Government was necessary for the cutting of any timber. The individual trees were not specified but were to be selected by the appellant and were to be cut down to the soil but not the roots or other parts which should be within or below the surface of the soil. The trees were 70 to 80 years old and were ripe for cutting.

The respondents' contention is that the trees were partes soli and that there is no distinction between the present case and the cases of mines such as *Alianza Co. Ltd.* v. *Bell*[5] and *Kauri Timber Co. Ltd.* v. *Commissioner of Taxes*,[6] in which it was held that no allowance could be made for exhaustion of the mines and that payments for the timber there in question were capital which could not be deducted in arriving at the balance of profits and gains of the mine or timber owner. In my opinion, these cases do not govern the present case. Mines are specifically dealt with in the Income Tax Act: standing timber is not. In the *Kauri* case[6] the Privy Council was dealing with a New Zealand statute, which is not the same as the British statute, and the observations of the Board[7] show that the decision was not intended to decide anything beyond the construction of the New Zealand statute, and, indeed, the Board expressly adopted the judgment of Brett J. in *Marshall* v. *Green*[8] which they said properly[9] accepted the note in Saunders' Reports. The note upon the case of *Duppa* v. *Mayo*[10] is as follows: "The "principle of these decisions appears to be this: that wherever "at the time of the contract it is contemplated that the purchaser "should derive a benefit from the further growth of the thing "sold, from further vegetation, and from the nutriment afforded "by the land, the contract is to be considered as for the interest "in land; but where the process of vegetation is over, or the "parties agree that the thing sold shall be immediately with-"drawn from the land, the land is to be considered as a mere "warehouse of the thing sold, and the contract is for *goods*. "[This doctrine has been materially qualified by later decisions, "and it appears to be now settled that, with respect to emble-"ments or fructus industriales (i.e., the corn and other growth "of the earth which are produced, not spontaneously, but by "labour and industry), a contract for the sale of them while "growing, whether they are in a state of maturity, or whether "they have still to derive nutriment from the land in order to "bring them to that state is not a contract for the sale of "any interest in land, but merely for the sale of *goods*. *Evans*

[5] [1906] A.C. 18.
[6] [1913] A.C. 771; 29 T.L.R. 671.
[7] [1913] A.C. 771, 779.
[8] (1875) 1 C.P.D. 35.
[9] [1913] A.C. 771, 778.
[10] (1669) 1 Wms.Saund. 275 d., 277 c.

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"v. *Roberts*.[11] *Sainsbury* v. *Matthews*.[12] And it will make no "difference whether they are to be reaped or dug up by the "buyer or by the seller. 10 A. & E. 759. 2 Perr. & D. 594. "The true question is, whether, in order to effectuate the inten-"tions of the parties, it be necessary to give the buyer an interest "in the land, or whether an easement of the right to enter the "land, for the purpose of harvesting and carrying them away, "is all that was intended to be granted to the buyer. . . .]"

In the present case the timber was mature timber 70 to 80 years old and ripe for cutting, and although the time for felling was not specified, it is to be presumed that a timber merchant who had paid such a large sum of money for ripe timber would fell it within a reasonable time. In any event, it could not have been contemplated that the purchaser would derive a benefit from further growth of the timber, and it is therefore to be regarded as goods, and the rights acquired by the appellant do not constitute an interest in land.

If I am right in thinking that the appellant acquired no interest in the land on which the trees stood, the distinction between the two classes of cases is that in the case of mines the purchaser purchases the land of which the mine forms the integral part, and although he makes use of the products of the land as his stock in trade, yet he has the land when that stock in trade has been exhausted and his purchase is therefore regarded as the purchase of a capital asset and not as a forward purchase of stock in trade. But, as Lord Sorn said in the present case[13]: "My reason for this is that under the ordinary contracts for "purchases of standing timber which a regular timber merchant "makes to supply himself with his current requirements, the "merchant has to go and win the material for himself, and yet "I have never heard it suggested that, by entering such a con-"tract, he is acquiring a capital asset and cannot debit the cost "in his annual accounts."

It appears to me that if the decision of the Court of Session is right, every sale of a standing tree is the purchase of a capital asset. The fact that it is a comparatively small transaction cannot make any difference. It is the purchase of a growing tree which, it is said, is pars soli, and if the fact that the tree is pars soli at the time the contract is made regardless of whether the soil remains in the seller or the buyer after severance, I cannot see that it makes any difference whether the purchase is for one tree or one thousand. If the woods or forests had been bought in their entirety in the present case and the property in them and in the ground on which they stand had been acquired by the appellant, I should agree that the purchase price had been a capital payment. The fundamental distinction which the Income Tax Acts make is between fixed capital and circulating capital or stock in trade. All payments laid out for the

[11] (1826) 5 B. & C. 829.
[12] (1838) 4 M. & W. 343.
[13] 1956 S.L.T. 259, 264.

purposes of trade are, of course, capital in a sense, but the class of capital which cannot be set off against the profits is the capital which is employed to produce the income without any intention of using it up, whereas the capital which can be set off against the profits is the capital which it is intended to circulate by sales and fresh purchases.

A timber merchant such as the appellant, who buys mature standing timber, has no interest in the forest, unless he purchases the forest as such, except as a purchase of his stock in trade which he must acquire in order to carry on his trade. He is not interested in the forest in the way that a landowner is, as a fixed asset, nor in what it may grow in the future either by replanting or natural regeneration. The purchase price is not, to use Viscount Cave's words in *British Insulated & Helsby Cables Ltd.* v. *Atherton*,[14] "an expenditure . . . once and for "all . . . with a view to bringing into existence an asset . . . "for the enduring benefit of a trade."

Purchases of standing timber are merely a way of acquiring the timber merchant's stock in trade in the way most convenient to him and to the landowner, and the question is not how does the taxpayer acquire his stock in trade but what is his stock in trade. It does not cease to be his stock in trade because he buys it by a forward contract nor because he buys a little or much of it at one time. As Channell J. said in the *Alianza* case[15]: "The legislature might if it chose say that the "gross receipts of a business should be treated as profits for "the purpose of income tax without any allowance for current "expenses, and, if it did say so, the rule would have to be "followed. But it has not gone quite so far as that. I find "nothing in the rules to say that if the business to be assessed "is that of manufacturing an article and selling it, and nothing "more, the cost price of the material consumed in the manu-"facture is not to be taken into account in assessing the profits. "In the ordinary case, the cost of the material worked up in a "manufactory is not a capital expenditure; it is a current "expenditure, and does not become a capital expenditure merely "because the material is provided by something like a forward "contract, under which a person for the payment of a lump sum "down secures a supply of the raw material for a period extend-"ing over several years. I do not think it would be necessary "that the payment for the raw material should be in the year "of assessment, or even in the three years over which the "average extends. It is not necessary to deal with that point "at present, and I do not decide it; I merely say that I do "not think it would be necessary. The question in this case "which we have to consider is what is the nature of the adven-"ture or concern which this particular company is carrying on.

[14] [1926] A.C. 205, 213; 42 T.L.R. 187.

[15] [1904] 2 K.B. 666, 673.

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"If it is merely a manufacturing business, then the procuring "of the raw material would not be a capital expenditure."

The only thing I wish to add is that the only question before the Commissioners was the question of principle and it was not suggested that the two sums of £24,275 and £24,900 were expenses of any of the particular five years in question.

For these reasons I am of opinion that this appeal should be allowed and the case sent back to the Commissioners with a direction that the sums paid for the trees cut in the years in question on the basis of the contract should be allowed as deductions from the appellant's profits.

Lord Morton of Henryton. My Lords, I agree with the decision of the First Division of the Court of Session and with the speech which is about to be delivered by my noble and learned friend, Lord Keith of Avonholm.

The question arising in the present case is the same as the question posed by Jenkins L.J. in *Stow Bardolph Gravel Co. Ltd.* v. *Poole*[16]: "Is this a case of a purchase of the raw material "of the trade, or of the stock-in-trade, in which a particular "trader deals, or is it a case of a purchase of a capital asset from "which the taxpayers will be able to derive raw material or stock-"in-trade as and when the requirements of the taxpayers' "business makes it expedient to do so?" In my opinion, having regard not only to the nature of the right acquired but to the other circumstances of the present case, the purchase now under consideration is accurately described as a purchase of the latter kind.

Counsel for the appellant sought to put forward an alternative argument, in the event of his main contention being rejected. The argument was that the appellant would be entitled to deduct, in his trading accounts, for each year in which he exercised his right to cut down trees and made the resulting timber available for use in his business, a sum equal to the market value of that timber at the date when it was so made available. In support of this argument he cited the cases of *Craddock* v. *Zevo Finance Co. Ltd.*,[17] *Inland Revenue Commissioners* v. *Williamson Brothers*,[18] and *Sharkey* v. *Wernher*.[19] I am of opinion that this question did not arise under the case stated, as any sums so claimed to be deducted would not be a part of the two sums of £24,275 and £24,900 paid by the appellant under the two agreements in question and, indeed, would bear no relationship to either of these sums. Consequently, I express no opinion upon it.

I would dismiss the appeal.

[16] [1954] 1 W.L.R. 1503; [1954] 3 All E.R. 637, 646; 35 T.C. 459, 475.

[17] [1944] 1 All E.R. 566; 27 T.C. 267, 279; (H.L.) [1946] 1 All E.R. 523n.

[18] 1950 S.C. 391; 31 T.C. 370.

[19] [1956] A.C. 58, 73, 83–84.

LORD COHEN. My Lords, this is an appeal from an interlocutor of the Court of Session dated December 21, 1955, finding that the sums of £24,275 and £24,900, payable by the appellant under two agreements dated respectively September 30, 1947, and September 30, 1948, both relating to the purchase of standing timber, did not fall to be taken into account in computing the trading profit of the business of the appellant as a timber merchant, sawmiller and joiner for the years under appeal.

The appellant based his appeal on two main grounds—I. he said that the matter was concluded in his favour by findings of fact of the General Commissioners; II. he said that if your Lordships rejected his first contention, your Lordships, acting as a tribunal of fact, should conclude that the said agreements were purchases of stock-in-trade and therefore fell to be taken into account in computing the appellant's trading profit for the years under appeal.

My Lords, I have had the opportunity of reading in print the speech which the noble and learned Lord, Lord Keith, is about to deliver. I agree on both points with the conclusion he has reached. I will therefore not trouble your Lordships with a detailed recapitulation of the facts but will state shortly my reasons for agreeing that this appeal should be dismissed.

On the first point, the substance of the appellant's contention is to be found in the letter of the General Commissioners dated August 9, 1955, "issued in clarification of and to be read in "conjunction with their original finding" on the points submitted to them. In that letter the General Commissioners say that the timber specified in the case stated (i.e. the timber comprised in the two agreements attached to the case stated) was in fact stock-in-trade of the appellant's business. I agree with Lord Sorn that, regarded as a finding of fact, this finding was in flat contradiction with the original finding and cannot form a firm basis for a decision of the issues between the parties, and I would add that, in my opinion, the question whether the timber comprised in the agreements was or was not stock-in-trade of the appellant's business raises a question as to the construction of the agreements and the question is, therefore, a question of mixed fact and law proper for reconsideration before the Court of Session.

On the second point I find myself in complete agreement with Lord Sorn. Like him, I see no reason for doubting that under the ordinary contract for purchases of standing timber which a regular timber merchant makes to supply himself with his current requirements, the merchant is not acquiring a capital asset and is entitled to make the appropriate debit in his annual accounts. Equally, I think it is clear from the authorities to which your Lordships' attention was directed, and in particular from the judgment of the Judicial Committee of the Privy

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Council in *Kauri Timber Co. Ltd.* v. *Commissioner of Taxes*,[20] that the terms of the contract in question in a particular case and the surrounding circumstances may be so special that the proper conclusion may be that under the contract the trader acquired a capital asset from which he intended to get and win his stock-in-trade. In each case it must be, as counsel for the appellant admitted, a question of degree, and for the reasons given by their Lordships in the Court of Session and about to be given by the noble and learned Lord, Lord Keith, I have no doubt but that in this case, as in *Kauri's* case,[20] what the appellant, under the agreements in question, acquired was not goods or stock-in-trade but an enduring interest in the land and the natural increment of the trees of the nature of a capital asset.

I therefore agree that the appeal should be dismissed.

Lord Keith of Avonholm. My Lords, this is an appeal from a judgment of the First Division of the Court of Session, sitting as Court of Exchequer, making a finding on a case stated by the Commissioners for the General Purposes of the Income Tax for the Division of Mull. The case arose out of assessments made on the appellant under Case I of Schedule D of the Income Tax Act, 1918, in the form of random assessments for the five fiscal years 1947–1948 to 1951–1952. The procedure in the case has taken an unusual and remarkable course. As the procedure, however, is involved to some extent with the facts of the case it will be convenient for a full understanding of the case to deal with the facts before coming to matters of procedure.

The appellant carries on business as a timber merchant, sawmiller and joiner under the name "Killiechronan Sawmills and "Joinery Works," Killiechronan, Aros, Isle of Mull. He commenced business on April 6, 1947. He is also a shareholder and director of a company known as the Chalmers Property Investment Co. Ltd. (hereinafter called "the company") which owns a large estate in the Isle of Mull. He holds 49 shares in the company out of an issued capital of 100 shares.

On September 30, 1947, and September 30, 1948, the appellant and the company entered into two agreements. Apart from the schedules to the agreements, the prices mentioned therein and the dates from which the agreements were to run, these agreements are in identical terms and it will be sufficient to quote in full the material portions of the first agreement. The company (called "the vendors") and the appellant (called "the "purchaser") agreed as follows:

"1. The vendors will sell and the purchaser will buy as at "April 7, 1947, all the timber specified in the first part of the "schedule now standing and growing in or upon the forests "referred to in the second part of the schedule hereto which "forests form part of the vendors' estate situate and being at

[20] [1913] A.C. 771.

"Killiechronan Aros Mull together with the boughs branches and "other parts of the same trees respectively down to the soil "whereon the same shall be growing but not the roots or other "parts thereof which shall be within or below the surface of the "soil TOGETHER with the following powers and authorities "namely:—

"Full and free power and authority for the purchaser his "servants agents and workmen to go to and return from the lands "upon which the said trees are situate through over and along "the existing or usual roadways or tracks for the purpose of "felling cutting or sawing up and carrying away or otherwise "dealing with the said trees and the boughs tops logs and bark "thereof at all usual and convenient times and also to top lop "and strip off the bark thereof and also to place and dry the bark "of the said trees on convenient parts of the said premises to be "appointed by the vendors or their agents for that purpose and "also for any of the purposes aforesaid to employ horses wagons "motor traction and other mechanical contrivances which may "be necessary or convenient and also to dig and use sawpits and "stages and erect and construct sawmills and other erections "and to break and saw up the said timber and stack up the same "upon proper and convenient parts of the ground.

"2. The purchase price shall be the sum of £24,275:0:0 "(twenty-four thousand two hundred and seventy-five pounds).

"3. The purchaser may mark fell and carry away all the said "trees and complete all the operations authorized at such times "as he the purchaser shall consider convenient.

"4. The cutting of the trees and all the operations hereby "authorized shall be done in a proper customary and workman-"like manner and so as to cause as little injury or damage as "possible to the standing timber underwood grass crops and "other property of the vendors or its tenants and the purchaser "shall make compensation for all injury or damage which he "shall commit or occasion in or upon the vendors' lands.

"5. The purchaser will amend and repair all such hedges "ditches fences and gates as may be injured or damaged in the "felling cutting down or carrying away of the said trees including "all gaps made in the hedges by the cutting away of trees there-"from and for the purposes aforesaid will allow and supply "proper hedge botes and timber.

"6. All questions in dispute between the parties hereto "touching this agreement or the rights duties and liabilities of "either party hereunder shall be referred to a single arbitrator "pursuant to the provisions of the Arbitration Acts, 1889 to 1934.

"THE SCHEDULE above referred to

"First Part

"500 Sitka or Silver Spruce
"500 Pinus Silvestris or Contorta
"10,000 Larch, Large
"1,000 Larch, Small

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"Second Part
"Pairce Choille
"Old Killiechronan
"Coire Pholachie
"Garden Plantations
"Narrow Plantations
"Horse Park Wood

"the above in accordance with S.R. & O. 2209 of 1946."

In the second agreement entered into exactly a year later and operative as at April 7, 1948, the price agreed was £24,900 for further lots of trees in the same forests specified as follows:

"First Part

"200 Common Ash, selected, at avge. 25c. @ 5/– ...	£1,250
"100 Common Oak, selected, at avge. 20c. @ 4/– ...	400
"20,000 Larch, Large 6″ and over avge. 18c. @ 1/3 ...	22,500
"1,000 Larch, Small, under 6″ at avge. 10c. @ 9d. ...	750
	£24,900

"Second Part
"Pairce Choille
"Old Killiechronan
"Coire Pholachie
"Garden Plantations
"Narrow Plantations
"Horse Park Wood

"the above in accordance with S.R. & O. 2209 of 1946."

The sums of £24,275 and £24,900 were paid by the appellant to the company. It is found in the stated case that these sums were arrived at "(A) by estimating the cubic content of certain "trees according to the 'Hoppus System' (which is a method "recognized in the timber trade of estimating the cubic content "of trees by means of certain measurements and tables); (B) by "applying to the cubic content so arrived at, the maximum "prices laid down by the Statutory Rule and Order No. 2209 of "1946 referred to in the said agreements, and (C) by deducting "from the resultant figure a sum by way of discount." It will be observed that, while the cubic content and rates applied are indicated in the Schedule to the second agreement, no such figures appear in the schedule to the first agreement.

It is stated in the case that "it was estimated before us that "the trees in question were some seventy to eighty years old and "were therefore ripe for cutting but we were not in a position "finally to determine the age or quality of the trees in question." For the purposes of this appeal I shall accept it that the trees were ripe for cutting. The only other material fact found in the case is that after the appellant entered into the agreements he acted as contractor to the company and supplied some of the fencing stobs in respect of a hill farming scheme put into operation by the company under the Hill Farming Act, 1946. From

a subsequent finding of the Commissioners made in circumstances which I shall refer to in a moment it would appear that some at least of these fencing stobs were supplied from timber procured under the agreements in question.

In view of what subsequently happened, I should here quote in full the original finding of the Commissioners: "We, the "Commissioners, who heard the appeal after consideration of "the foregoing facts and the contentions of the appellant and "respondent decided to uphold the assessments appealed against "and on November 27, 1952, our decision to that effect was "communicated to the parties. After an enquiry on behalf of "the appellant as to the effect of that decision, we amplified it "and our amplified decision was communicated in writing to "the parties on January 3. That the previous decision made "by the Commissioners at their meeting on November 27, 1952, "was not intended to uphold the actual figures of assessments "which were never intended to be serious assessments, but to "uphold the contention of the Inland Revenue on the matter of "principle involved. The Commissioners decided that the two "sums referred to in the two agreements for the purchase of "timber were capital payments and in any event they are not "satisfied that the said sums were proper commercial prices for "the timber in question." The concluding words from "and "in any event" are not material to this appeal and need not be further noticed.

The appellant appealed against this determination of the Commissioners and on the appeal coming before the First Division of the Court of Session the court on July 2, 1954, under reference to the opinion of the court, remitted to the Commissioners to amplify and amend the case with power, if so moved by either side, to take further evidence. The Lord President (Lord Cooper) in the course of his opinion said:

"The difficulty in which we now find ourselves is that it is "not clear to us, even after hearing the argument from the "appellant, what exactly are the points which it is sought to "raise, or what are the materials on which our decision of a "question of law is to be based. It has been pointed out more "than once that a stated case must always raise a clear and "distinct point of law, and I am afraid that this case does not.

"For instance, the first question of law is stated, if I may so "put it, in vacuo, unrelated to the facts, or even to pro forma "figures for the trade or business with regard to any of the years "of assessment, five in number beginning in 1947 and ending "in 1952. We do not know whether the accounts for one year "and statements printed in the appendix were ever before the "Commissioners, nor on what basis they were compiled, least of "all in regard to the vital figures of the alleged cost of the timber "debited against the receipts earned by the appellant. We do "not even yet know whether, and if so to what extent, the appel-"lant has availed himself of the right he enjoys under certain

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"agreements to enter upon the lands of somebody else and to fell "and remove the trees growing on that land, nor whether timber "so acquired was utilized in earning the receipts of his business "in any of the years covered by the assessments. It seems to "me that, until the case is presented to us in such a form as to "clarify these matters and to provide us not with detailed figures "(which can be left for later adjustment), but at least with pro "forma computations and an indication of the basis on which "the appellant on the one hand and the Inland Revenue on the "other maintain that the liability of the appellant should be "determined, it is not feasible for us to appreciate or to decide "the question in controversy."

Proceeding upon this remit the Commissioners, after an interval of almost a year, issued two documents which had no recognizable relationship to the points on which the First Division wished to be enlightened. It is necessary to quote these in full. The first runs:

"We, the General Commissioners for Income Tax for the "Mull Division for the County of Argyll, have given at the "request of the solicitors for the appellant further consideration "to the words 'capital payments' employed by us in our "decision, and we make the following further findings:—

"(1) The words 'capital payments' were used by us to denote "payments made from the capital of the business and were "intended so to indicate that the payments under the contracts "referred to were substantial sums and therefore represented "capital in the ordinary meaning of the word. But as these "payments did not purchase what can be regarded as fixed "capital assets we must regard them as having been made from "the circulating capital of the business.

"We further find in fact that the payments in question "referred to in our previous decision constituted the purchase "of stock in trade of the business of timber merchants and that "this stock is represented in the sales of the business.

"(2) In our decision we said that we 'were not satisfied that "'the said sums were proper commercial prices.' By this we "meant to say that we were unable to state what the proper "commercial prices should be rather than that we had any "reason to assume that the prices were wrong.

"Tobermory.

"May 26, 1955."

The second document is as follows:

"August 9, 1955.

"I am directed by the Commissioners to inform you that on "May 26, 1955, the General Commissioners of Income Tax for "the Division of Mull in the County of Argyll issued in clarifica-"tion of and to be read in conjunction with their original finding "on the two points referred to them in November, 1952, findings "of fact as follows:—

"1. That the timber specified in the case stated was in fact "stock in trade of the appellant's business.

"They relied on evidence that such timber was being sold "and used for a hill farming scheme.

"2. That the prices for the said timber specified in the case "stated could not be considered by them from the evidence "submitted to be other than correct.

"They relied on the evidence of the district valuer dealing "with values of timber in the Isle of Mull.

"Such findings of fact were finally decided by the Commis-"sioners on May 26, 1955, and have been duly notified to the "parties.

"Yours faithfully,
"(Sgd.) D. M. McWILLIAM,
"Clerk to Commissioners."

When the case came back to the Court of Session counsel for the Revenue moved the court to remit back to the commissioners to hear and determine the appeal de novo. This was opposed by counsel for the appellant and the motion was refused, the Lord President (Lord Clyde) saying [21]: "There is no prece-"dent for such a course, which, in any event, I do not consider "in the light of the history of the case would serve any useful "purpose." The additional findings were incorporated as part of the case.

The view taken by the First Division on the merits of the appeal is summarized in the following passage from the opinion of the Lord President [21]: "In my opinion, in the case of con-"tracts so unusual as these, and covering, as they do, an "indefinite track of time, it is not possible in the circumstances "to conclude that the prices paid for the selective right conferred "by them represents a payment for the raw material of the "business. The decision of the Commissioners, therefore, that "these were capital payments, and that the contention of the "Inland Revenue on principle should be sustained, appears to "me to be well founded." Lord Carmont and Lord Russell concurred and Lord Sorn on an independent consideration of the facts of the case reached the conclusion that the right acquired by the appellant was the acquisition of a capital asset.

My Lords, the judges of the First Division, in my opinion, reached a right conclusion. There is included among the documents attached to the stated case a profit and loss account of the appellant's busness for the year ended March 31, 1948. That is the only account produced in the case and it is earlier than the date of the second agreement. It brings in, as in a trading account, the sum paid under the first agreement as a purchase during the year, and shows as stock at the end of the year this sum of £24,275 reduced to £23,061 5s. A further statement shows that this depreciation is wholly due to gale damage, less

[21] 1956 S.L.T. 259, 262.

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the value of the blow trees and natural appreciation of growth of the standing trees.

It is unnecessary in this case to consider whether standing trees can ever be so treated. Lord Sorn considered that there may be cases where a timber merchant buying standing trees for his current requirements is entitled to debit the cost in his annual accounts. This may be so if regard is had to current requirements and the timber merchant proceeds to cut down the trees and reduce them into his possession within a short time of their acquisition. It may be that the cut timber then becomes his stock-in-trade, and that the price paid for the trees should enter into the cost price of this stock-in-trade. I say no more because much may depend on the circumstances of the particular case, and such a case is not, in my opinion, this case.

The number of trees here was very large, 30,000 large larch, and 2,000 small larch, as well as other conifers and a quantity of hard timber. There is no evidence that there was any immediate outlet for such a large quantity of timber. The appellant's balance sheet shows him as possessing at March 31, 1948, relatively modest plant and machinery costing some £832, and loose tools and equipment costing some £118, a total of £950. These figures do not suggest the appellant was able to cope within any short period of time with the large quantity of trees made matter of the agreements. Further, the trees under the two agreements were quite unidentified, though no doubt understood to be trees of varying average sizes or contents. The appellant was to "mark fell and carry away all the said trees "and complete all the operations authorized at such times as he "the purchaser shall consider convenient." As was observed in the Court of Session, this absence of any time limit presents an unusual feature. It gives the appellant a right to defer the cutting of the trees for a very long period, if not indefinitely, though practical considerations and the ripe condition of the trees might well stimulate the appellant to exercise his rights with such promptitude as was consistent was his capacity and opportunity to do so. The fact, however, remains that when the agreements were completed he had no right of property in a single tree. He had merely a right to select and thereafter to cut. Even by selection he acquired no property in the trees. He could obtain no property in any part of a tree till he had felled it to the ground.

I find it impossible to hold that this very peculiar right is capable of being treated as stock-in-trade of the appellant. The nature of the right, the indefiniteness of the period for its exercise, and the lack of identification of the trees on which the right was to be exercised, to which may be added the size of the transaction and the absence of any evidence of intention or means to complete it within any foreseeable time, all, in my opinion, negative the idea that the appellant had anything that could be called stock-in-trade.

In my opinion, what the appellant acquired here was merely a right to go on to the company's land to mark, cut and carry away such trees, up to a specified number, as fell within the size and description mentioned in the agreements. The money paid for this right was, in my opinion, a capital and not a revenue expenditure. There may be many cases where the dividing line is a narrow one. But in this case I consider that the scale falls heavily on the capital side of the line. I find it fruitless to examine the many cases that were cited at the hearing. In these cases the question generally was what was the proper inference to be drawn as to the nature and purpose of the transaction in the particular circumstances of the case. No infallible test can be propounded for all cases.

A similar question was recently considered in *Stow Bardolph Gravel Co. Ltd.* v. *Poole*,[22] in which it was decided that the purchase of unworked deposits of gravel by a dealer in sand and gravel was capital and not revenue expenditure. There, Jenkins L.J. said[23]: "I would say that the taxpayers here do "carry on the business of dealers in sand and gravel, but "that one part of the business consists, not merely in "purchasing gravel but in obtaining gravel, and there may be "expenditure necessary or desirable with a view to obtaining "gravel which is nevertheless not the purchase price of gravel as "stock-in-trade of the business." Mutatis mutandis this passage could be applied to the appellant here as dealer in timber. As it was expressed in argument in the case cited, he has provided himself with a means of supplying himself with timber which when procured would form part of his stock-in-trade. A similar illustration was given by Romer L.J. in *Golden Horse Shoe (New) Ltd.* v. *Thurgood*[24] with reference to a manufacturer of gas acquiring a coal mine with a view to supplying himself with coal for his gasworks.

Reliance was placed by counsel for the appellant on the definition of "Goods" in section 62 (1) of the Sale of Goods Act, 1893, viz.: "'Goods' include all chattels personal other "than things in action and money, and in Scotland all corporeal "moveables except money. The term includes emblements, "industrial growing crops, and things attached to or forming "part of the land which are agreed to be severed before sale "or under the contract of sale." Forest trees some 70 years old are not industrial growing crops, and it was the last part of the definition that was prayed in aid. As between parties to a contract the definition may, in cases to which it applies, be important as affecting their rights and duties under the contract, but it may be doubted whether in a case with third parties, in this case the Revenue, it can have the effect of making something stock-in-trade which would not properly be so regarded

[22] [1954] 3 All E.R. 637; 35 T.C. 459.

[23] [1954] 3 All E.R. 637, 646; 35 T.C. 459, 475.

[24] [1934] 1 K.B. 548; 18 T.C. 280.

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until reduced into possession. But, in any event, the considerations already referred to would preclude an appeal to this definition. There are no trees ascertained as the subject-matter of the contract, and therefore no one can say what are the trees attached to and forming part of the land that are said to be "goods." Further, there is no obligation on either vendor or purchaser to sever the trees. At best the appellant has only a licence to sever trees at such times as he shall consider convenient. The definition, in my opinion, has no application to the circumstances of this contract, and it is unnecessary to consider what the precise effect of this definition may be in an appropriate case.

It remains only to consider the effect of the additional findings made by the Commissioners. These findings are in contradiction of the previous decision of the Commissioners upholding the contention of the Inland Revenue on the matter of principle involved and were made without any additional evidence being led. It was represented by counsel for the appellant that the finding that the payments were "made from circulating "capital," that they "constituted the purchase of stock-in-"trade" and that the timber "was in fact stock-in-trade," were findings in fact which should not be disturbed. In truth they are findings in law or of mixed fact and law which, for the reasons I have already expressed, are opposed to all the real findings of fact and documents in the case.

In my opinion, the court below came to a right conclusion. The assessments, I apprehend, have still to be considered on actual figures, and nothing that I have said in upholding the decision that the sums in question were capital payments is intended to preclude consideration of what, if any, allowance is to be made for timber actually cut down and taken into stock by the appellant.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Tyrrell Lewis & Co. for Fyfe, Ireland & Co., W.S., Edinburgh; Solicitor of Inland Revenue.*

F. C.

[CHANCERY DIVISION.]

* BEAUCHAMP'S EXECUTORS *v.* INLAND REVENUE COMMISSIONERS.

1957
Feb. 7.

Wynn-Parry J.

Revenue — Special contribution — Limitation of assessment — Whether special contribution assessment to be made not later than six years after end of year of assessment—Whether assessment must be made on executors not later than third year next following year of assessment in which deceased person died—Finance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 49), *ss.* 47, 55, 65, 68—*Special Contribution Regulations,* 1948 (*S.I.* 1948, *No.* 2029), *arts.* 4, 5.

B. died on June 17, 1950 in the year of assessment 1950–1951, and his executors appealed to the Commissioners for the Special Purposes of the Income Tax Acts against an additional assessment to special contribution [1] in the sum of £11,211 made upon them in

[1] Finance Act, 1948, s. 47 (1): "In the case of individuals whose "total income for the year 1947–48 "exceeded two thousand pounds and "whose aggregate investment income "for that year exceeded two hundred "and fifty pounds, there shall subject "to the provisions of this Part of this "Act be charged a special contribu-"tion (in this Part of this Act "referred to as 'contribution') of an "amount determined in accordance "with the following Table. . . ."

S. 55: "(1) Contribution shall be "a debt due to the Crown, and shall "be assessed and charged by the "Special Commissioners."

"(6) The Commissioners of Inland "Revenue may by statutory instru-"ment make regulations with respect "to the assessment and collection, "and the repayment, of contribution "and interest thereon, and subject to "the foregoing provisions of this sec-"tion may by those regulations apply "and adapt the provisions of the "Income Tax Acts relating to returns "and the giving of information and "to the assessment and collection of "income tax and interest there-"on. . . ."

S. 65 (1): "Where at any time "before April 5, 1954, it is shown to "the satisfaction of the Special Com-"missioners that an assessment to "contribution was excessive by "reason of any error or mistake in "any return or statement made for "the purposes of contribution, or that "after the assessment became final "any adjustment was made under "the provisions of the Income Tax "Acts of any income that was rele-"vant to ascertaining aggregate in-"vestment income or total income for "the purposes of the assessment, the "Special Commissioners shall autho-"rise any appropriate adjustment of "the contribution."

S. 68 (1): ". . . the expression "'assessment' includes additional "assessment. . . ."

Special Contribution Regulations, 1948, art. 4: "Subject to the express "provisions of the Act these regula-"tions the provisions of the Income "Tax Act, 1918, enumerated in the "Schedule to these regulations shall, "with any necessary modifications, "apply to the assessment and collec-"tion of contribution, and to appeals "under section 60."

Art. 5: "Assessments to contribu-"tions shall be made, signed and "allowed by the Special Commis-"sioners in the same manner as "assessments to sur-tax are made, "signed and allowed by those Com-"missioners."

Income Tax Act, 1918, s. 67 (2): "In cases in which the Special Com-"missioners have authority to make, "sign or allow assessments, as to "hear appeals, they shall possess and "exercise all the powers of the "additional commissioners and "general commissioners with respect "to assessments, appeals, and the "collection and recovery of tax."

Finance Act, 1923, s. 29: "(1) "Subject to the provisions of this "section, an assessment, an addi-"tional first assessment or a sur-"charge in respect of income tax "chargeable for the year 1920–21 or "any subsequent year of assessment "may be amended or made, as the "case may be, under section 125 of "the Income Tax Act, 1918, or "section 126 of that Act, at any time

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

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their representative capacity on April 30, 1954. The appeal was dismissed by the commissioners. The executors appealed on the grounds (a) that an assessment to special contribution must be made not later than six years after the end of the year of assessment 1947–1948—i.e., not later than April 5, 1954; (b) such assessment must be made on executors not later than the end of the third year next following the year of assessment in which the deceased person died—i.e., on the facts of the present case, again not later than April 5, 1954:—

Held, that there was no such time limit within which an assessment must be made on the taxpayer or his executors in respect of special contribution.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the commissioners held on December 7, 1955, the executors of Sir Frank Beauchamp (hereinafter called "the "appellants") appealed against an additional assessment to the special contribution in the sum of £11,211, made upon them in their representative capacity.

The two questions for the special commissioners' decision were: (a) whether an assessment to the special contribution must be made not later than six years after the end of the year of assessment 1947–1948—i.e., not later than April 5, 1954; (b) whether an assessment to the special contribution must be made on executors not later than the end of the third year next following the year of assessment in which the deceased person died—i.e., on the facts of this case, again not later than April 5, 1954.

Sir Frank Beauchamp, Bart., died on June 17, 1950, in the year of assessment 1950–1951. There was a grant of letters of administration pendente lite, the action was settled, Sir Frank's will was proved in solemn form, and the appellants were the executors thereof.

The additional assessment to the special contribution which was the subject of the appeal was made on the executors on April 30, 1954.

It was contended on behalf of the appellants that: (1) Special contribution did not become payable until an actual assessment to the special contribution had been made, and that this assessment must be made by the special commissioners (Finance Act, 1948, s. 55 (1)); (2) the regulations made by the Commissioners of Inland Revenue provide that assessments to the special contribution should be made by the special commissioners in the same manner as assessments to surtax are made

"not later than six years after the "end of the year to which the assess- "ment relates or the year for which "the person liable to income tax "ought to have been charged."

"(3) For the purposes of the "charge of income tax or super-tax "on the executors or administrators "of a deceased person in respect of "the profits or gains or income which "arose or accrued to him before his "death, the time allowed by the "foregoing provisions of this section "shall not extend beyond the end of "the third year next following the "year of assessment in which the "deceased person died."

by them, and that with regard to assessments to the special contribution the special commissioners should have the same powers, but no more, as they possess for the purpose of surtax (S.I. No. 2029 of 1948, para. 5); (3) the regulations made by the Commissioners of Inland Revenue also provide that certain provisions of the Income Tax Act, 1918, enumerated in the Schedule to those regulations, shall, with any necessary modifications, apply to the assessment and collection of the special contribution. Among the enumerated provisions is section 67 (2) of the Income Tax Act, 1918 (S.I. No. 2029 of 1948, para. 4, and the Schedule to the regulations); (4) (a) the powers of the Special Commissioners to make an additional assessment to surtax cannot be exercised later than six years after the end of the year to which the assessment relates or the year for which the person liable to the tax ought to have been charged (section 29 (1) of the Finance Act, 1923, read with section 67 (2) of the Income Tax Act, 1918); (b) the powers of the special commissioners to make additional assessments to surtax on the executors of a deceased person in respect of profits or gains or income which arose or accrued to him before his death cannot be exercised beyond the end of the third year next following the year of assessment in which the deceased person died (section 29 (3) of the Finance Act, 1923); (5) the effect of the above-mentioned legislation is that: (a) an assessment to the special contribution cannot be made later than six years after the end of the year of assessment 1947–1948; (b) an assessment to the special contribution cannot be made on the appellants as executors of the late Sir Frank Beauchamp later than the end of the third year next following the year of assessment (1950–1951) in which Sir Frank Beauchamp died.

On behalf of the respondents (the Commissioners of Inland Revenue) it was contended that: (1) (a) the Finance Act, 1948, imposed upon the special commissioners a duty to assess the special contribution without limitation as to time; (b) the regulations made by the Commissioners of Inland Revenue pursuant to the powers granted by that Act ought not, as subordinate legislation, to be read as lessening or limiting the duty imposed by the Act; and (c) the regulations in fact did not and did not purport so to lessen or limit the special commissioners' said duty; (2) there was no year of assessment for the special contribution; there could, therefore, be no time limit of three years or of six years from the end of a year of assessment for the making of an assessment to the special contribution; (3) the assessment was validly made.

The commissioners rejected the appellants' contention and dismissed the appeal.

Roy Borneman Q.C. and *C. N. Beattie* for the appellants.

John Senter Q.C. and *Sir Reginald Hills* for the Commissioners.

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The following cases were cited in argument: *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co.*[2]; *Whitney* v. *Inland Revenue Commissioners.*[3]

Wynn-Parry J. The special commissioners stated the two questions before them for decision in these words: "(a) whether "an assessment to the special contribution must be made not "later than six years after the end of the year of assessment 1947–"1948—i.e. not later than April 5, 1954; (b) whether an assess-"ment to the special contribution must be made on executors "not later than the end of the third year next following the year "of assessment in which the deceased person died—i.e., on the "facts of this case, again not later than April 5, 1954." I accept that as correctly stating the questions before me in this appeal.

In order to arrive at a solution it is necessary to consider certain of the sections forming Part V of the Finance Act, 1948. Mr. Borneman's first proposition is that upon an examination of the language of Part V there will be found provision which has the result that a time limit is imposed upon the special commissioners, and for that purpose he bases himself on the definition in section 68 (1) of the expression "assessment" as including "additional assessment," pointing out that "additional assess-"ment" has a technical meaning in the Income Tax Acts which can only be ascertained by reference thereto, and that upon an analysis of the relevant provisions of the Income Tax Act, 1918, section 125 must apply. Even assuming that that is right it means that a period of limitation is introduced in Part V, so to speak, by a side wind, because one thing is perfectly clear in this case if nothing else is, and that is that there is no express provision anywhere in Part V saying that there shall be a particular period after which no assessment can be made. Section 47 (1) of the Finance Act, 1948, is the charging section. [His Lordship read the relevant part of the subsection and continued:] The commissioners in the course of their reasons have said: "Furthermore, we accept the Crown's contention that in spite "of the many references to the year 1947–1948 the Special Con-"tribution was not a tax imposed for the year of assessment "1947–1948," and I agree with them. The year 1947–1948 is introduced simply as a basic year upon which the necessary calculation is to be made, and in that regard the scheme of Part V clearly differs very materially from the schemes which are to be found in the other Acts dealing with the levying and payment of tax. The rest of section 47, subsections (2) to (7), appear to me to be supplementary to the charge contained in subsection (1), and there follows section 48, which is in these terms: "Subject to the provisions of this Part of this Act, income "from any source and total income shall be ascertained for the

[2] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531; 33 Tax Cas. 259.

[3] [1924] 2 K.B. 602; 40 T.L.R. 705; 10 Tax Cas. 88.

"purposes of this Part of this Act as they are ascertained for the "purposes of sur-tax; and subject as aforesaid income shall be "treated for the purposes of this Part of this Act as income of "an individual if it would be so treated for the purposes of "sur-tax." Mr. Borneman relied strongly on that section as indicating—as well as other parts of Part V—that this particular tax, special contribution, was tied to surtax for all purposes. I myself do not read the section in that sense. I think it was more accurately described by Mr. Senter as a measuring section, because its object—and I think its sole object—is to provide a means for ascertaining the amount which is to be paid by the taxpayer by way of contribution.

I pass now to consider section 65 which deals expressly with relief in respect of error or mistake. There in the most express terms is an ad hoc provision dealing with relief in respect of error or mistake. By way of contrast, as I have said, there is no such express provision dealing with the limitation of the period in respect of which an assessment may be made. That appears to me to be a matter of considerable importance. If the legislature had decided to provide that in respect of this special tax there should be such a limited period within which an assessment could be made nothing would have been easier than to have incorporated such a provision in this Part of the Finance Act, 1948, so that it could stand alongside and be, as it were, a corollary to this express provision as to relief in respect of error or mistake. One is therefore thrown on again to the definition section upon which Mr. Borneman has to rely, where it is provided that the expression "assessment" includes "additional assessment." I find for myself great difficulty, having examined Part V even to the limited extent to which I have examined it, in coming to the conclusion that the legislature has by this definition introduced a period of limitation. I think the proper conclusion on this first point is that I must apply the doctrine expressio unius est exclusio alterius. Therefore, I am against Mr. Borneman on his first and main point.

It then becomes necessary to consider section 55. Subsection (1) reads: "Contribution shall be a debt due to the "Crown, and shall be assessed and charged by the Special "Commissioners." What follows to my mind is subsidiary to that, including subsection (6), which is the subsection upon which Mr. Borneman founds the second part of his argument. [His Lordship read subsection (6) and continued:] Upon that Mr. Borneman has submitted that the Commissioners of Inland Revenue have the widest possible powers. They might, he contended, have done nothing and made no statutory regulations at all, they might have made an express provision introducing the period of limitation, or they might have introduced an express regulation saying that there should be no period of limitation. In my view, I am concerned only with considering the position as it has in fact evolved, and in my view as the commissioners

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have made regulations this part of the case has got to be determined upon a consideration of those regulations.

The regulations are contained in Statutory Instrument No. 2029 of 1948, and the two relevant ones are paragraphs 4 and 5. I will deal first with paragraph 4, which reads: "Subject to the "express provisions of the Act and these regulations the pro- "visions of the Income Tax Act, 1918, enumerated in the "Schedule to those Regulations shall, with any necessary modifi- "cations, apply to the assessment and collection of contribution, "and to appeals under section 60." Mr. Borneman's argument is that when one looks at the Schedule it emerges that the Commissioners of Inland Revenue have in exercise of their power under section 55 (6) of the Finance Act, 1948, in fact brought it about that there is a limited period within which the assessment may be made, because it is provided in the Schedule that one of the provisions of the Income Tax Act, 1918, which is to apply is section 67 (2), which reads: "In cases in which the special "commissioners have authority to make, sign or allow assess- "ments, or to hear appeals, they shall possess and exercise all "the powers of the additional commissioners and general com- "missioners with respect to assessments, appeals, and the collec- "tion and recovery of tax." Mr. Borneman's contention is that the phrase "all the powers" includes those powers, and nothing but those powers, and must therefore make applicable such limitations as there are upon those powers. When one turns to section 125, it is provided by subsection (2) that "An assess- "ment may be amended, or an additional first assessment may "be made at any time not later than three years after the "expiration of the year of assessment." It is perfectly true that strictly speaking that subsection has not been repealed, but by section 29 of the Finance Act, 1923, it is provided by subsection (1): [His Lordship read the subsection]. Subsection (3) reads: [His Lordship read it and continued:] Those provisions in section 29 are substantive provisions, and in effect they take the place of section 125 (2). Mr. Borneman, in his reply, suggested that the fact that section 125 (2) had not been repealed was a point in his favour because once, so to speak, he got into section 125—if he did—then he need not go any further because there was a provision still upon the statute book containing the period of limitation. I take just the opposite view. I think that the circumstance that the legislature has thought fit in section 29 of the Finance Act, 1923, to introduce substantive provisions dealing with the period within which an assessment can be made is a very strong pointer to the conclusion that assuming the commissioners had had power under the regulations to introduce a period of limitation they would have done so, and they ought to have done so, by an express reference to section 29 of the Finance Act, 1923. I am not to be taken to be agreeing that they could have done so, but the circumstance that the governing statutory provision as regards limiting the period within which

an assessment can be made is not to be found in section 125 appears to me to militate very strongly against Mr. Borneman's argument, and I come to the conclusion that the special commissioners were right when they took the view that even assuming that the commissioners had power under paragraph 4 of the regulations to introduce a period of limitation, they have not done so.

It remains to consider paragraph 5. The first comment I have to make is that in looking at the scheme disclosed by this Statutory Instrument, one would, I think, find it a matter for surprise if the object had not been achieved by paragraph 4 but had been achieved by paragraph 5. In my view, when properly understood paragraph 5 deals only with matters of form and procedure. The verbs used are "made, signed and allowed"—"Assessments to contributions shall be made, signed and allowed "by the special commissioners in the same manner as assess-"ments to sur-tax are made, signed and allowed by those com-"missioners." It seems to me that paragraph 5 is dealing with a different subject-matter altogether from that which is being dealt with under paragraph 4, and my conclusion is that paragraph 5 can afford Mr. Borneman no help. On the reasoning of my judgment I have come to the conclusion that Mr. Borneman's last point cannot succeed, because to succeed on the second question he must satisfy me that section 29 (3) of the Finance Act, 1923, applies, but, as will have been seen, I have reached the conclusion that one never gets as far as that section. Therefore, I agree with the special commissioners that they were right in rejecting the argument under the second question. For those reasons, in my view this appeal fails.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills for Thatcher & Hallam, Midsomer Norton; Solicitor of Inland Revenue.*

[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION (ANCILLARY RELIEF).

1957
Mar. 5.

Husband and Wife—Practice—Pleading—Ancillary relief—Petition or answer—Remedy where application for ancillary relief omitted—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940 (*L.* 27)), *rr.* 3 (3), 44 (1)—*Matrimonial Causes (Amendment) Rules,* 1957 (*S.I.* 1957, *No.* 176 (*L.* 2)),[1] *rr.* 4, 16.

[1] By rule 1 (3) of these rules: "These rules shall come into operation on April 30, 1957, but (except "rule 21 of these rules [which adds "a new rule 54A concerning injunctions restraining removal of children "and 54B concerning separate representation of children]) shall not "affect proceedings commenced before "that date."

The explanatory note to these rules reads as follows: "These Rules give "effect to a number of recommendations made by the Royal Commis-

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Practice Direction (Ancillary Relief).

(i) At any time up to the hearing of a cause, the omission of a prayer for ancillary relief from a petition or answer may be remedied by an application under rule 15 or 19 for leave to amend the pleading, reservice of which will normally be ordered.

(ii) An application under the proviso to rule 3 (3)[2] for leave to make an application for ancillary relief which should have been included in the petition or answer must be made to a judge on summons which should be supported by affidavit. If in such cases an extension of time is necessary under rule 44 (1),[3] it should be sought in the same summons.

(iii) In cases in which the leave of a judge under the proviso to rule 3 (3) is not required, an application for extension of time under rule 44 (1) may be made to a registrar on summons, supported by affidavit.

(iv) In cases (ii) and (iii) the summons and affidavit should be served on the respondent to the application, whether or not he has entered an appearance.

(v) The Practice Direction dated May 17, 1955,[4] is hereby cancelled.

B. LONG.
Senior Registrar.

March 5, 1957.

"sion on Marriage and Divorce, and "make other amendments in the "Matrimonial Causes Rules, 1950. "The principal alterations resulting "from the Royal Commission's Report "are—(1) A petitioner or respondent "who claims custody of the children "must give full particulars of the "arrangements proposed for their "support, care and upbringing (paras. "5 (2), 11 (2) and 13 (2)). (2) An "injunction restraining the removal "of any children out of the juris-"diction of the court may be applied "for as soon as the petition has been "filed (para. 21). (3) The court is "given power to order children to be "separately represented whenever it "thinks fit (para. 21). (4) Any appli-"cation for maintenance or other "financial relief must, wherever "practicable, be made in the petition "or answer (para. 4). (5) The court "may allow the filing of a petition "which does not disclose the peti-"tioner's address (para. 5 (1)). (6) "Leave of the court will be necessary "before execution can issue for the "recovery of any sum due by way of "maintenance, alimony, etc., where "an application for the discharge or "variation of the maintenance order "is pending (para. 23).

"It was decided in *Galloway* v. "*Galloway* [1956] A.C. 299; [1955] "3 W.L.R. 723; [1953] 3 All E.R. "429, that the court's power to make "provision for the custody and main-"tenance of children extends to "illegitimate children of the two "spouses, and references throughout "the Matrimonial Causes Rules, "1950, to the children of the "marriage have, wherever appropri-"ate, been amended accordingly "(paras. 3, 5 (1), 13 (1), 16 (2), 20 "and 22).

"Ordinary post may be used "instead of registered post, if so "desired, for the service of petitions "and other documents authorised to "be served by post (paras. 8 (1) and "9)."

[2] See Matrimonial Causes (Amendment) Rules, 1957, r. 4, for terms of new rule.

[3] See Matrimonial Causes (Amendment) Rules, 1957, r. 16, for terms of new rule.

[4] [1955] 1 W.L.R. 703; [1955] 2 All E.R 465.

[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION (ADDRESS OF PETITIONER).

1957
Mar. 5.

Husband and Wife—Practice—Pleading—Petition—Address of petitioner—Application for leave to omit address—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940 (*L.* 27)), *r.* 4 (1) (*d*)—*Matrimonial Causes* (*Amendment*) *Rules,* 1957 (*S.I.* 1957, *No.* 176 (*L.* 2)),[5] *r.* 5.

Where it is sought to obtain a registrar's order, under rule 4 (1) (*d*),[6] that the residence of a petitioner be omitted from the petition, the following procedure should be adopted:—

The petition should be filed, the address having been omitted from it, but not from the affidavit verifying it. The solicitor should apply, ex parte, on an affidavit by the petitioner stating the address and the grounds of the application.

If this is granted, the registrar will order that the copy petition to be served shall omit the affidavit that is part of the document; that a similar copy shall be lodged with the papers —the marriage certificate being annexed thereto; that the original petition and the affidavit in support of the application be enclosed in a sealed envelope, and be not opened without leave of the court; the envelope being so endorsed; and that any subsequent affidavit may be worded "I A . . . B . . . the "above named petitioner, whose address is retained on the "court file under seal, by virtue of an order dated ——, make "oath and say: ."

If the application is refused, the registrar will make an order directing amendment of the petition before it is served.

B. LONG.
Senior Registrar.

March 5, 1957.

[5] See footnote (1) to Practice Direction (*supra*).

[6] See Matrimonial Causes (Amendment) Rules, 1957, r. 5 (1), for terms of new rule.

[PROBATE, ETC., DIVISION.]

1957
Mar. 5.

* PRACTICE DIRECTION (PRAYER FOR DISCRETION).

Husband and Wife—Practice—Pleading—Petition—Prayer for discretion — Phraseology — Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940 (*L.* 27)), *r.* 4 (3).

Where a petition filed on or after April 30, 1957, contains a prayer that the court will exercise its discretion, the full wording set out in rule 4 (3) [7] must be employed, including the words "notwithstanding the adultery of the petitioner during the "marriage."

B. LONG.
Senior Registrar.

March 5, 1957.

[7] Matrimonial Causes Rules, 1950, r. 4 (3): "The petition shall conclude with a prayer setting out "particulars of the relief claimed . . . "and, in appropriate cases, a prayer "that the court will exercise its "discretion to grant a decree nisi "notwithstanding the adultery of the "petitioner during the marriage."

[QUEEN'S BENCH DIVISION.]

1957
April 1.

Ashworth J.

* PRACTICE DIRECTION (FIXED DATES FOR NON-JURY ACTIONS) (No. 2).

Practice — Trial — Date — Non-jury actions — Fixed dates — Delay — Mitigation.

Ashworth J. I am directed by the Lord Chief Justice to make the following statement. It has now become possible to form some view as to the working of the scheme for fixing dates for the trial of cases in the Queen's Bench Division.

The response to the scheme was very great, so much so that by the middle of March applications in nearly 300 cases had been heard. In planning the scheme it was a matter of paramount importance to ensure that cases would in fact be tried on the dates fixed for them; in other words, that there would be judges available to try them on those dates. For this reason the number of courts allotted for the trial of fixtures was at first limited to four and, apart from an increase to six in the last weeks of these sittings, this number has been retained.

The result of this limitation, coupled with the large number of applications for fixtures, has inevitably been that trials have had to be fixed for dates a long time ahead, and when a temporary stay was placed on applications a fortnight ago, the earliest date available for a fixture was one in January, 1958.

The possibility of increasing the number of courts available

for the trial of fixtures to six or more has been carefully considered. While it is true that at times there may be enough judges in London for six or more such courts, circuit and other commitments are such that it would not be possible to plan on a basis of six courts throughout the year without running a serious risk that fixed cases would not in fact be tried on the dates allotted to them. So far every fixture has at least been in the list for the day for which the case was fixed, and it is considered that this principle should be maintained.

It has always been realized that a system of fixed dates must inevitably involve delay, and in order to mitigate that position the following further Practice Direction[1] is given with the approval of Lord Goddard C.J.

1. The number of courts available for fixtures will be increased to six for the first two weeks of next Michaelmas Sittings and next Hilary Sittings, as there ought then to be sufficient judges available in London.

2. If on the hearing of an application for a fixture one of the parties objects on the ground that the case will thereby be delayed, the clerk of the lists may, instead of fixing a date for trial, leave it in the general list marked "Not to come on for trial" before such date as the parties agree or in default of agreement as will enable the parties adequately to prepare for trial. A party objecting to this course may appeal to the judge in charge of the lists.

3. In order to give an opportunity to parties whose cases have already been fixed for dates later than October 31, 1957, to apply for an earlier date, in particular a date in the first two weeks of Michaelmas Sittings, application may be made to the Clerk of the Lists for advancement at any time before the last day of these sittings.

4. Subject to the preceding paragraph, the stay on the making of applications for fixtures which is at present in force will continue until May 6, 1957, after which date any open dates available may be allotted to applicants.

5. Applications to fix a date will not be entertained in respect of any of the cases in the general list which have been included in the warned list for the week beginning May 6, 1957, or in respect of any of the next 50 cases included in the general list. All these cases will have been disposed of long before any date which might be allotted as a fixture and it is undesirable that applications for fixtures should be used merely as a method of achieving delay. This, however, will not prevent parties applying on special grounds to the judge in charge of the list for a fixture.

E. M. W.

[1] For previous direction see [1957] 1 W.L.R. 183; [1957] 1 All E.R. 219.

[CHANCERY DIVISION.]

1957
Jan. 29.

Harman J.

* *In re* FREEMAN-THOMAS INDENTURE.

In re RATTON ESTATE.

[1956 F. 1071.]

Restrictive Covenant—Declaration—Whether land affected by covenant —Conveyance of land by tenant for life to local authority—Covenant with settled estate to maintain "as a public park or common and "for no other purpose whatsoever"—Settled estate no longer in existence—Application for declaration covenants no longer enforceable—No appearance by respondents—Ambit of declaration—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 84 (2).

By a conveyance dated August 16, 1901, to which Settled Land Act trustees were also parties, F., the tenant for life of the R. estate, conveyed 82 acres of land forming part of it to a local authority. Part of the consideration for the conveyance was a covenant expressed to be entered into by the local authority with F. and "other the owner or owners for the time being of the "[R.] Estate . . . his and their heirs and assigns" to maintain the land conveyed as a public park or common only. The conveyance also contained a covenant by the local authority not to erect any building on any part of the land without the consent of F. or other the owner for the time being of the R. Estate or the trustees for the time being thereof.

By 1956 the land, which the local authority had duly maintained as a public park, had become, with the progressive development of the locality, increasingly surrounded by small houses: and the authority was minded to build a grammar school on part of it. The R. Estate was by then non-existent, it having been broken up into small plots. The local authority applied for a declaration under section 84 (2) of the Law of Property Act, 1925,[1] that the restrictive covenants contained in the conveyance of 1901 no longer affected the land on which it was proposed to build, and that they were no longer enforceable by anyone. A large number of persons living in the neighbourhood of the proposed school were joined as respondents to the summons, but none of them entered an appearance:—

Held, there being no one who could enforce the covenants, the court had discretion to declare that that land was not affected by the restrictions.

In re Sunnyfield [1932] 1 Ch. 79 considered.

Adjourned summons.

By an indenture dated August 6, 1901, and made between Freeman Freeman-Thomas and others of the first part, the Settled Land Act trustees therein named of the second part, and Eastbourne Corporation of the third part, certain lands, commonly

[1] Law of Property Act, 1925, s. 84 (2): "The court shall have power on "the application of any person inter- "ested—(*a*) To declare whether or not "in any particular case any freehold "land is affected by a restriction im- "posed by any instrument; or (*b*) To "declare what, upon the true construc- "tion of any instrument purporting to "impose a restriction, is the nature "and extent of the restriction thereby "imposed and whether the same is "enforceable and if so by whom."

called The Decoy and Ham Shaw, together with the pasture land and the piece of land called or known as the Polo Ground adjoining thereto, all of which premises contained about 82 acres and were delineated on a plan drawn on the indenture and thereon coloured dark green and light green, were conveyed to the corporation in fee simple. The corporation covenanted "for themselves and their assigns . . . with the said Freeman Freeman-Thomas and other the owner or owners for the time being of the Ratton Estate in the said county of Sussex his and their heirs and assigns in manner following that is to say: The corporation shall for ever hereafter maintain the said pieces of land hereby conveyed and coloured dark green and light green respectively on the said plan as a public park or common and for no other purpose whatsoever," subject, by virtue of four provisos, to the benefit of a subsisting tenancy of the Polo Ground and to the right to let the land coloured light green on the plan for the building on it of up to four private houses according to plans to be approved by "the tenant for life or the trustees for the time being of the said Ratton Estate . . ."

The corporation covenanted further not, "without the consent in writing of the said Freeman Freeman-Thomas or other the owner or owners for the time being of the said Ratton Estate or of the trustees for the time being of the said estate . . ." to erect any building on any part of the land conveyed other than a building usually erected in a public park or pleasure ground, and covenanted to keep in good order existing outer boundary fences and hedges and within ten years from the date of the deed to build an unclimable fence along the outer boundaries. The corporation covenanted also not to fell timber without consent. The title deeds were never handed over to any purchaser, which indicated that the Ratton Estate never passed to a purchaser. The corporation duly maintained the land as a public park, which, as Eastbourne was developed, became increasingly surrounded by small houses: and the corporation ultimately wished to build a grammar school on part of the recreation ground next to the park. The Ratton Estate had by that time ceased to exist.

By this summons, to which a large number of persons living in the neighbourhood of the proposed school were joined as respondents, none of whom entered an appearance, the corporation sought a declaration that the land on which it was proposed to build was no longer affected by the restrictive covenants and that they were not enforceable by any person. There was evidence that the representative for the time being of the family of Freeman-Thomas was not interested, and the question for decision was whether anyone else was.

G. H. Newsom Q.C. and *Lionel Abel-Smith* for the corporation.

1957

Freeman-Thomas Indenture, *In re.* Ratton Estate, *In re.*

Cases cited in argument not referred to in the judgment: *In re Ballard's Conveyance* [2]; *Northbourne* v. *Johnston* [3]; *In re Union of London and Smith's Bank Ltd.'s Conveyance* [4]; *London County Council* v. *Allen* [5]; *Drake* v. *Gray* [6]; *Kelly* v. *Barrett.* [7]

Harman J. stated the facts and continued: The covenant does not purport to be made with the owner for the time being of any part of the Ratton Estate but with the owner of the estate as a whole, and there appears to be no such owner. The deeds are still in the hands of the vendors' solicitors and have not been handed over to any purchaser. That is evidence that the Ratton Estate as such has not passed to anybody as a purchaser, and it seems to me impossible to say there is anybody now in a position to enforce these covenants. It would be an extraordinary state of things if they were binding, because the corporation would then be prevented from ever getting any consent to build anywhere, or indeed cutting down any of the trees in the woods. My judgment is that these covenants are obsolete, and there being nobody interested now they are not in fact at anybody's command.

In those circumstances, the corporation were entitled as a public body with a contractual obligation and no more, but no doubt open to criticism of the neighbours and ratepayers, to make an application concerning this instrument under section 84 of the Law of Property Act, 1925. In section 84 (2) we find these words: "The court shall have power on the application of "any person interested—(*a*) To declare whether or not in any "particular case any freehold land is affected by a restriction "imposed by any instrument; (*b*) To declare . . . whether the "same [the restriction] is enforceable and if so by whom."

Section 84 (2) has not been referred to very often, but there is one reported case before Maugham J., *In re Sunnyfield*,* where a somewhat similar application was made to him, and he made the order under section 84 (2) that the covenants there involved were no longer effective.

In the present case, as in *In re Sunnyfield*,* no opposition or body of opponents could be discovered. There are a number of local people who grumble in a vague way and say: "This kind "of trust is something which the local authority ought not to "break," but nobody comes on their behalf and says that he is entitled as a matter of law to object to the breach of this covenant. In those circumstances, what is the corporation to do?: Maugham J. said †: "When such an order as this is asked "for, the court ought to make every effort to see that all persons "who may wish to oppose the making of the order have the

[2] [1937] Ch. 473; 53 T.L.R. 793; [1937] 2 All E.R. 691.
[3] [1922] Ch. 309.
[4] [1933] Ch. 611.
[5] [1914] 3 K.B. 642; 29 T.L.R. 30.
[6] [1936] Ch. 451; [1936] 1 All E.R. 363.
[7] [1924] 2 Ch. 379; 40 T.L.R. 650.
* [1932] 1 Ch. 79.
† Ibid. 83.

"opportunity of being heard, stating their objections in argument "before the court, and inviting the court to refuse to exercise "its powers. In the present case, it seems that every effort has "been made to give notice to all persons having a probable "interest in the property, and accordingly I ought not to refuse "to proceed to the hearing of the matter."

The powers of the court are discretionary and not obligatory. The corporation here has joined as respondents a large number of persons, none of whom has entered appearance or made a move to respond. The respondents number 39, but of that number two have ceased to have any interest in the matter. The 37 who are left are interested in plots of land more or less adjacent to the plot on which it is proposed to build the grammar school. It has been proved by certificate that no appearance on any other parties' behalf has been entered. Is that an adequate compliance with Maugham J.'s injunction? I think on the whole that it is. I cannot see that anyone else can have any real interest in this matter. These people live in houses which are more or less in proximity to the proposed school, and, therefore, it might be supposed that the proximity of noisy schoolboys would to some extent depreciate the value of their properties, but, nevertheless, none of them has come and said that he is entitled to the benefit of these covenants. The truth is that nobody could possibly have said so or could have put forward such a plea. The objections which they have made are in fact objections more of a moral or ethical nature which this court will only look at because this is a discretionary jurisdiction.

In my judgment there is no one who can enforce these covenants. The only serious question is, ought I to exercise a power which is, as I say, of a discretionary kind? The words of the section are: "The court shall have power . . . to declare." It seems to me that that is a power which I should use on this occasion, and I propose to do so in order to quiet possible objections which might be raised by people who have not chosen to come forward here but may like to cherish a grievance hereafter. Consequently, I propose to make a declaration that the property described in the heading to the originating summons, which will be set out on a plan conveniently annexed to the order, is not affected by the restrictions imposed by the instrument mentioned in the heading nor are they enforceable by any person. I do not think that the court is entitled to make a general order but only to declare that the land brought to its notice on the particular application is or is not subject to the operation of the restrictive covenant.

Declaration accordingly.

Solicitors: *Sharpe, Pritchard & Co. for Town Clerk, Eastbourne.*

K. R. A. H.

[PROBATE, ETC., DIVISION.]

1956
Oct. 11.

1957
Mar. 4.

Willmer J.

* CRUICKSHANKS *v.* CRUICKSHANKS.

Conflict of laws—Domicile—Change—Military duty—Residence for purpose of military duty may be sufficient if accompanied by animus remanendi—Necessity of considering factum and animus in conjunction.

A Scotsman born and educated in Scotland joined a Scottish regiment in Scotland in 1945. In 1949 he was transferred to the Royal Army Ordnance Corps, in which regiment he remained at all material times, and was posted to England where, in the same year, he married an Englishwoman. The husband never resumed residence in Scotland after the marriage and the parties cohabited in England until December, 1952, when the husband deserted the wife. He thereafter continued to live in England both on leave and on duty save when posted overseas.

By a petition dated February 17, 1956, the wife, alleging that the husband was domiciled in England, sought the dissolution of the marriage on the grounds of adultery and desertion. At the hearing of the suit the court found the offences proved but adjourned the matter for the assistance of the Queen's Proctor on the question of jurisdiction:—

Held, that, (1) although the acquisition of a domicile of choice could not result solely from mere residence for the purpose of military duties, it was possible to show the acquisition of a domicile in England by a soldier compulsorily posted here if there were sufficiently cogent evidence before the court to indicate that such was his state of mind; in cases of this character the questions of the factum and animus of residence could not be considered wholly in isolation, for the animus was an important element in considering whether the residence relied upon was or was not a voluntary residence.

(2) That the evidence fell far short of the cogency required and the petition must, therefore, be dismissed for want of jurisdiction.

Donaldson v. *Donaldson* [1949] P. 363 followed in applying *Sellars* v. *Sellars*, 1942 S.C. 206.

Undefended petition for divorce.

The parties were married in December, 1949. The husband, whose domicile of origin was Scottish, was at all material times a serving soldier. He originally joined the Army in 1945, when he joined a Scottish regiment at Dundee in Scotland. He had been brought up and educated in Scotland by his Scottish mother. He continued serving with a Scottish regiment until 1949, when he was transferred to the Royal Army Ordnance Corps, a regiment membership of which is not confined to English or Scots, Welsh or Irish. After his posting to the Royal Army Ordnance Corps he was sent to England, and he resided in England for some considerable time in the course of his military duties, during which he met the wife whom he married in England on December 19, 1949. The parties cohabited at various addresses in England, and their cohabitation came to an end when the husband left the wife in December, 1952.

The wife was an Englishwoman. The husband never returned to reside in Scotland after his marriage. He continued to serve in England throughout the period of cohabitation, but subsequent thereto he was posted abroad and served both in Korea and in Malaya.

In 1956 the wife filed a petition seeking the dissolution of the marriage on the ground of the husband's adultery and desertion, claiming that the court had jurisdiction to hear the matter on the ground that the husband had acquired a domicile of choice in England. The cause came before Willmer J. on October 11, 1956.

In giving evidence in support of her petition the wife could say very little of her own knowledge as to the intentions of her husband. She agreed that her husband was a Scot, and said that she met him at Chilwell in Nottingham; he was then in the R.A.O.C. She was then asked: "Was it discussed between "you at all, either before the marriage or just after, where you "would live?" Her answer was: "Well, we did talk about "living in England but, I mean, no definite plans were made."

It appeared that even after the husband had withdrawn from cohabitation with the wife he continued, whilst still serving in England, to reside in England, on leave as well as on duty, with the woman named in the petition, who was also an Englishwoman.

It was not contested on behalf of the wife that the husband's domicile of origin was Scottish, and that in those circumstances the burden was upon the wife to satisfy the court that there had been an acquisition of a domicile of choice in England on the part of the husband, and that, failing satisfactory proof of that, she could not show that the court had the necessary jurisdiction to deal with the case. At the conclusion of the hearing Willmer J., finding that the matrimonial offences charged against the husband had been proved, adjourned the matter for the assistance of the Queen's Proctor on the question of jurisdiction.

At the date of the adjourned hearing in March, 1957, the husband had returned to and was stationed in England, and his engagement was shortly due to terminate. An affidavit by the husband's mother and an unsworn draft affidavit by the husband were before the court.

A. B. Hollis for the wife.

Colin Duncan for the Queen's Proctor.

In addition to the cases referred to in the judgment the following were cited in argument: Rayden on Divorce, 6th ed., p. 26; Halsbury, Laws of England, vol. 7, p. 22.

WILLMER J. referred to the facts and continued: There is, I think, no doubt—and it became apparent as Mr. Duncan, in his extremely lucid and helpful argument, traced the history of the

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law on the subject—that there has, over the years, been some degree of what I might perhaps call relaxation of the very strict view which the law took half a century and more ago with regard to the acquisition of a domicile of choice. For instance, I would refer to the often-cited passage in the speech of Lord Westbury in *Udny* v. *Udny*[1] which stated: "There must be a "residence freely chosen, and not prescribed or dictated by any "external necessity, such as the duties of office. . . ." It may seem at first sight that those words, strictly applied, exclude the case of residence prescribed by such duties, for instance, as military service, such as we have in this case. Similarly, in *King* v. *Foxwell*,[2] Jessel M.R. stressed this aspect of the matter and said[3]: "I have had before me a great number of authorities, "and the conclusion I draw is this, that in order that a man may "change his domicile of origin he must choose a new domicile— "the word 'choose' indicates that the act is voluntary on his "part—he must choose a new domicile by fixing his sole or "principal residence in a new country . . . with the intention of "residing there for a period not limited as to time."

The question of domicile arose, following those cases, in relation to a serving soldier in the case of *In re Macreight*,[4] where Pearson J. expressed his views as follows[5]: "As I under- "stand the rule of law it is this: a British subject does not by "merely entering into the British Army abandon his domicile, "and his remaining in the Army is no evidence of an intention to "abandon the domicile which he had at the time when he "entered it, but, so long as he remains in the Army, he retains "that domicile which he had when he entered it." If I applied that view strictly, it would be conclusive, I apprehend, against the husband in this case.

A similar view in relation to a serving officer was expressed in *In re Mitchell, Ex parte Cunningham*.[6] Lindley L.J. said[7]: "It is said that, whether his domicile of origin was Scotch or "Irish, it became English by his entering into the English "Army, and in particular by his entering the Royal Engineers "whose headquarters are at Chatham. I think that this is not "a correct view of the law. This depends on whether that which "Mr. Dicey says in his book correctly represents the result of the "authorities. He says (p. 139): 'A soldier or sailor in the "'service of his own sovereign retains the domicile which he "'had on entering the service, wherever he may be stationed,' "and he refers to *Yelverton* v. *Yelverton*[8] and *Brown* v. *Smith*.[9] "I think that his statement is fully borne out by those authori- "ties. The point appears to me perfectly plain."

Perhaps it is due to the fact that, as a matter of history,

[1] (1869) L.R. 1 Sc. & Div. 441, 458.
[2] (1876) 3 Ch.D. 518.
[3] Ibid 520.
[4] (1885) 30 Ch.D. 165.
[5] Ibid. 168.
[6] (1884) 13 Q.B.D. 418.
[7] Ibid. 425.
[8] (1859) 1 Sw. & Tr. 574.
[9] (1852) 15 Beav. 444.

questions relating to serving soldiers have bulked rather larger than they did in those far-off Victorian days, but, whether for that cause or any other, there is no doubt that in the more recent authorities a more liberal attitude towards the question of the acquisition by serving soldiers of a domicile of choice has developed. I have been referred, for instance, to a recent decision of Ormerod J. in *Donaldson (or Nichols)* v. *Donaldson*,[10] a case of a serving officer in the Royal Air Force, who was found on the facts of the case to have acquired a domicile of choice in Florida, so as to give jurisdiction to the court in that State in matrimonial proceedings.

I think perhaps the most illuminating modern authority on the development of the law is the Scottish case, to which Mr. Colin Duncan referred me, of *Sellars* v. *Sellars*.[11] That was actually the converse case to that which we have to consider here, namely, the case of an Englishman whose war service took him to Scotland, where he resided with his wife. It was sought to set up a Scottish domicile, and the matter came before the court on that point. The Lord President, Lord Normand, said [12]: "*Clarke* v. *Newmarsh*,[13] in fact, shows that the proposition that "a soldier cannot acquire a domicile in the place where he is "stationed is not universally true. In that case it was held "that Governor Trapaud, an Englishman by origin who was "resident as Military Governor in Fort Augustus, had acquired a "Scottish domicile. But it was proved that he had taken a lease "of land in Scotland, which he cultivated, and that he had "become a magistrate in Scotland and had formed other "Scottish connexions.

"In order to acquire a domicile of choice two things are "necessary—first, the actual fact of residence in the new "country; and, second, an intention *remanendi*. Now, in my "opinion, the requirement of residence is not satisfied merely "by proof of a residence imposed upon a soldier by the order "of his military superiors. But, then, there may co-exist with "a residence, which has begun and is continued under military "orders, facts and circumstances which establish a residence "voluntary in character and chosen by the soldier, although it is "a residence in the place in which he is stationed by the order "of his military superiors. Such facts and circumstances were "present in the case of Governor Trapaud, and they played their "due part in the decision that he had acquired a Scottish "domicile and had abandoned his English domicile.

"Accordingly, I think that the proposition as stated by the "Lord Ordinary should be modified to the effect that a soldier "does not and cannot acquire a domicile in the place where he is "stationed if there is nothing more to qualify his residence "there than the mere fact that he is present in it under orders."

It seems to me—and I know of no authority to the contrary—

[10] [1947] P. 363; 65 T.L.R. 233.
[11] 1942 S.C. 206.
[12] Ibid. 211.
[13] (1836) 14 S. 488.

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that that statement of the law, which was applied by Ormerod J. in *Donaldson* (*or Nichols*) v. *Donaldson*,[14] is a correct statement of the law of England as well as of the law of Scotland as it stands today, and I should be only too happy to adopt those words of Lord Norman as my own. Agreeing with him, I hold that, although mere residence in England as a result of posting for the purpose of military duty is not enough, it is possible, even for a soldier compulsorily posted to England, nevertheless to show the acquisition of an English domicile of choice, if sufficiently cogent evidence is put before the court to show his state of mind.

That brings me to the final submission on behalf of the Queen's Proctor which, in my judgment, sums the matter up correctly, namely, that when you are dealing with cases of this character it is no longer possible to keep the question of the factum of residence separate from the question of animus. They cannot be considered wholly in isolation when one comes to apply the law in practice, for the animus must be an important element to be taken into account when considering whether the residence relied on is or is not a voluntary residence. At any rate, that is the view of the law which I now seek to apply to the facts of the present case. Is it proved to my satisfaction, the onus of proof being upon the wife, that the husband in this case did acquire a voluntary residence in this country, superimposed, as it were, upon the involuntary posting to this country which he got in the course of his military duties?

The only evidence, other than that given at the previous hearing, now before the court on the matter is, first, an affidavit which has now been obtained from the husband's mother, which has been admitted without objection—or, at any rate, without too strenuous objection—on the part of the Queen's Proctor before me today, and secondly, a draft affidavit, which was submitted by the wife's solicitors to the husband but never sworn to by him. The importance of the latter lies not so much in what was submitted to him, but in what was crossed out from the draft when he returned it to show what he was prepared to swear, and also in the substituted passages which he inserted to take the place of those parts which he had crossed out.

So far as the evidence of the wife's mother is concerned, one must agree straightaway that, so far as it goes, it is wholly in favour of the wife. I have no reason to suppose that she has said in her affidavit anything other than what she believes to be the truth; and she says that her son had told her that, when he was married, he intended permanently to reside in England and to settle there with his wife, and that, after he had finished in the services he still intended to settle in England. She concludes her affidavit by saying: "Throughout the time my son lived "with his wife the matrimonial home was always in England to "the best of my knowledge, and he has from time to time told

[14] [1949] P. 363, 365–366.

"me that he intended to reside in England permanently." That, so far as it goes, is, of course, wholly in favour of the submission made on behalf of the wife, but I think it is rightly observed on behalf of the Queen's Proctor that this is not really very cogent evidence; at best it is secondhand.

[His Lordship then referred to the contents of the draft affidavit submitted to the husband but never sworn by him, and continued:] From all that it appears to me to be reasonably clear that when the husband—the man whose intentions are in question in this case—was being asked to say in black and white that he had abandoned any intention of continuing to live in Scotland, and had formed an intention—a voluntary intention—of remaining permanently in England and founding a permanent home in England, he withdrew from any such proposition and refused to set his signature to it.

In those circumstances, the burden being upon the wife to establish to my satisfaction the acquisition of a domicile of choice in England, I can only say that, in my judgment, the evidence adduced in an attempt to discharge that burden falls far short of having the cogency required. I am not satisfied on the facts that this husband in fact acquired a domicile of choice in England, either at the date of the petition or at the date when he is alleged to have been guilty of desertion, and in those circumstances I cannot find that this court has jurisdiction to grant relief.

Petition dismissed.

Solicitors: *R. H. Marcus, the Law Society, Divorce Department; Queen's Proctor.*

E. J.

[PROBATE, ETC., DIVISION.]

* CADE *v.* CADE.

1957
Jan. 30, 31.

Lord Merriman P. and Collingwood J.

Husband and Wife — Cruelty — Desertion — Neglect and indifference— Course of conduct—Simple desertion as cruelty—Justices.

The nature of a wife's case of persistent cruelty and desertion was that the husband had displayed a callous indifference to her and the children, stayed out late at night and left them alone, and refused to take them out, and told her that she was no wife to him. He had refused to sleep with her after the birth of a child on July 13, 1956, and had registered the child under a name which he knew was not that chosen by the wife. On September 2, 1956, he had told her that he had lost interest in her and the children and would like a separation, and on the following three days he ignored them completely.

The wife accordingly went to her parents on September 6, 1956, not intending to leave the husband permanently; but shortly afterwards the husband in answer to a letter offering a reconciliation if he would treat her and the children in a proper affectionate manner

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replied that it would be best for all to separate. The justices found the charges proved:—

Held, (1) that the husband's conduct had rightly been held to amount to persistent cruelty, for he knew of his wife's condition, he had persisted none the less in a course of conduct to which the wife had objected, and had shown a callous indifference towards her, and her health had been affected.

Simpson v. *Simpson* [1951] P. 320; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955; *Jamieson* v. *Jamieson* [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875; *Waters* v. *Waters* [1956] P. 344; [1956] 2 W.L.R. 661; [1956] 1 All E.R. 432 followed and applied.

(2) That such conduct also had amounted to constructive desertion, of which the husband's letter was corroboration of his intention to disrupt the marriage and to drive his wife out of the home.

Per curiam. There may be circumstances in which simple desertion could amount to cruelty: it does not follow from the fact that, by contrast with cruelty, the remedy of divorce is only given for desertion which has lasted for three years before the presentation of the petition, that desertion per se cannot be cruelty. Desertion is an offence apart altogether from its duration.

Beard v. *Beard* [1946] P. 8; 61 T.L.R. 555; [1945] 2 All E.R. 306; *Carpenter* v. *Carpenter* [1955] 1 W.L.R. 669, 673; [1955] 2 All E.R. 449 considered.

Appeal by a husband from an order of the justices for the county borough of Great Yarmouth, made on October 31, 1956, on the ground of persistent cruelty, desertion and wilful neglect to provide reasonable maintenance. The husband was ordered to pay £5 a week for the maintenance of the wife and £1 10s. 0d. in respect of each of the three children of the marriage, the custody of those children being given to the wife and no objection to that course being taken at the hearing. The justices also inserted a non-cohabitation clause in the order, such clause being asked for in the wife's summons.

The parties were married in December, 1951, and lived in Spalding. There were three children of the marriage, all girls, the first born on August 22, 1952, the second on April 18, 1954, and the third on July 13, 1956. On September 6, 1956, the wife left her husband and went to her mother's. The substance of her case was that from the beginning of 1956 her husband consistently neglected her and the children, and that he spent at first most of his time and finally all of his time, frequently into the early hours of the morning, at the public-house next door, the "Butcher's Arms," with the proprietor or licensee of which he was friendly. There was no suggestion of insobriety. The wife complained and asked her husband to return home earlier; he knew, according to the evidence, that she was nervous of being left alone, but took no notice, although her condition during the spring and summer of 1956 was one of pregnancy and later of advanced pregnancy. Even when the birth of the baby was imminent and the wife made it clear to him that she was frightened of being left alone he still went to the "Butcher's "Arms," his excuse to her being that he was only next door.

and she could telephone him if she were in any trouble. When she asked him to help her with the children he not only refused but told her to clear out. On one occasion, she said, there was a space of six days during which he spoke to her three times only. The husband admitted that he ignored the child when it was born on July 13, 1956, and apparently resented its sex. Despite the fact that it was ill shortly after birth, he continued to ignore it. He gave it a name, Josene, which was one of the matters of which the wife made complaint, although she had told him of another name, Wendy Jane, which she desired to be given to the child.

After the birth of the child he refused to sleep with his wife any more, and when she complained of that his answer was that he was quite all right where he was, which was in the other room. The wife gave evidence of two specific occasions. One was a Sunday, August 5, 1956, not very long after the child was born, when he went off early in the afternoon with the neighbours and was away until 2 o'clock the following morning. The following day he told his wife that he had finished with her, finished with her and the children, finished with them all, and had lost interest in them. On September 2, 1956, he was out all day with the neighbours. She asked if he had still lost interest in them all, and he agreed; she then asked him if it would be best if they separated and he said that it would, and for three days he did not speak either to her or to any of the children. On September 6, 1956, she left and went to her parents, not at that time, she said, intending to go for ever, but expecting to return after she had been there a fortnight.

Shortly after she had left, the wife wrote to the husband: "Dear Joe, No doubt you wont be surprised at receiving this "letter—with what you told me last Sunday—and on a previous "occasion that you have lost all interest in myself and the "children, and you think yourself it better that we should part. "Well Joe, I have put up with a lot for the last few months and "I feel I cannot stand it any longer. It is up to you now to "decide, which way you choose—as you know of my affection for "you. If however you wish to amend your ways and treat me "and the children in a proper affectionate manner I should be "very pleased, but otherwise I'm afraid we will have to come "to an understanding regarding a separation. I will await until "next Saturday for a reply. From your loving wife, Pauline." The husband replied on September 12, 1956: "Dear Paul, As "we cannot get along now, I think it would be best for all con-"cerned to separate. Awaiting your reply. Joe. P.S.: Sending "the £5 to you on Friday."

A few weeks afterwards she went with her father to the house, and when they got there they found that the locks on the back and the front doors had been changed.

The husband agreed that he spent his time with the neighbours next door. He alleged that the house was not properly looked

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after, that his wife's cooking was not up to his standard, and that he got more acceptable meals next door than his wife provided for him. He agreed that he had refused to sleep with her, and said that he had felt like that six months before; and he also agreed that he used to refuse to take his wife out when he went out in the evenings, or for excursions, because he had promised to take the neighbours out in preference to taking her. After he had referred to his giving this name of Josene to the child because, he said, he thought Wendy Jane was "silly," he said: "I did "not tell wife I was going to do it. I knew it would upset her. "Correct I refused to sleep with her. I had felt like that six "months before. Had not meant to have third child. I was "hoping it was going to be a boy, but that was not at the bottom "of my attitude towards her. I was naturally disappointed it "was a girl." A little later on in his evidence he said: "It may "be I ignored my wife and the children for the next four days "[after Sunday, September 2, 1956], I was not really surprised "she said she could not go on like that any longer. She was "saying we would have to live apart. I did not mind which way "it was, whether I lived with her or not. I do not want her to "return. She said in a letter she would like to come back. My "solicitor told me of the letter, but I would not have her back. "My main reason was I had not any interest in her."

The justices gave the following reasons for their decision: "We find the complainant has substantially proved the allega-"tions set out in the written particulars of persistent cruelty "(a copy of which is annexed hereto)[1] put in by the com-"plainant. Indeed, except as to the periods which on certain "occasions elapsed between midnight and the defendant's return

[1] The particulars of the persistent cruelty to which the justices referred were these:—

"1. Between the months of Janu-"ary, 1956, and September 4, 1956:— "(a) Displaying a callous indifference "to his wife and children. (b) Stay-"ing out of the matrimonial home "most evenings until late at night, or "the early hours of the morning, "leaving the wife and children alone "in the house.

"2. On May 26, 1956, staying in "an adjoining public house all after-"noon and on his return to the matri-"monial home at tea time telling his "wife that she was no wife to him.

"3. After the birth of the third "child on July 13, 1956:—(a) Dis-"playing a callous indifference. (b) "Refusing to sleep with his wife. (c) "Registering the child's name as "'Josene,' well knowing that it was "not the name chosen by the wife.

"4. On August 5, 1956:—(a) Re-"fusing to take his wife and children "out but taking some person from the "said public house to London. (b) "Telling his wife that he had finished "with her and the children. (c) "Leaving his wife and children alone "until 2 a.m. the following morning.

"5. On August 6, 1956, staying in "bed all morning, going to the said "public house at lunch time, staying "in bed all afternoon and going out "on his own in the evening.

"6. On September 2, 1956:—(a) "Staying in bed all morning, going "to the said public house at lunch "time and after refusing to take his "wife and children out taking out in "his van some person from the said "public house during the afternoon, "and leaving his wife and children "alone in the house until 10.35 p.m.; "(b) Telling his wife that he had lost "interest in her and the children and "he would like to have a separation.

"7. On September 3, 4 and 5, 1956, "treating the wife and children with "callous indifference by ignoring "them completely."

"home, they were substantially admitted. The defendant had "some kind of explanation for the allegations relating to his "journey to London on August 5, 1956. After making allow-"ances in the defendant's favour in these respects, we consider "that the defendant's conduct amounted to persistent cruelty. "We find that the defendant had received a letter from the "complainant and had sent a letter in reply (copies of which "are also attached) and that as from the date of the reply "[September 12, 1956] the defendant has been in a state of "desertion from his wife. His 'intention to desert' was further "evidenced by his statement in court that he does not wish to "have his wife back. We find from the accounts produced by "the defendant it appeared that taking the average for the three "calendar years ended April 5, 1956, his annual income may "be taken to be £900."

K. G. Jupp for the husband appellant.
K. Bruce Campbell for the wife respondent.

Buchler v. *Buchler*[2] was referred to in argument in addition to the cases cited in the judgments.

LORD MERRIMAN P. I am asking Collingwood J. to give the first judgment.

COLLINGWOOD J. stated the facts substantially as set out above and continued: With regard to the findings of the justices it was first submitted on behalf of the appellant husband that that conduct cannot in law amount to cruelty. It was submitted that even if one accepts, as the justices did accept, the whole of the wife's allegations, all that they amounted to on the husband's part was passive conduct, and that there was no evidence here of any deliberate intention on his part to injure his wife, and that in default of such evidence such conduct could not amount to cruelty. One of the phrases used by counsel was that such an intention—that is, an intention to injure the wife—was requisite here as a matter of law in order to "tilt the scales" and change this conduct from conduct which could not be cruelty into conduct which could. In my opinion that is not so.

Mr. Bruce Campbell, for the respondent, has referred to a number of cases which, in his submission and in my opinion, show that conduct of this character can amount to cruelty. *Simpson* v. *Simpson*,[1] *Waters* v. *Waters*[2] and *Jamieson* v. *Jamieson*[3] are the three principal cases to which he referred. Let me say at once that of course it was not suggested, and one will not look at the cases to find, that the kind of conduct

[2] [1947] P. 25; 63 T.L.R. 100; [1947] 1 All E.R. 319.

[1] [1951] P. 320; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955.

[2] [1956] P. 344; [1956] 2 W.L.R. 661; [1956] 1 All E.R. 432.

[3] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

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alleged in those cases is precisely the same kind of conduct as here. It would be a remarkable thing if any two cases coincided to the last degree in the conduct which was alleged to be cruelty; but I think that the conduct in *Simpson* v. *Simpson*[4] was properly described as the same kind of conduct. I think that I must refer to the summary of the facts of it as given by Lord Merriman P.[5] [His Lordship read the facts set out in the footnote below and continued:] Lord Merriman summed up the position in *Simpson* v. *Simpson*[4] as follows[6]: "In other words, "generally speaking her complaint was of stinginess, lack of "affection and attention, callous indifference, taciturnity and "selfishness." If one leaves out the attribute of stinginess all the rest are to be found in this case.

In *Waters* v. *Waters*[7] a number of other decisions were cited. There are two passages in the head-note to which I should like to refer. [His Lordship read them and continued:] Again, if one excludes the uncleanliness which the husband showed in that case all those words apply, if my opinion, to the present case.

[4] [1951] P. 320.

[5] [1951] P. 320, 321; Lord Merriman P. said: "The wife's case may "be summarised briefly as follows:— "The husband had kept her short of "money in spite of a solicitor's letter "and until the local probation officer "had intervened; he had closed the "account at the stores at which she "was accustomed to deal, without "informing the wife that he had done "so, in such a way as to humiliate "her; he had 'made her life a hell,' "in support of which she said that he "had compelled her to keep an "account of her household expenses; "he used to keep food which he had "bought for himself locked up in the "garage, and had on more than one "occasion brought food and asked her "to cook it for him—'an egg, but he "'did not get one for me'; he had "refused to take her for a holiday or "to take her out in his new car; he "had put the purchase of the car, "partly used for his municipal duties, "before the provision of new curtains "or furniture for the home; generally "speaking, he neglected her by stay-"ing out of the house, except at week-"ends, from the time he left in the "morning until 11 o'clock at night, "and was taciturn and unfriendly and "took no notice of her; there was no "affection or love and, as his own "evidence showed, he had not realised "that their unhappy relationship was "telling on her health; and he had "told her to go on several occasions, "one of which was quite recent. She "added that when she had been in "bed for three days during the war "the husband had never gone near "her. On the other hand, it was "admitted that there had been no "violence of any kind."

[6] Ibid. 322.

[7] [1956] P. 344. The passages read: "If a reasonable man would "know—if the particular husband "must know—that a continuance in "the course of conduct complained of "would have an injurious effect on "his wife's mental health, such con-"duct will in the absence of rebutting "evidence amount to mental cruelty, "just as an intention (even though it "conflict with his desire) to drive the "wife out will be found where the "conduct of the husband towards his "wife was such that a reasonable "man would know—that the husband "must have known—that in all prob-"ability it would result in her depart-"ure from the home." The head-note continues: "A wife's case of persist-"ent cruelty and constructive deser-"tion before a court of summary juris-"diction was a complaint of extreme "boorishness on the part of her hus-"band, of unbearable taciturnity, of a "deliberate refusal to co-operate over "the running of the home and finance, "and of personal uncleanliness of a "very marked character persisted in "in spite of the wife's protests to the "extent that it became, in effect, "nauseating. There was a complete "indifference to her health, which was "affected, and to her protests against "the adverse effect upon her of his "conduct."

The passage to which I particularly wish to refer in this case is this. Having set out the facts, and the arguments which had been put forward, Lord Merriman P. continued[8]: "In a word, "it is a case of extreme boorishness, of, as she says, unbearable "taciturnity, deliberate refusal to co-operate over the running "of the house, the finance, the smallholding, and so on, and "personal uncleanliness of a very marked character, persisted in "in spite of protests on her part to the extent that it became, in "effect, nauseating: on the other hand, complete indifference to "her own state of health, to her own protests that what was "happening was, if I may use a colloquial phrase, getting her "down, callous neglect of her when she had an accident while "driving the pony-cart and was in hospital, and on her return "home indifference at first, making no welcome of her or any-"thing of that sort, and then, when he finally went to see her "in her bedroom, making a most opprobrious and offensive "remark which suggested that the accident was due to her "having taken too much to drink." There is, of course, no suggestion of that in the present case. Lord Merriman P. goes on: "The result of all this was that she was heading, so she "says, for a nervous breakdown, and to some extent she was "supported by the doctor, though, of course, he was not in a "position to say what was the cause, though he did say that "certain other complaints from which she suffered were not and "could not be the whole ground for her mental condition." Pausing there for one moment, a similar complaint was made in this case, that the doctor was not saying her obvious condition of ill-health was and could only be due to the conduct of her husband of which she complained. I shall refer to the doctor's evidence a little later.

[His Lordship then read further passages[9] from the judgment of Lord Merriman P. and continued:] Lord Merriman P. went on[10]: "But before I cite *Lang* v. *Lang*[11] I should like "to refer to what Lord Tucker said in his short opinion in "*Jamieson* v. *Jamieson*.[12] After pointing out that judges have, "and the wisdom of judges having, always refrained from "attempting a comprehensive definition of cruelty, he says: "'It is in my view equally undesirable—if not impossible—by "'judicial pronouncement to create certain categories of acts or "'conduct as having or lacking the nature or quality which "'render them capable or incapable in all circumstances of

[8] [1956] P. 344, 351.

[9] The passages to which his Lordship referred were as follows: At pp. 354–355 from "That brings me to the "justices' reasons" to "the husband "is said to have had no intention of "being cruel" (his Lordship observing that that was one of the contentions in the present case); at pp. 355–356 from "I will begin with the "statement that the husband had no "intention of being cruel" to "that "the guilty spouse in a mental cruelty "case must either intend to hurt the "victim or at least be unwarrantably "indifferent as to the consequences to "the victim."

[10] [1956] P. 344, 358.

[11] [1955] A.C. 402; [1954] 3 W.L.R. 762; [1954] 3 All E.R. 541.

[12] [1952] A.C. 525, 550.

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"'amounting to cruelty in cases where no physical violence is "'averred.' And then he goes on: 'Every such act must be "'judged in relation to its attendant circumstances, and the "'physical or mental condition or susceptibilities of the innocent "'spouse, the intention of the offending spouse and the "'offender's knowledge of the actual or probable effect of his "'conduct on the other's health (to borrow from the language "'of Lord Keith) are all matters which may be decisive in "'determining on which side of the line a particular act or "'course of conduct lies.' Then he said later: 'In the present "'instaince I think that the averments of knowledge, intention "'and persistence remove this case from the area of doubt in "'which it might otherwise have lain in the absence of such "'averments.'"

Pausing there, I will deal with those requisites, knowledge, intention, and persistence or indifference, as they apply to this case:—Knowledge: it is quite clear that the husband knew of his wife's condition. He must have known, because he was told of her objection to the course of conduct which he was following—Persistence: that is the gravamen of her charge, that it went on night after night—Indifference: indifference which the justices here have stigmatized as callous indifference, a word which counsel for the respondent says is really an understatement.

Further, it was submitted that in this case the particulars of cruelty which I have read are really particulars of desertion, not an actual act of desertion but desertion in a sort of inchoate form, and it was submitted that desertion cannot itself be one of the ingredients of cruelty. In support of that proposition we were referred to *Carpenter* v. *Carpenter*.[13] That was a decision of Sachs J., and the passage relied upon was this[14]: "The "remedy for desertion is laid down by section 1 (1) (*b*) of the "Matrimonial Causes Act, 1950. Desertion, of course, often "creates great distress and always does so if the wife was and "remained in love with her husband. Here, again, Mr. Harms-"worth [for the wife] conceded very properly that desertion was "not of itself cruelty. Indeed, otherwise it would be only too "easy to stultify the intention of the legislature that there must "be three years' desertion in order that a petition for divorce "may be properly grounded. I emphasize 'desertion of itself' "lest I be construed as saying that the act which constitutes "desertion could never become an ingredient in a charge of "cruelty, as for instance where the desertion took place just "when the deserted spouse was critically ill."

In my opinion that case does not support the proposition that simple desertion cannot in any circumstances be regarded as constituting cruelty. In fact, the judge himself gives an instance where it can be.

But this is not, in my opinion, a case of simple desertion at

[13] [1955] 1 W.L.R. 669; [1955] 2 All E.R. 449.

[14] [1955] 1 W.L.R. 669, 673.

all. It is a case of constructive desertion, and it is quite impossible to draw the line between conduct which constitutes expulsive conduct in a charge of constructive desertion and conduct which constitutes an ingredient in a charge of cruelty. Very often the two are mixed so that it is impossible to extricate one from the other. It is true that the finding of the justices is "that the defendant had received a letter from the com-"plainant and had sent a letter in reply . . . and that as from "the date of the reply the defendant has been in a state of "desertion," but that merely means, in my opinion, "There is "a date which puts it beyond question that this husband is in "a state of desertion, because, having received this letter asking "him to give some sort of guarantee of a reformation in his "behaviour he wrote that short peremptory letter 'As we "'cannot get along now, I think it would be best for all con-"cerned to separate. Awaiting your reply.'" That was his reaction to her request that she should have some promise of reform given which she was quite prepared to return. That letter quite clearly in the opinion of the justices was merely a confirmation of the evidence which the wife had given of his conduct, which was calculated to drive her from the home. It cannot be anything else, having regard to the fact that in the line before the justices say "We consider that the defendant's "conduct amounted to persistent cruelty."

The next submission was that there was no evidence here of injury to the wife's health. I can deal with that very shortly. First of all there is the evidence of the doctor, who was the first witness called. He said that he had known the complainant for about eight years. He saw her on August 27, 1955, for a condition consequent upon pregnancy. She had a back ache and generally poor health. Then: "October 6, 1956, giddy, nervous "giddines, sways with eyes shut; anxious, worried; condition "compared with previous year considerably worse. Leucorrhea. "Whole condition poor, debilitated. Not so good this year as "last year"; and then he referred to a condition of trichomonas of the vagina which had arisen after the childbirth, which he said was likely to be prolonged if there was any damage at birth —but he said later on that there was no difficulty over the child-birth—and he finished his examination-in-chief by saying: "If "in ill-health or worried, leucorrhea becomes worse." In his cross-examination—I have already referred to his statement that there was no difficulty over the childbirth—he said: "Any "woman who has a child is liable to similar conditions. Nervous "or worried, not always that mother dries up if woman is breast-"feeding," that clearly being the doctor's answer to the sugges-tion put to him: "Well, does not the fact that this woman is "breast-feeding negative your suggestion that there is present "any condition of worry?"—"No." In my opinion that evidence of the doctor is evidence of apprehension of injury to

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this wife's health, having regard to the condition in which she was.

It is only necessary for me to refer to one or two passages in the wife's own evidence. She speaks of the time before the baby being born, and says that she was nervous and upset—"husband "took no notice and I cried myself to sleep," and a little later she said "Husband staying out late made me very nervous and "upset. He saw me crying but took no notice"; and finally she speaks of a loss of weight which she sustained, and she said that that was due to worry.

The only other matter which remains is the question of the amount. It is common ground that the justices here were in error in taking a part of the remuneration of the respondent as being a figure of £480. The error arises from the fact that he receives a salary, he being one of three partners, of what till the last year was £416 a year, but has now become, apparently, £474. It was upon the basis of £416 that the justices reached the figure at which they arrived. Their error in the other direction is that they said his share of profits was £480, and they have arrived at that figure by failing first to deduct from the total profits the figure which would be necessary to pay the salaries of the three partners. It has been submitted on behalf of the appellant that if this order stands it is really asking him to pay more than he actually receives.

It is impossible, in my view, for us to go into these figures. Various arguments have been put forward, by Mr. Bruce Campbell on the one side and by Mr. Jupp on the other, as to what the figure should be, or, rather, what the considerations are which should be taken into account in arriving at that figure. No doubt those considerations will be heard before the justices, and in my opinion it is impossible to arrive at that figure by any method other than by submitting it to the justices for reconsideration.

For these reasons, therefore, in my opinion this appeal should be allowed on the question of quantum and the case remitted to the justices to determine the amount of the order for maintenance.

Lord Merriman P. I entirely agree, but out of deference to the careful and forcible argument of Mr. Jupp I wish to add one or two observations.

I will deal first with the point last mentioned by Collingwood J., with the addition that Mr. Jupp submitted not merely that the question of the amount should be dealt with but that we should refer back the very question whether there was wilful neglect at all, because, he truly said, it might work out that the figure which the husband was admittedly paying to the wife was on any view of the matter sufficient, and, therefore, could not amount to wilful neglect. Well, I follow the point, but in my opinion it is enough for us to say that there is sufficient evidence.

even taking into account the undoubted mistake to which my brother has referred, that at the time immediately preceding her complaint the husband was not paying a reasonable amount to the wife, and that it was open to the justices to find wilful neglect. I should not myself, therefore, be prepared to send the case back on that point, though I entirely agree that the matter must, on any view, go back on amount generally, and not merely must the error which Mr. Jupp pointed out and which is now plainly admitted to be correct, but other matters, to which Mr. Bruce Campbell alluded, must be open to discussion. In other words, the justices will not be bound, in discussing this question of amount, by any figure arrived at on the wrong basis. They should consider the whole matter de novo, and arrive at what is a proper basis.

I want to deal for a moment with another matter which was mentioned. As I understood the argument, it was this: This finding of desertion must be a finding of simple desertion, for this reason, that the wife had admittedly left the matrimonial home on September 6, 1956, whereas the justices have founded their decision that desertion was proved upon the letter written by the husband on September 12, 1956. Now, I entirely agree with what Collingwood J. said, that this is not a case of simple desertion at all by the husband: it is plainly constructive desertion, and the submission to the contrary effect confuses the legal conception of what is constructive desertion with the evidence by which it is proved. This woman left home, according to the finding of the justices, because, in effect, she could not put up with the treatment to which she had been subjected. That the husband knew about the effect that that treatment was having upon her to my mind is past dispute, and I am not going to repeat the conclusive arguments to that effect which my brother has already mentioned. But the proof positive that that was so is provided by the fact that he wrote in that letter on September 12, 1956, that that is what he did intend. That is the sum and substance of it. That does not mean that he deserted on September 12, 1956. It does mean, and this is the real inference that should be drawn, that he is confessing on September 12, 1956, that he had intended to disrupt the marriage and drive his wife out. In effect, just as in *Lauder* v. *Lauder* [15] and *Jamieson* v. *Jamieson* [16] the conduct complained of was characterized by the intention to bend the wife to the husband's will, so here the conduct was characterized by and based on his set determination, as I think, to drive his wife out.

In other words, it is the clearest possible case of constructive desertion; but as we were referred to a passage in Sach J.'s judgment,[17] which my brother has already read, I wish to say a word about it, because I think, with the greatest possible respect to the judge who pronounced it, it may be rather a dangerous

[15] [1949] P. 277; [1949] 1 All E.R. 76.

[16] [1952] A.C. 525.

[17] [1955] 1 W.L.R. 669, 673.

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pronouncement. I do not myself accept the view that desertion cannot be cruelty. In my opinion it does not in the least follow from the fact that, by contrast with cruelty, the remedy of divorce is only given for desertion which has lasted for three years before the presentation of the petition, that desertion per se cannot be cruelty. Desertion is an offence apart altogether from its duration: *Beard* v. *Beard*.[18]

I think that the judge himself provides an example in which desertion might well be cruelty, and not merely an ingredient in cruelty. Even if there was nothing else in a case but this—that the wife to the knowledge of the husband was lying seriously ill in the home, and that, with that knowledge, and without excuse, he left her, with the result that her health deteriorated and she became dangerously ill; on principle I cannot see why that should not also be conduct of a kind which was calculated to cause danger to life, limb or health, bodily or mental. However that may be, these cases can be dealt with as they arise.

But I think there is one other criticism (and I hope that I am not being too critical), which should be directed to that passage. It fails, if I read it correctly, to distinguish between simple desertion and constructive desertion. In my opinion—indeed I should say it is a commonplace—constructive desertion and cruelty are constantly, in substance, the same thing, proved by the same evidence. In that sense, at any rate, it cannot be true to say that desertion can never be cruelty.

Then it was said—and this is the only other thing I wish to say about this case, because I so completely agree with what my brother has said that it is unnecessary to elaborate the few observations that I think it necessary to make—that whereas the particulars given in this case were all particulars of cruelty, it is impossible for us to take them, found as they are to be substantially proved by the justices, and say: "There is a plain case of "constructive desertion." It is said that we cannot do that because the justices have held that desertion began on September 12, 1956. Well, I have dealt with the question of what sort of desertion it was. But I do not agree with that, either, because it seems to me that when there is the evidence one is entitled, indeed directed, by the rules to draw any inference which ought to have been drawn by the justices, and if authority is necessary for this I think that I find it in a later passage in the judgment which my brother has so fully discussed in *Waters* v. *Waters*.[19] I was there discussing what had been said in *Lang* v. *Lang*,[20] and said[21]: "In saying that there was no proof of wilful ill-"treatment of the wife by the husband, and that he had not "deliberately conducted himself so as to drive the wife away from "the home, and making that the test, the justices have mis-"directed themselves, and on any view of this matter I think that

[18] [1946] P. 8; 61 T.L.R. 555; [1945] 2 All E.R. 306.
[19] [1956] P. 344.
[20] [1955] A.C. 402.
[21] [1956] P. 344, 361.

"this case must go back on the issue of desertion. But although "these observations"—that is, the observations in *Lang* v. *Lang* [22]—"were directed to cases of constructive desertion I know "of no reason why precisely the same considerations should not "be applied to mental cruelty. If a reasonable man (if I may "paraphrase) would know—and this husband did know—that "continuance in the course of conduct complained of would have "an injurious effect on his wife's mental health, what more is "necessary?" Then I refer to the passage in Lord Normand's opinion in *Jamieson* v. *Jamieson* [23] which my brother has already read, in which he likened intention and unwarrantable indifference as being, in effect, the same thing having the same legal effect.

If that is true, precisely the same must be true vice versa, and it must be just as legitimate to use for the purposes of constructive desertion evidence which goes to show, and is the evidence which does show and is accepted as showing mental cruelty. We recently had the same argument addressed to us in *Parkin* v. *Parkin*.[24] The justices had in that case found cruelty, which was challenged, but we eventually upheld the decision. The justices had said: "It follows that the wife was abundantly "justified in leaving home"; and they therefore based their decision about desertion on that logical sequel. But I said this: "It is quite impossible to say that there is not evidence of a "direction to leave, here, intended to be acted upon and never "(as the justices thought) withdrawn, which operates as con-"structive desertion independently of whether a charge of cruelty "is proved or not. It none the less supports the charge of "constructive desertion that it happens itself to be part of the "evidence which is put forward on the major charge. The thing "seems to me to be perfectly simple, and if necessary I should "be prepared to draw the inference which was not drawn by the "justices that apart from cruelty altogether there was plain "material for a finding of constructive desertion."

I should be prepared to do exactly the same thing in the present case if it was necessary, but for the reasons which my brother has already given I do not think that it is necessary to draw that inference.

In my opinion this appeal must be allowed and the order of the justices varied by striking out the amount. That will leave the complaint proved, and the matter will be referred back to a fresh panel of justices to approach the question of amount de novo.

Appeal allowed on quantum only and remitted accordingly.

Solicitors: *Smiles & Co. for Mossop & Bowser, Wisbech; Gardiner & Co. for Ruddock, Middleton & Killin.*

J. B. G.

[22] [1955] A.C. 402.
[23] [1952] A.C. 525, 535.
[24] Unreported, January 29, 1957.

[QUEEN'S BENCH DIVISION.]

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Feb. 20, 21, 22, 25, 26.

McNair J. and a jury.

* BOLAM *v.* FRIERN HOSPITAL MANAGEMENT COMMITTEE.

[1956 B. No. 507.]

Negligence—Hospital—Operation—Electro-convulsive therapy—Patient injured during course of treatment—Varying methods of administering treatment—Method adopted in accordance with one body of medical opinion—Liability of hospital.

During the course of electro-convulsive therapy [E.C.T.] treatment administered to him at the defendants' mental hospital, the plaintiff, a voluntary patient, sustained bilateral "stove-in" fractures of the acetabula. E.C.T. treatment consisted in the passing of an electric current through the brain of the patient which, when given unmodified, i.e., without the prior administration of a relaxant drug, resulted in violent muscular contractions and spasms, attended with a known, though slight, risk of bone fracture. In accordance with his normal practice the doctor treating the plaintiff had given the E.C.T. unmodified, and without applying any form of manual restraint other than to support the plaintiff's chin and hold his shoulders, nurses being present on either side of the couch in case the plaintiff fell off. The plaintiff claimed damages, alleging, inter alia, that the defendants were negligent (1) in failing to administer any relaxant drug prior to the passing of the current through his brain; (2) since they had not administered such drug, in failing to provide at least some form of manual restraint or control beyond that given; and (3) in failing to warn him of the risks involved in the treatment. Expert witnesses called by either side gave evidence as to the different techniques which they adopted in giving E.C.T. treatment; some used relaxant drugs, some restraining sheets, and some manual control, but all agreed that there was a firm body of medical opinion opposed to the use of relaxant drugs, and also that a number of competent practitioners considered that the less manual restraint there was, the less was the risk of fracture. It was the practice of the defendants' doctors not to warn their patients of the risks of the treatment (which they believed to be small) unless asked; if asked, they said that there was a very slight risk. The witness called for the plaintiff considered that it would not be right not to warn a patient of the risks of the treatment:—

Held, (1) that a doctor who had acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not guilty of negligence merely because there was a body of competent professional opinion which might adopt a different technique.

Dictum of Lord President Clyde in *Hunter* v. *Hanley*, 1955 S.L.T. 213, 217, applied.

(2) That in determining whether or not the plaintiff was entitled to succeed on his allegation of failure to warn, the material considerations were, first, whether or not the defendants, in not warning him of the risks involved in the treatment, had fallen below a standard of practice recognized as proper by a competent body of professional opinion and, if a good medical practice did require warning, then, secondly, would the plaintiff, if warned,

have refused to undergo the treatment, and that it was for the plaintiff to show to the satisfaction of the court that, had he been warned he would not have taken the treatment.

JURY ACTION.

The plaintiff, John Hector Bolam, sued the defendants, the Friern Hospital Management Committee, claiming damages for negligence on the part of the defendants, their servants or agents, in electro-convulsive therapy [E.C.T.] treatment administered to him on August 23, 1954, when, during the treatment, he sustained fractures of the pelvis on each side caused by the head of the femur being driven through the acetabulum or cup of the pelvis.

The following facts appeared from the evidence. The plaintiff, having previously been a voluntary patient at the Friern Hospital, a mental hospital, was re-admitted as a voluntary patient on August 16, 1954, suffering from depression and on August 19 and 23 was treated for his condition by E.C.T. E.C.T. treatment is carried out by placing electrodes on each side of the head and allowing an electric current to pass through the brain. One of the results of passing the electric current through the brain is to precipitate violent convulsive movements in the form of a fit in the patient, and muscular contractions and spasms; if a relaxant drug is administered to the patient prior to the treatment, the muscular reactions can be reduced as to be barely discernible, but the plaintiff was given the treatment without any prior administration of such drug and it was during the convulsive muscular movements in the course of his treatment that he sustained his injuries. On August 23 the treatment was given to the plaintiff by one Dr. Allfrey, who, in accordance with his normal practice, and with that of his chief, one Dr. Bastarrechea, consultant psychiatrist attached to the defendant hospital, had given the treatment "unmodified," i.e., without the prior administration of a relaxant drug, and without applying any form of manual restraint. The treatment was given to the plaintiff whilst he was lying on a couch, and the precautions were to support his chin, to hold his shoulders and to place a gag in his mouth, while nurses were present on either side of the couch to prevent him from falling off.

The plaintiff alleged, inter alia, that the defendants were negligent in that they had failed to administer to him before the current was passed through his brain a suitable relaxant and/or anaesthetic drug or drugs to prevent or control the violence of the convulsion; failed to supply sufficient nurses to control his convulsive movements whilst undergoing the fit; permitted the treatment to be given without either the previous administration of a relaxant drug or the provision of manual control of his convulsive movements; and failed to warn him of the risks which he was running when he consented to the treatment, in particular, failed to warn him that they proposed to carry out the treatment

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without relaxant drugs being previously administered and without manual control being available.

The defendants denied liability.

On behalf of the plaintiff evidence was given by an expert (Dr. Randall), a consultant psychiatrist, who was of the opinion that relaxant drugs and an anaesthetic should be used when E.C.T. treatment was given, as the drugs prevented reaction of the muscles to the electric shock and so eliminated the risk of fracture; he said that up to 1953 he had only used relaxant drugs in selected cases but that since then he had used them in all cases. He admitted, however, that although he was in favour of the use of relaxant drugs, there was a large body of competent persons, whose opinion he respected who took a contrary view, and that he could not say that a practitioner using E.C.T. in 1954 who did not use relaxants was falling below the standard of care required of a competent medical practitioner merely by failure to use relaxant drugs. His personal opinion, which he said was shared by others was that, if relaxants were not used, some form of manual control or restraint was necessary; he said that if a relaxant was not given it was in his view foolhardy to give E.C.T. treatment without using some form of restraint, but agreed that there was a school of thought which took a different view and that it was the view of some competent doctors whose opinion he respected that the more restraint there was, the more likelihood there was of fracture.

On behalf of the defendants evidence was given by Dr. Bastarrechea to the effect that he was normally opposed to the use of relaxant drugs as he considered that there was, with their use, a risk of mortality while he considered that the risk of fracture with unmodified E.T.C. to be minimal; he said that, as a matter of clinical judgment he balanced the risk of death with the use of relaxants against the risk of fracture and decided that it was better not to use relaxants except in special circumstances, and that he only gave relaxant drugs in selected cases where the risk of unmodified E.C.T. would be greater than usual, and that there was no special reason why the plaintiff should have been given a relaxant drug. Other witnesses gave evidence as to the different techniques which they adopted in giving E.C.T.; some used restraining sheets, some relaxant drugs, some manual restraint, but all agreed that there was a firm body of opinion which was opposed to the use of relaxant drugs as a matter of routine. The defendants' evidence was that they used to provide manual control but had not done so since 1951, as it was their view, borne out by their experience, that the less restraint there was, the less the risk of fractures.

On the question of warning, the plaintiff's witness thought that it would not be right not to warn a patient of the risk of fracture while the defendants took the view that it was not desirable to warn patients of the risk unless they asked about it.

It also appeared from the evidence that the nature of the plaintiff's injury was exceptional.

N. R. Fox-Andrews Q.C. and *Roger Ormrod* for the plaintiff.
James Stirling Q.C. and *E. Sutcliffe* for the defendants.

The following cases were referred to in argument: *Hatcher* v. *Black*[1]; *Marshall* v. *Lindsey County Council*[2]; *Hunter* v. *Hanley*.[3]

McNAIR J. Members of the jury, it is now my task to try to help you to reach a true verdict, bearing in mind that you take the law from me and that the facts are entirely a matter for your consideration. You will only give damages if you are satisfied that the defendants have been proved to be guilty of negligence. Counsel for the plaintiff quite squarely faces up to that and accepts that he has to satisfy you that there was some act of negligence, in the sense which I will describe in a moment, on behalf of the defendants—and that primarily means Dr. Allfrey—and that that proved negligence did cause the injuries which the plaintiff suffered, or at least that the defendants negligently failed to take some precaution which would have minimised the risk of those injuries.

Before dealing with the law, it is right that I should say this, that you must look at this case in its proper perspective. You have been told by Dr. Page that he had only seen one acetabular fracture in 50,000 cases, involving a quarter of a million treatments, and it is clear, is it not, that the particular injury which produced these disastrous results in the plaintiff is one of extreme rarity. Another fact which I think it is right that you should bear in mind is this, that whereas some years ago when a patient went into a mental institution afflicted with mental illness, suffering from one of the most terrible ills from which a man can suffer, he had very little hope of recovery—in most cases he could only expect to be carefully and kindly treated until in due course merciful death released him from his sufferings—today, according to the evidence, the position is entirely changed. The evidence shows that today a man who enters one of these institutions suffering from particular types of mental disorder has a real chance of recovery. Dr. Marshall told you that in his view that change was due almost entirely to the introduction of physical methods of treatment of mental illness, and of those physical methods the electric convulsive therapy which you have been considering during the last few days is the most important. When you approach this case and consider whether it has been proved against this hospital that negligence was committed, you have to consider that against that

[1] The Times, July 2, 1954.
[2] [1935] 1 K.B. 516; 51 T.L.R. 279.
[3] 1955 S.L.T. 213.

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background, and bearing in mind the enormous benefits which are conferred upon unfortunate men and women by this form of treatment.

Another general comment which I would make is this: on the evidence it is clear, is it not, that the use of E.C.T. is a progressive science. You have had it traced for you historically over the quite few years in which it has been used in this country, and you may think on the evidence that even today there is no standard settled technique upon all points, to which all competent doctors will agree. The doctors called before you have mentioned in turn different variants of the technique they use. Some use restraining sheets, some use relaxants, some use manual control; but the final question you have got to make up your minds about is this, whether Dr. Allfrey, following upon the practice he had learnt at Friern and following upon the technique which he had shown to him by Dr. Bastarrechea, was negligent in failing to use relaxant drugs or, if he decided not to use relaxant drugs, that he was negligent in failing to exercise any manual control over the patient beyond merely arranging for his shoulders to be held, the chin supported, a gag used, and a pillow put under his back. No one suggests that there was any negligence in the diagnosis or in the decision to use E.C.T. Furthermore, no one suggests that Dr. Allfrey or anyone at the hospital was in any way indifferent to the care of their patients. The only question is really a question of professional skill.

Before I turn to that, I must tell you what in law we mean by "negligence." In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Mr. Fox-Andrews put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a

perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if he conforms with one of those proper standards, then he is not negligent. Mr. Fox-Andrews also was quite right, in my judgment, in saying that a mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds. That again is unexceptionable. But the emphasis which is laid by the defence is on this aspect of negligence, that the real question you have to make up your minds about on each of the three major topics is whether the defendants, in acting in the way they did, were acting in accordance with a practice of competent respected professional opinion. Mr. Stirling submitted that if you are satisfied that they were acting in accordance with a practice of a competent body of professional opinion, then it would be wrong for you to hold that negligence was established. In a recent Scottish case, *Hunter* v. *Hanley*,[1] Lord President Clyde[2] said: "In the realm of "diagnosis and treatment there is ample scope for genuine "difference of opinion and one man clearly is not negligent merely "because his conclusion differs from that of other professional "men, nor because he has displayed less skill or knowledge than "others would have shown. The true test for establishing "negligence in diagnosis or treatment on the part of a doctor is "whether he has been proved to be guilty of such failure as no "doctor of ordinary skill would be guilty of, if acting with "ordinary care." If that statement of the true test is qualified by the words "in all the circumstances," Mr. Fox-Andrews would not seek to say that that expression of opinion does not accord with the English law. It is just a question of expression. I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying: "I do not believe in "anaesthetics. I do not believe in antiseptics. I am going to "continue to do my surgery in the way it was done in the "eighteenth century." That clearly would be wrong.

Before I get to the details of the case, it is right to say this, that it is not essential for you to decide which of two practices is the better practice, as long as you accept that what the defendants

[1] 1955 S.L.T. 213. [2] Ibid. 217.

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did was in accordance with a practice accepted by responsible persons; if the result of the evidence is that you are satisfied that his practice is better than the practice spoken of on the other side, then it is really a stronger case. Finally, bear this in mind, that you are now considering whether it was negligent for certain action to be taken in August, 1954, not in February, 1957; and in one of the well-known cases on this topic it has been said you must not look with 1957 spectacles at what happened in 1954.

The plaintiff's case, as it has developed in the evidence, primarily depends upon three points. Firstly, that the defendants were negligent in failing to give to the plaintiff a warning of the risks involved in the treatment, so that he might have a chance to decide whether he was going to take those risks or not. Secondly, that they were negligent in failing to use any relaxant drugs which admittedly, if used, would have to all intents and purposes excluded the risk of fracture altogether. Thirdly—and this was, I think, the point upon which Mr. Fox-Andrews laid the most emphasis—that if relaxants are not used, then at least some form of manual control beyond shoulder control, support of the chin, and pillow under the back, must be used.

I am not going to take you through the whole of the evidence again, but let us examine those three points. Bear in mind that your task is to see whether in failing to take the action which it is said the defendants should have taken, they have fallen below a standard of practice recognized as proper by a competent reasonable body of opinion? First let me deal with the question of warning; when you are dealing with this point, there are two questions which you have to consider. First, does good medical practice require that a warning should be given to a patient before he is submitted to E.C.T. treatment; and, secondly, if a warning had been given, what difference it would have made? Are you satisfied that the plaintiff would have said: "You have told me "what the risks are. I will not take those risks. I prefer not to "have the treatment"? The plaintiff relies, on this aspect of the case, upon the evidence of Mr. Randall, whom you may think was a most distinguished psychiatrist, well qualified to express an opinion. You may also think that he was very cautious, in that in most of his answers on these matters of practice he said "My personal opinion is" so and so, "The way I do it is" so and so, "The circles in which I move do" so and so. Only once did he use a word of criticism against the defendants, when he expressed the view that not to use manual control was foolhardy. Asked about his practice, he said: "Having assessed the patient, "it is then put to him that he might benefit from electric "convulsive therapy—some people call it electro-shock therapy, "but from the point of view of the patient that is not material "because the patient is never aware either that he has a shock "or a convulsion. It is put to the patient, and our practice at "St. Thomas's and my practice at Charing Cross is to provide "the patient with a consent form." Then he is asked: "Would

"you warn him of the risks involved? (A) Yes, I would indeed; "in fact, we do. I make a practice always of saying to the "patient that using the technique of relaxation he would be given "an injection which would put him to sleep; that he would then "be given another injection which would have the effect of "paralysing all his muscles so that he could not move"; and he said: "I explain to the patient that if he were not given a relaxant "drug his body would make some strong movements" and "If you do feel very sincerely as a doctor that it is the only hope "of relieving this horror, would you think it wise to discourage "the patient by describing to him the possible risk of serious "fractures? (A) I suppose that one has to form some opinion "as to whether the patient is likely to be influenced by it. "Depressed patients are often deluded about their bodily health, "and nothing will alter their attitude. Taking that distortion of "judgment into account, it is probable that to tell a patient that "a risk of fracture exists will not materially alter his attitude to "treatment, or his attitude to his illness." If that is right, that to tell him of the risk of fracture will not materially alter his attitude to treatment or his attitude to his illness, you may ask yourselves: "Is there really any great value in giving this "warning?" Asked: "Would you quarrel with a point of view "as being wholly unsound if it was held that it was not beneficial "to the patient to hear about that sort of thing? (A) I can "believe that there would be circumstances in which it could be "considered that it would not be beneficial to tell a patient of "possible dangers and mishaps, subject to what I have already "said." Then I put: "Do you think that other competent "people might take a contrary view to the one which you have "expressed? (A) I think so, my Lord; yes, they might. "(Q) Other competent people might think that it is better not to "give any warning at all? (A) I think that is going a little "further than I could go generally, but I think that other people "might consider it better not to give any warning at all." In re-examination, when he was asked: "Do you think it ever right "to give no warning of the risk to a person who can understand "the warning?" he said "I think it is not right to give no "warning of the risks to a patient who can understand the import "of the warning." That is the highwater mark of the case for the plaintiff in favour of the view that it was negligent, in the sense I have used, not to give a warning. But, against that, you have got to consider the evidence given by the defendants; firstly, Dr. Bastarrechea, who said: "I do not warn as to technique. "I do not think it desirable to do so. If the patient asks me "about the risks, I say there is a very slight risk to life, less "than in any surgical operation. Risk of fracture, 1 in 10,000. "If they do not ask me anything, I do not say anything about "the risk," and that in his view there was some danger in emphasizing to a patient who ex hypothesi is mentally ill, any dangers which in the doctor's view were minimal, because, if he

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does so, the patient may deprive himself by refusal of a remedy which is the only available hopeful remedy open to him. In cross-examination he said: "I agree that when an operation is "decided upon, the patient should be carefully examined, but I "do not agree the patient should be warned of all the risks "involved. I agree a man should be given the opportunity of "deciding whether to take the risk, but I leave him to put the "question. I do not agree that he should be told of all the risks. "I do say that he should be told there are some slight risks, "but I do not tell him of the catastrophe risk." Dr. Baker, from Banstead Hospital, said: "I have to use my judgment. "Giving the full details may drive a patient away. I would "not say that a practitioner fell below the proper standard of "medical practice in failing to point out all the risks involved." Dr. Page, the Deputy Superintendent of the Three Counties Hospital, said: "I say that every patient has to be considered "as an individual. I ask them if they know of the treatment. "If they are unduly nervous, I do not say too much. If they ask "me questions, I tell them the truth. The risk is small, but a "serious thing when it happens; and it would be a great mistake "if they refused to benefit from the treatment because of fear. "In the case of a patient who is very depressed and suicidal, it is "difficult to tell him of things you know would make him worse."

Having considered the evidence on this point, you have to make up your minds whether it has been proved to your satisfaction that when the defendants adopted the practice they did (namely, the practice of saying very little and waiting for questions from the patient), they were falling below a proper standard of competent professional opinion on this question of whether or not it is right to warn. Members of the jury, though it is a matter entirely for you, you may well think that when dealing with a mentally sick man and having a strong belief that his only hope of cure is E.C.T. treatment, a doctor cannot be criticized if he does not stress the dangers which he believes to be minimal involved in that treatment.

If you do come to the conclusion that proper practice requires some warning to be given, the second question which you have to decide is: If a warning had been given, would it have made any difference? The only man who really can tell you the answer to that question is the plaintiff, and he was never asked the question. He dealt with it quite shortly, and I was waiting for the question to be put. He says: "On August 16 I was examined by Dr. "Bastarrechea. He told me he recommended convulsive treat-"ment. I knew what it meant; but Dr. Bastarrechea did not "give me any warning of any risk." I was rather waiting for the next question: "What would you have done if he had told you "there was a 1 in 10,000 risk?" but the question was not put. Surely, members of the jury, it is mere speculation on your part to decide what the answer would have been. He might very well have said: "You have treated me for six months by rest. That

"worked as a temporary cure on me, but it did not last. You "now tell me that you recommend this form of treatment. At "the same time, you tell me there is some risk involved in it. "Well, I am going to take it, rather than continue in my present "condition." At any rate, whether that is right or wrong, as it seems to me, you might well take the view that unless the plaintiff has satisfied you that he would not have taken the treatment if he had been warned, there is really nothing in this point.

I now pass to what I venture to believe is the real point which you have to consider, or the two real points you have to consider: Was it negligent, in the sense which I have indicated not to use relaxants? It is really a double point: Was it negligent not to use relaxants and, if no relaxants were used, was it negligent to fail to use manual control? But it is easier to take them separately. On the plaintiff's side, the argument is put this way, that if relaxants had been used, it is common ground that the risk of fracture in the operation would, to all intents and purposes, be excluded; therefore it ought to be excluded. On the other hand, the defendants say: "It is really not as simple as that." They say: "The risk of fracture without relaxants is really "minimal, although if it does occur, of course, to the individual "patient it may be very serious, but the actual risk is minimal. "But there is also, in the use of relaxants with an anaesthetic, "another risk which has got to be balanced against it, and that "is the mortality risk." They say: "Forming a judgment as "best we can as medical men, balancing what we believe to be "a remote risk of fracture on the one hand with what we believe "to be a remote risk of mortality on the other hand, we, as a "matter of professional skill, have decided not to use relaxants "except in cases where there is something special in the man's "condition which indicates that a relaxant should be used." For instance, if a man has had a recent fracture or is suffering from some arthritic condition, or hernia, they say: "We would "use relaxants merely to avoid the greater risk of straight "E.C.T. in those particular cases, but we select the cases for "relaxants by the exercise of our clinical judgment."

[His Lordship reviewed the evidence on this issue summarized above and continued:] On that body of evidence, is it open to you to say that mere failure to give relaxants is itself any evidence of negligence in the case of a medical man? There is a firm body of opinion against using relaxants as a routine, and there is agreement from all the witnesses that there is this body of opinion, although one (Dr. Randall) prefers to take the risk of relaxants and thus eliminate the risk of fractures. That is all I will say to you on that.

Now we come to the question of manual control. It is urged by the plaintiff: "If you do not use relaxants, which you know "will eliminate all risk of fracture, the least you can do is to "exercise some form of manual control. You did not use any "manual control, and this disaster happened." Here again the

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defendants say you are in the realm of two schools of thought. They say: "There is a school of thought, to which we adhere, "which believes honestly, on reasonable grounds, that if you "definitely hold a man down firm, either with a restraining sheet "or by a nurse lying over his body or holding him down firmly, "you do in fact increase the risk of fracture." They hold that view; and, holding that view, they, since the end of 1951, have adopted a new technique of leaving the limbs free to move, except that the man is held down at the shoulders and a nurse stands on either side of the couch ready to catch the man if he shows any sign of falling off.

Dr. Randall, called on behalf of the plaintiff, was quite definitely of the opinion, a personal opinion which he said was shared by others, that some manual control was necessary. Indeed, it is not disputed by the defendants, that some people think that manual control is desirable. But Dr. Randall was asked: "In your view, would a practitioner in this art of "ordinary competence in 1954 have administered this treatment "without any precaution?" said "It is the opinion of some "people that restraint is not indicated; but I would not have "given the treatment without some form of restraint. (Q) There "is a school of thought who would take a different view? (A) "Yes. (McNair J.): And who would give E.C.T. without any "restraint? (A) Yes, my Lord."

[His Lordship referred to the evidence of Dr. Randall and continued:] That is the view of a skilled person whose evidence you have heard, and you have to form your judgment as to how far he was merely expressing a personal view in favour of the practice which he preferred, or to what extent (if at all) he was condemning the practice advocated by the defendants. But, as against that, you have got to weigh the whole body of opinion represented by the witnesses called by the defendants. Dr. Bastarrechea was quite definite in his view that since he changed over to the use of no manual control after 1951, a decision which he took as a matter of clinical judgment, he got the impression that the fracture risk at any rate had not increased. He had got the impression that it had diminished. He had not at that time got out the figures, merely basing that judgment upon his clinical experience and on discussions with colleagues.

[His Lordship reviewed the evidence on this issue and continued:] Dr. Allfrey dealt with this matter. I have not said anything about Dr. Allfrey in detail, though he is primarily the man under attack, for it was during his operation that the disaster occurred. You have got to form your judgment of Dr. Allfrey, and make up your minds whether you think that he was a careful practitioner interested in his art, giving thought to the different problems, or whether he was a man who was quite content just to follow the swim. You may recall that on quite a number of occasions in the course of his evidence he gave instances where he had really applied his inquiring mind to the problem and come

to a conclusion. On the use of restraint, he told you that during his training he knew that there was a school of thought that favoured restraint, but that he got the impression that the general view was against it. He recalls how he was taught by the man responsible for his training that there was a greater danger of fracture if two ends of a rigid member like a stick were held firm than if one was left swinging or both were left swinging, and that rather persuaded him that there was something in the view that restraint should not be used. He, at his hospital, Knole, adopted under tuition (and, as he got older, on his own responsibility) the practice of leaving the limbs free to move, merely holding down the shoulders. When he got to Friern he found the same practice was being carried out by his chief there, Dr. Bastarrechea. Having had his technique shown to him, he followed it. The question you have got to make up your minds about is whether he is, in following that practice, doing something which no competent medical practitioner using due care would do, or whether, on the other hand, he is acting in accordance with a perfectly well-recognized school of thought. Dr. Marshall at Netherne adopts the same practice. Dr. Baker at Banstead adopts the same practice. It is true, and in fact interesting as showing the diversity of practice, that Dr. Page at the Three Counties mental institution adopts a modification of that, inasmuch as he prefers to carry out the treatment in bed, with the patient controlled to some extent by the blanket, sheets and counterpane. That may be of interest to you as showing the diversity of practice; but it would not be right, would it, to take that as a condemnation of the practice adopted by the defendants?

Before I leave this question of liability it is right to refer you to some wise words used recently in the Court of Appeal in *Roe* v. *Minister of Health*,[3] a case not dissimilar to this. That was a case where two men in the prime of life were submitted to an anaesthetic for, in both cases, some trivial condition requiring operative treatment and, as the result of a mishap in the anaesthetic, both men came off the operating table paralyzed. After a very long inquiry, the trial judge came to the conclusion that it had not been established that, by the standard of care and knowledge operating at the time, the anaesthetist was negligent. The Court of Appeal took the same view, and Denning L.J. said[4]: "If the anaesthetists had foreseen that the ampoules might get "cracked with cracks that could not be detected on inspection "they would no doubt have dyed the phenol a deep blue; and "this would have exposed the contamination. But I do not "think that their failure to foresee this was negligence. It is so "easy to be wise after the event and to condemn as negligence "that which was only a misadventure. We ought always to be "on our guard against it, especially in cases against hospitals

[3] [1954] 2 Q.B. 66; [1954] 2 All E.R. 131.

[4] [1954] 2 Q.B. 66, 83.

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"and doctors. Medical science has conferred great benefits on "mankind, but these benefits are attended by considerable risks. "Every surgical operation is attended by risks. We cannot take "the benefits without taking the risks. Every advance in tech-"nique is also attended by risks. Doctors, like the rest of us, "have to learn by experience; and experience often teaches in "a hard way. Something goes wrong and shows up a weakness, "and then it is put right. That is just what happened here." Then again[5]: "One final word. These two men have suffered "such terrible consequences that there is a natural feeling that "they should be compensated. But we should be doing a dis-"service to the community at large if we were to impose liability "on hospitals and doctors for everything that happens to go "wrong. Doctors would be led to think more of their own safety "than of the good of their patients. Initiative would be stifled "and confidence shaken. A proper sense of proportion requires "us to have regard to the conditions in which hospitals and "doctors have to work." And this is important[6]: "We must "insist on due care for the patient at every point, but we must "not condemn as negligence that which is only a misadventure."

That concludes what I wish to say on the question of liability.

[His Lordship, having directed the jury on the question of damages, left to them the following questions: (1) Do you find for the plaintiff or the defendants; and (2) If you find for the plaintiff, what sum of money do you award as damages?]

After a retirement of 40 minutes the jury returned a verdict for the defendants.

Judgment for the defendants.

Solicitors: *Pennington & Son; J. Tickle & Co.*

J. F. L.

[5] [1954] 2 Q.B. 66, 86. [6] Ibid. 87.

[HOUSE OF LORDS.]

H. L. (N.I.)†

1957 *Feb.* 18, 19, 20; *Apr.* 4.

* McCLELLAND . . . . . Appellant;

AND

NORTHERN IRELAND GENERAL HEALTH SERVICES BOARD . . . . . Respondent.

Master and Servant—Contract of service—Implied term—Duration of service—Officer of statutory board—Advertisement inviting applications for post—Employment expressed to be "permanent and "pensionable"—Contract providing for termination in certain contingencies—Right to terminate employment in circumstances not specified.

† *Present*: Lord Oaksey, Lord Goddard, Lord Tucker, Lord Keith of Avonholm and Lord Evershed.

In 1948 the Northern Ireland General Health Services Board advertised, inviting applications for posts as senior clerks, the appointments being expressed to be "permanent and pensionable." The appellant, having applied, was appointed and was shown the terms and conditions of service. These contained a clause providing for the dismissal of officers for "gross misconduct" or if they proved "inefficient and unfit to merit continued employment." There was also a provision for dismissal on failure to take or to honour the oath of allegiance and another related to termination of employment by reason of permanent ill-health or infirmity. There was no provision for dismissal in other circumstances. It was, however, provided that "permanent officers," who wished to terminate their employment with the board, must give one month's notice. In 1953 the board purported to terminate the appellant's employment on six months' notice on the ground of redundancy of staff and without any suggestion of misconduct or inefficiency on her part:—

Held (Lord Tucker and Lord Keith of Avonholm dissenting), that on the true construction of the terms and conditions of service the express powers of the board to dismiss an officer were comprehensive and exhaustive and no further power could be implied. Accordingly, her service had not been validly terminated.

Decision of the Court of Appeal in Northern Ireland [1956] N.I. 127 reversed.

APPEAL from the Court of Appeal in Northern Ireland.

This was an appeal from an order of the Court of Appeal in Northern Ireland of March 29, 1956, affirming an order of the Chancery Division in Northern Ireland of May 9, 1955, whereby it was declared and adjudged that question No. 3 on the originating summons in this matter, that is to say, whether, in the events which had happened the engagement of Elizabeth McClelland, the plaintiff and appellant, as a senior clerk with the Northern Ireland General Health Services Board, the defendant and respondent, had been validly terminated, was answered in the affirmative.

The facts are fully set out in the opinions of Lord Oaksey and Lord Tucker.

E. W. Jones Q.C. and *C. B. Shaw* (both of the Bar of Northern Ireland) for the appellant.

W. F. Patton Q.C. and *John MacDermott* (both of the Bar of Northern Ireland) for the respondent board.

The following authorities, in addition to those referred to in their Lordships' opinions, were cited in argument: *Henriksen* v. *Grafton Hotel Ltd.*[1]; *Sampson's Executors* v. *Nottinghamshire County Council*[2]; *Elderton* v. *Emmens*[3]; *Tyers* v. *Barmera Packing Co. Ltd.*[4]; *Beaufort* v. *Crawshay*[5]; *Ward* v. *Barclay*

[1] [1942] 2 K.B. 184; 58 T.L.R. 271; [1942] 1 All E.R. 678.
[2] [1949] 2 K.B. 439; 65 T.L.R. 376; [1949] 1 All E.R. 1051.
[3] (1847) 4 C.B. 479.
[4] [1930] S.A.S.R. 123.
[5] (1866) L.R. 1 C.P. 699.

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Perkins & Co. Ltd.[6]; *In re Berker Sportcraft Ltd.'s Agreements*[7]; *North Stafford Steel, Iron & Coal Co. (Burslem) Ltd.* v. *Ward*[8]; *Jones* v. *Llanrwst Urban District Council*[9]; *Ottoman Bank* v. *Chakarian*[10]; *Martin-Baker Aircraft Co. Ltd.* v. *Canadian Flight Equipment Ltd.*[11]; *Jackson* v. *Hayes, Candy & Co. Ltd.*[12]

Their Lordships took time for consideration.

April 4. Lord Oaksey. My Lords, this is an appeal from an order of the Court of Appeal for Northern Ireland affirming an order of the Chancery Division in Northern Ireland declaring on an originating summons that the engagement of the appellant as a senior clerk with the respondent had been validly terminated.

The appellant had been and was employed as a clerk in the service of the Northern Ireland Hospitals Authority and on June 21, 1948, she read an advertisement in the Belfast Evening Telegraph which invited applications for posts on the general staff of the Northern Ireland General Health Services Board and stated, in reference to senior clerks: "Subject to a probationary "period appointments will be permanent and pensionable. "Salaries and wages will be subject to deductions under a "superannuation scheme." The appellant accordingly applied for a post, and on July 29, 1948, after an interview, was selected for appointment as a senior clerk at a salary of £300 per annum rising to £400. In the month of August, 1948, she was shown a copy of the conditions of service, which were called "the "September conditions," and it is convenient to set out clauses 4, 9 and 12 of these conditions:

"4. *Probation*:

"The appointment of every new entrant shall be subject to "a term of probation of six months. At the end of the proba- "tionary period, subject to a satisfactory report by the secretary, "the appointment will be confirmed. If the board think fit, the "period of probation may be extended. Unless a satisfactory "report is received from the secretary at the end of an officer's "period of probation or extended period of probation, the board "may dismiss him by giving him one month's notice of their "intention.

. . . . . .

"9. *Oath of Allegiance*:

"Every person employed will be required to take the oath of "allegiance as prescribed in regulations made under section 80 of "the Health Services Act (Northern Ireland), 1948. Any failure

[6] [1939] 1 All E.R. 287.
[7] (1947) 177 L.T. 420.
[8] (1868) L.R. 3 Ex. 172.
[9] [1911] 1 Ch. 393; 27 T.L.R. 133.
[10] [1930] A.C. 277.
[11] [1955] 2 Q.B. 556; [1955] 3 W.L.R. 212; [1955] 2 All E.R. 722.
[12] (1938) 160 L.T. 112; [1938] 4 All E.R. 587.

"to comply with this requirement or any failure to honour such "oath if taken will involve immediate dismissal of the person "concerned from the service of the board.

. . . . . .

"12. *Dismissal and Reduction in Rank, and termination of "employment otherwise*:

"The board may dismiss any officer for gross misconduct and "may dismiss any officer who is proved to their satisfaction to be "inefficient and unfit to merit continued employment. Except "where an officer has been guilty of gross misconduct, the board "shall give at least one month's notice of their intention to "exercise their powers of dismissal under this rule. As an "alternative to dismissal, the board may order the reduction in "rank of an officer who is found by them to be unfit to discharge "the duties of the grade in which he has been employed. One "month's notice in writing shall be given by all permanent "officers who wish to terminate their employment with the "board."

Having served a probationary period of six months on February 16, 1949, the appellant was confirmed in her post as a senior clerk.

On August 14, 1950, the respondent inserted the following provision in the said conditions: "Female officers will on "marriage be required to tender their resignations to the "board." The appellant made inquiries whether this condition was to be applied to officers already on the staff, and, being advised and being under the impression that it did not apply to them, got married in March, 1951.

On May 29, 1953, the respondent wrote to the appellant terminating her employment on June 30, 1953, on the ground of redundancy of staff. After further correspondence between the respondent and the appellant's solicitor the respondent's establishment officer wrote, on June 25, 1953, saying: "The "committee agreed that, in order to enable you to qualify for "superannuation benefits, the notice of dismissal dated May 29 "be withdrawn and that your services be retained until "December 31, 1953."

On November 30, 1953, the appellant received the following letter:

"Northern Ireland General Health Services Board,
"9, Upper Queen Street,
"Belfast.
"November 30, 1953.

"Ref. No. G.H.S.

"Dear Madam,

"As you are aware, the board some time ago considered the "situation created by the refusal of some married women on "their staff establishment to accept as applicable to themselves "the requirement in the terms of service that female members "of the staff should tender their resignations on marriage. To

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"enable the position to be clarified, the board extended the "employment of the persons concerned to December 31, 1953.

"In order that there may be no further dubiety as to the "applicability of the terms of service, the board, acting on legal "advice, now intend to serve on each married woman on their "establishment six months' notice of dismissal expiring on the "anniversary date of her employment. Notice will, therefore, "in due course be served on you expiring on August 16, 1954, "the anniversary date of your appointment, and employment "with the board will continue to be open to you from Decem-"ber 31, 1953, to that date.

"Yours faithfully,
"(Signed) W. BIRNIE,
"for Secretary.

"Mrs. E. M. McClelland,
"Dental Branch,
"9, Upper Queen Street,
"Belfast."

The appellant thereupon commenced these proceedings by originating summons in the Chancery Division, and on May 9, 1955, Curran J. gave judgment in favour of the respondent, holding that the appellant was a civil servant holding office during the pleasure of the Crown and that her dismissal was accordingly valid. This view of the case had not been argued and it has at no time been supported by the respondent.

On appeal to the Court of Appeal the appeal was dismissed by Lord MacDermott C.J. and Black L.J., Porter L.J. dissenting.

Lord MacDermott C.J. and Black L.J. were of opinion that the case depended on the September conditions and that clause 12 did not preclude the board from terminating the employment of a permanent officer by reasonable notice. In arriving at this conclusion the Lord Chief Justice relied upon the fact that there was, in his view, no express provision or plain implication that the right to give a reasonable notice was taken away, that the heading of clause 12 was insufficient to make the clause comprehensive, that the fact that the clause empowered a permanent officer to give one month's notice signified that the office was not of a permanent nature, and that many of the conditions applied to temporary officers.

Black L.J. was of opinion that clause 12 of the September conditions, since it only dealt with certain limited and specified cases for dismissal, did not exclude the right to give reasonable notice. Porter L.J., who dissented, held that the meaning of the word "permanent" was supplemented and explained by the word "pensionable," and after citing the words of Scrutton L.J. in *Reigate* v. *Union Manufacturing Co. (Ramsbottom) Ltd.*[1] he held that condition 12 was an express provision for the rights of

[1] [1918] 1 K.B. 592, 605.

the parties to determine the contract and that it was not necessary to imply any further right to give the transaction that efficacy that both parties must have intended it to have.

In my opinion, Porter L.J. was right and the appeal ought to be allowed.

I do not think it is necessary to discuss the cases which were cited in the court below, for the question depends upon the construction of this contract. No doubt the word "permanent" must be construed in the light of its context but no case has been cited in which the word "permanent" has been linked with the word "pensionable" and in which the termination of the contract on the one side and on the other is expressly defined.

Counsel for the respondent in your Lordships' House based their arguments upon the fact that in the case of a general hiring for an indefinite time a master is entitled to give his servant a reasonable notice and contended that the contract in question was a contract of master and servant for a general hiring. It is, no doubt, true that a general hiring without more is terminable on reasonable notice, but, in my opinion, the contract in question was not a simple contract of general hiring for an indefinite time. It began by an offer of a permanent and pensionable post. That offer did not, of course, conclude a contract but it cannot be ignored in the construction of the contract which was then concluded. That contract incorporated provisions under which the appellant, after a period of probation, was entitled to an annual pension on a contributory basis on completing ten years' service in circumstances of ill health or on attaining the age of sixty, a short service gratuity for five years and other pension rights and allowances for sickness. Moreover, the contract was expressly subject to the September conditions.

The clauses I have set out all contain express powers of termination and, in my opinion, there is no ground for suggesting that it is necessary to imply a further power to terminate the contract in order to give the contract the efficacy which the parties must have intended it to have. With the greatest respect to the Court of Appeal in Northern Ireland and those of your Lordships who take a different view, I think, on the contrary, that to offer an officer a permanent and pensionable post on such terms and then to claim the right to give him notice which will deprive him of all the pension and other rights offered by the express terms of the contract, not only is not a right which the parties must have intended the master to have, but is one which no reasonable person could have contemplated he would claim.

For these reasons I move your Lordships that this appeal be allowed.

LORD GODDARD. My Lords, the respondents are a statutory corporation established under the Health Services Act (Northern Ireland), 1948, and the number, remuneration and conditions of service of their staff are subject to the approval of the Ministry

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of Health and Local Government. The board are apparently required to recruit staff by advertisement and on June 21, 1948, they advertised in the Belfast Evening Telegraph inviting applications for posts on their staff. The advertisement set out the qualifications required and the salary offered and stated that: "Subject to a probationary period appointments will be permanent and pensionable. Salaries and wages will be subject to deductions under a superannuation scheme." The appellant, who at that time was a clerk in the service of the Northern Ireland Hospital Authority, applied for a position as senior clerk and, following an interview with the board, she was informed by letter dated July 29, 1948, that she had been selected for appointment. She accepted the appointment, resigned from her employment with the Hospitals Authority, and started work under the respondents on August 16. It is clear, in my opinion, and neither party seeks to contend otherwise, that the service on which she then entered was for the probationary period referred to in the advertisement and during that period, indeed quite soon after August 16, she was given a document containing the full conditions of service, which she agrees she accepted as the conditions of her employment. The probationary period ended in February, 1949, and her appointment was then confirmed. Until it was confirmed it would have been, in my opinion, permissible for the board to have terminated the employment at any rate on one month's notice. The object of a probationary period is to ascertain if the candidate is likely to prove efficient and, as will be seen below, a month's notice can be given for inefficiency. In 1954 the board sought to determine the appellant's engagement, and after some discussion and correspondence into which it is unnecessary to enter she was finally given six months' notice expiring on August 16 of that year. It is not disputed that if the board had the right to determine the employment the notice was adequate. The question on which there has been a difference of opinion in the Court of Appeal is whether the board had the right to determine the employment. The question, to my mind, depends on the true construction of clause 12 of the conditions of employment. It is entituled: "Dismissal and reduction in rank, and termination of employment otherwise." This title indicates, in my opinion, that the clause is intended to be comprehensive. It provides that an officer may be dismissed for gross misconduct and if found to be inefficient and unfit to merit continued employment. It provides that except where the officer has been guilty of gross misconduct the board shall give at least one month's notice of their intention to exercise their powers of dismissal under the rule and that they may, instead of dismissing, order a reduction in rank of the officer found to be unfit to discharge the duties of the grade in which he was employed. The clause then provides that an officer may terminate his employment by giving one month's notice. The only other provision in the conditions with regard to dismissal is

one providing that a failure to take the oath of allegiance or failure to honour the oath, if taken, will involve instant dismissal. Officers employed by the board are entitled to the benefits and liable to contribute towards the Health Services superannuation scheme established by the Ministry of Health and Local Government. This scheme provides for a pension to an officer of ten years' service who becomes incapable on account of ill health or has attained the age of 60. If he has attained the age of 60 and has completed five years' service he may receive a lump sum retiring allowance if he retires owing to ill health. There is also a provision for repayment of contributions to an officer who retires but does not become entitled to a pension.

That an advertisement offers permanent employment does not, in my opinion, mean thereby that employment for life is offered. It is an offer, I think, of general as distinct from merely temporary employment, that is, that the person employed would be on the general staff with an expectation that apart from misconduct or inability to perform the duties of his office the employment would continue for an indefinite period. But apart from a special condition, in my opinion, a general employment is always liable to be determined by reasonable notice. Nor do I think that because a person is offered pensionable employment the employer thereby necessarily engages to retain the employee in his service long enough to enable him to earn a pension. But, when one comes to consider the express condition in this case relating to dismissal, in my opinion, the fact that the offer was of a permanent and pensionable employment does assist in the construction to be placed on that condition. As I have said, the clause appears to be comprehensive in its terms. It provides, no doubt unnecessarily, for dismissal without notice for gross misconduct, but also for the length of notice to be given in a case of inefficiency and for the notice the officer may give to terminate his employment. If it was intended that the board should have a similar right to determine the engagement it is strange that it does not provide what notice is to be given, and this omission seems to me the more significant when it is remembered that the conditions apply to officers of various degrees or standing and varying rates of salary. Senior executives would ordinarily be entitled to longer notice than a typist or machine operator, and, had it been the intention that all these offices should be determined at the pleasure of the board, I should have expected that, considering their number and variety, the length of notice to be given and received would be stated in the conditions. Remembering the terms of the advertisement in conjunction with the provisions of condition 12, I think the fair conclusion is that the board offered and the appellant accepted employment on terms as secure as is in fact enjoyed by civil servants. Although a civil servant, as is well known, is employed at the pleasure of the Crown and can be dismissed at any moment, in fact once he has qualified by examination or probation

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and is taken on the establishment he is secure in his employment till he reaches the retiring age, apart, of course, from misconduct or complete inefficiency. I think, on the true construction of condition 12, the board debarred themselves from giving notice apart from the reasons specified therein, and I would therefore allow the appeal.

Lord Tucker. My Lords, on August 16, 1948, the appellant started to work for the respondent board as a senior clerk at a salary of £300 per annum rising by annual increments of £12 to £396 and a further single increment of £4 to £400. She had been selected for this post as a result of an interview following upon an advertisement inserted by the board in the press inviting applications for senior clerkships and other posts which, it was stated, would, "subject to a probationary period, be permanent "and pensionable." This probationary period came to an end on February 16, 1949, when she was confirmed in her post as senior clerk and became an established officer. In the meantime, on September 3, 1948, the Ministry of Health and Local Government had approved a document which has been referred to as "the September conditions" and which had been prepared by the respondent board, setting out the conditions of employment of its staff. The appellant was handed a copy of this document and it is common ground that her continued employment at the end of the probationary period was on the basis of her acceptance of these conditions so far as applicable to her case.

My Lords, unless there is to be found in this document something which clearly confers upon the appellant an appointment for life subject only to determination as therein expressly provided, it would, I think, be impossible to suppose that the use of the words "permanent and pensionable" in this advertisement indicated anything more than that the posts available were on the regular established staff and were subject to the terms of a pension scheme. In this context this is, I think, their natural meaning, and, judging from the appellant's letter of June 23, 1948, in which she states: "I was appointed to the "permanent staff of the Orange and Protestant Approved Society, "12 Donegall Square, West Belfast, on November 27, 1939, and "continued with them until January 13, 1948, when I was trans-"ferred to Stormont under the Ministry of Labour and National "Insurance," there can, I think, be no doubt that this is the sense in which the appellant understood the word "permanent." It is, in my view, impossible to hold that these words conferred upon her a contractual right to a freehold tenure of the post of senior clerk or did anything more than indicate that the posts available would have the degree of security of tenure which attaches to the regular, as distinct from the purely temporary, staff and would qualify for pension rights and benefits and be subject to the obligation to contribute as laid down in the scheme, which scheme, it is to be observed, is not one to which the board

is in any way a party. It is a scheme which is imposed upon the board and its officers by S.R. & O., N. I., 1948, No. 161, made by the Ministry of Health and Local Government under section 61 of the Health Services Act (Northern Ireland), 1948. The advertisement, in my view, formed no part of the eventual contract between the parties, but there is, I think, no ground for holding that the appellant could reasonably have supposed that the final terms of her contract at the conclusion of the probationary period would give her the legal right to a life appointment or that the board could for one moment have contemplated such a result.

It may well be, however, that the language used in the September conditions on its proper construction compels your Lordships to hold that this document, contrary to any expectation which the appellant could reasonably have entertained, has in fact conferred upon her a status of irremovability.

This is the angle from which I approach the construction of clause 12 of the conditions upon which the result of this appeal depends. Has it expressly or by necessary implication deprived the board of the right to determine by reasonable notice the contracts of service of its "permanent" (i.e., regular and established) staff, a right which attaches to all contracts of service of indeterminate duration in the absence of custom or provision expressed or implied to the contrary?

Clause 12 is headed: "Dismissal and Reduction in Rank, "and termination of employment otherwise." and reads as follows: "The board may dismiss any officer who is proved to "their satisfaction to be inefficient and unfit to merit continued "employment. Except where an officer has been guilty of gross "misconduct, the board shall give at least one month's notice "of their intention to exercise their powers of dismissal under "this rule. As an alternative to dismissal, the board may order "the reduction in rank of an officer who is found by them to be "unfit to discharge the duties of the grade in which he has been "employed. One month's notice in writing shall be given by all "permanent officers who wish to terminate their employment "with the board."

Three other clauses must also be referred to. Clause 4, which deals with the probationary period of six months, contains the following: "Unless a satisfactory report is received from the "secretary at the end of an officer's period of probation or "extended period of probation, the board may dismiss him by "giving one month's notice of their intention." Clause 9 requires every person employed to take the oath of allegiance and proceeds: "Any failure to comply with this requirement or any "failure to honour such oath if taken will involve immediate "dismissal of the person concerned from the service of the "board." Clause 19 deals with sickness payments and by sub-clause (3) (*h*) provides: "The provisions of this scheme shall "cease to apply to an officer on the termination of his employ-"ment whether by reason of permanent ill-health or infirmity

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"of mind or body or by reason of age, but without prejudice to "the right of an officer whose employment is terminated by "reason of permanent ill-health or infirmity to receive the "period of notice provided by his contract of service."

My Lords, a contract for employment for life is rare; such a contract covering a class of persons which may include young clerks and typists must be rarer still; and one which gives such security to such a class of persons, but enables them to terminate their employment on a month's notice, must be almost unique. I would therefore expect to find express language in any contract intended to have this result, and would require compelling words before I would feel justified in construing a contract as producing such a result by implication or the application of some rule of construction.

It is to be noted in the first place that clause 12 does not deal comprehensively with all cases of dismissal: cf. clauses 4 and 9 referred to above. Secondly, the reference to the notice to be given by permanent officers wishing to terminate their employment is the only instance of the use of the word "permanent" with reference to staff tenure anywhere in the document. Clause 12 does not seem to me inconsistent with an employment of indeterminate duration subject to an express concession in favour of the staff of a standard period of notice where they desire to terminate their employment, and express provision recognizing the common law right of immediate dismissal for gross misconduct coupled with a special fixed period in the case of unfitness. This leaves the board with their right to terminate by reasonable notice, which will vary with the different grades or status of their officers and the length of which is accordingly not specified. The expressio unius rule of construction does not, I feel, compel a different construction since the clause is not exhaustive and, in any event, is concerned with defining the length of notice required, in the absence of gross misconduct, rather than in prescribing the only circumstances in which the employment can be terminated.

My Lords, having regard to the fact that there is a difference of opinion in your Lordships' House on this matter, I have thought it right to set out my reasons for thinking this appeal should be dismissed. Otherwise I should have contented myself with expressing my complete agreement with the judgment of the Lord Chief Justice of Northern Ireland. In arriving at this conclusion, which is dependent upon the construction of clause 12 in the special context of this case, I can derive no assistance from any of the authorities which were referred to in argument.

Lord Keith of Avonholm. My Lords, this case raises a question of general importance which may affect not only persons in the employment of the respondent board in a like case with the appellant, but may well have repercussions on the powers of

public bodies or authorities which do not rank as branches of the Civil Service to terminate the employment of their servants.

A point raised in the case is whether the advertisement, in response to which the appellant applied for service with the respondent board, forms part of her contract of service. The point, in my opinion, is immaterial. I incline to the view that it was merely a notice of the kind of employment for which applications were invited, with a note of the salary scales for the respective classes of posts to be filled and with an indication of the qualifications for appointment and conditions to be observed by applicants. But it is not disputed that the appellant was in fact appointed to a permanent and pensionable post on the board's staff, whatever that may mean, and the statement or representation in the advertisement has accordingly been fulfilled. The only question is what results flow from this appointment.

A mere statement that a person holds a permanent and pensionable post is very imprecise. It contains no indication of the degree of permanence or the nature and conditions of the pension. It is to be noticed that, by letter from the board's secretary, dated July 29, 1948, the appellant was informed that she had been selected as senior clerk on the board's staff at a certain salary scale and was asked to say whether she was finally prepared to accept the appointment. She did accept and took up her duties on August 16, 1948. She came at once under the pension scheme set up by the Health Services (Superannuation) Regulations (Northern Ireland), 1948 (S.R. & O., N.I., 1948, No. 161), and dated June 24, 1948. This was not a pension scheme of the board but a government pension scheme made under the Health Services Act (Northern Ireland), 1948, which applied to the appellant as an officer of the board, an employing authority under the regulations. The statement in the advertisement that the appellant's appointment would be pensionable was thus satisfied. The appellant, of course, would have to comply with the conditions of the pension scheme, and under the scheme the board were entitled to deduct her contributions from her salary and pay them over to the Ministry; but the board did not guarantee her any pension, or control the conditions of its payment in any way, nor were they, in my opinion, bound to do so by any contract made with her.

I turn, then, to the question of the permanence of her appointment. When the appellant took up her appointment on August 16, 1948, there were no terms and conditions of service in existence. But section 56 (1) of the Health Services Act (Northern Ireland), 1948, required the board to determine the number, qualifications, remuneration and conditions of service of officers of the board. On August 18, 1948, the Finance and General Purposes Committee of the board recommended certain terms and conditions of service which were adopted by the board on August 25 and approved by the Ministry on September 3, 1948.

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From August 16 to September 3 neither the board nor the appellant were under any conditions other than those specified in the board's letter of July 29, and I think that Mr. Patton was right in his contention for the respondent board that during that period and subject to proving her fitness for the post during a probationary period of service the appellant held her post under a contract of general hiring. That is to say, she held a permanent post in the sense of an appointment on the board's permanent staff of indefinite duration. She was on the board's staff as senior clerk at an annual salary of £300 with yearly increments and that clearly meant on their permanent staff. On the view that she held her post under a general hiring, her service could not be terminated inside a year and then only on reasonable notice before the expiry of the year, failing which it would continue for a further year. It is quite impossible, in my opinion, to hold that during this period she was holding a lifelong appointment.

I come now to September 3, when the terms and conditions of service (conveniently referred to as "the September conditions") were approved. It is common ground that these became conditions of the appellant's service. The appellant says in her affidavit that she accepted them. It is immaterial whether they became contractual conditions or were imposed by effect of statute. The appellant's case is built up on the language of paragraph 12 of Part V of these September conditions. This paragraph starts with a statement which is no more than declaratory of the common law, viz., that the board may dismiss any officer for gross misconduct and any officer who is proved to their satisfaction to be inefficient and unfit to merit continued employment. The paragraph would be neither better nor worse if this opening statement had been omitted altogether. But it serves as an introduction for what immediately follows, for the paragraph provides that except where an officer has been guilty of gross misconduct the board shall give him at least one month's notice of dismissal under the rule. Alternatively, they may order reduction in rank of an officer who is found to be unfit to discharge the duties of the grade in which he has been employed. These may well be regarded as provisions favourable to the inefficient officer. At any rate, they fix the minimum amount of notice for dismissal on the ground of inefficiency and to that extent may modify the common law rules as to notice in such a case, or at least remove uncertainty upon the point. It may be noticed in passing that nothing is said about notice of dismissal for gross misconduct, but, in my opinion, the clear implication is that the common law power of summary dismissal is left to operate in such a case. The paragraph concludes with the sentence: "One month's notice in writing shall be given by "all permanent officers who wish to terminate their employment "with the board." This condition is not, in my opinion, entirely unrelated to what has gone before, because it would apply to an

officer who had, by order of the board, been reduced in rank and who was unwilling to accept such reduction. And this may well explain the heading to the paragraph: "Dismissal and Reduc- "tion in Rank and termination of employment otherwise." But it also has, I think, a wider ambit and would apply to any officer who for any reason wished to terminate his employment with the board.

The appellant's contention is that, apart from some special cases of dismissal or termination of employment dealt with in other paragraphs of the September conditions, paragraph 12 is exhaustive of the powers of the board to terminate her employment. I am quite unable to accept that contention. As I have said, the opening words of the paragraph are mere surplusage. If they are omitted, as they might well have been, the paragraph would be nothing but a statement of the length of notice to be given by the board in a case of inefficient service, with an alternative of reduction in rank, and a statement of the length of notice to be given by a permanent officer wishing to terminate his employment. It is impossible, in my opinion, to extract from this an implication, and it can only be an implication, that the appellant and indeed all the other permanent officers hold lifelong appointments except in certain circumstances in which the appointments are expressly authorized to be terminated. Appeal was made to the maxim "Expressio unius exclusio alterius." But a declaration in the conditions of certain common law powers of the board cannot, in my opinion, exclude other common law powers that the board may have to terminate contracts of service. The invocation of the maxim here is, in my opinion, inapposite. I would refer in this connexion to what, I think, is accurately expressed in Halsbury's Laws of England, 3rd ed., vol. XI, p. 395, § 644, as follows: "The maxim, however, requires to "be applied with caution. The failure to make the *expressio* "complete may be accidental; and the maxim ought not to be "applied when its application, having regard to the subject- "matter to which it is to be applied, will lead to inconsistency "or injustice. It should only be applied when the instrument, "on the face of it, apparently contains all the terms which the "parties have agreed upon."

In this connexion it is illuminating to look at paragraph 19 of the September conditions. This deals with absence and pay on sick leave. There is no express provision, however, for termination of employment in the event of prolonged ill-health. There appears, however, in paragraph 19 (3) (*h*) this statement: "The "provisions of this scheme shall cease to apply to an officer on "the termination of his employment whether by reason of "permanent ill-health or infirmity of mind or body or by reason "of age, but without prejudice to the right of an officer whose "employment is terminated by reason of permanent ill-health or "infirmity to receive the period of notice provided by his contract "of service."

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It is plainly the assumption of this paragraph that an officer's service may be terminated by reason of permanent ill-health or infirmity and this, of course, would be so at common law. Thus we have again another illustration of a direction as to the period of notice to be given in a situation which presupposes the terminability of the employment. The reference to the period of notice provided by the contract of service may create a difficulty where there is no contract of service expressly dealing with the matter. But that rather strengthens the view that the contracts of service are terminable generally. If there is no special period of notice, parties will just have to fall back upon common law rules. It may be noticed here that the contracts of service with the board will vary as to the length of notice required in cases not specially noticed in the September conditions or in the contracts of service, for some employees are engaged, under the conditions, at yearly salaries paid monthly and others at weekly salaries. In the result, my view is that wherever the matter can be tested by a reference to particular conditions, it is not the circumstances in which service can be terminated that are being dealt with, but the length of notice required in particular cases. I can find no reason for thinking that the ordinary common law rules governing the relations between master and servant are being otherwise abrogated.

I do not find any of the cases that have been cited helpful. In only one was it held that a servant held a lifelong appointment subject to satisfactory service and that was the case of *Salt* v. *Power Plant Co. Ltd.*[2] That was a very exceptional case of employment for a defined temporary period of service which could be terminated by notice within a further fixed period of time "and in the absence of such notice the engagement to remain "in force as a permanent one subject to your continuing to "perform your duties to the satisfaction of the directors." The language used and the contrast between the two periods of service were there so strong as to render inevitable the conclusion that a lifetime service was intended. It was sought to equate the probationary period of service in the present case followed by a subsequent period of service on the permanent staff with the two periods of service in *Salt's* case,[2] but the comparison is, in my opinion, invalid, particularly when regard is had to the entirely different terms of service in the present case.

I would add that the presumptions are all against the claim made by the appellant. There are judicial offices held ad vitam aut culpam for historical and constitutional reasons which it is unnecessary to explore. But it would need the clearest language to convince me that a contract of personal service was intended to be a contract for life, or a contract to endure till a servant has qualified for a full retirement pension. The position in the present case, if the appellant's argument be acceded to, would

[2] [1936] 3 All E.R. 322.

be the more remarkable in that it would be only the board that was bound, for the servant is entitled to terminate his employment at any time on one month's notice. Specific performance of such a contract could not, of course, be enforced, but refusal by the board to continue to employ the appellant would be a breach of contract sounding in damages. In the case of employment on the permanent staff of public bodies there is, no doubt, often an expectancy of permanence for the working life of the servant. But the law would be slow to hold, for obvious reasons, that a servant is bound to give lifelong service, or a master to afford lifelong employment. The appellant's case seems to have stemmed in origin from the idea that the advertisement was an offer of such an employment, which conceivably might have been as much to her detriment as to her benefit. But the appointment advertised was what she in fact got, a permanent and pensionable appointment in the sense of an appointment on the board's permanent staff and an appointment which would bring her under a pension scheme. That is all, in my opinion, that the advertisement could reasonably convey. If the advertisement were to be treated as an offer accepted by her, it would, in my opinion, be quite unreasonable to construe it as an offer binding her and the board to a lifelong contract of employment. Nor are the September conditions, in my opinion, capable of being construed as binding the board to any such contract.

I would dismiss the appeal.

LORD EVERSHED. My Lords, if the terms of the appellant's service depended only upon the respondents' advertised offer and its acceptance by the appellant, I should think that the respondents were entitled to succeed; for I should not regard the use of the word "permanent," even when the word "pensionable" is added to it, as sufficient in that context to create a promise of a life employment or to disable the respondents as employers from terminating the employee's contract of service upon reasonable notice. And I should reach the same conclusion if the terms of the relevant contract were derived from the respondents' secretary's letter of July 29, 1948, with or without the advertisement. Whether or not a servant, engaged according to the terms contained in the advertisement or to those in the letter or both, should be treated as engaged upon "a general hiring," I do not, for my part, think that, in a contract of service, use of the word "permanent" would be of itself sufficient to import the notion of a life appointment. The word is clearly capable, according to the context, of many shades of meaning; and it seems to me of considerable importance, in interpreting its use in a contract of service, that such a contract cannot be specifically enforced.

But the appellant was, until February 16, 1949, upon probation only; and it is not in doubt that during that period she had no security of tenure. She was, however, at the end of the period, taken on as an established officer. In the meantime, as she

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stated in her affidavit, she had received a copy of the staff conditions and terms of service which have been referred to in the case as "the September conditions." In my judgment, her service was, after February 16, 1949, governed by the September conditions, and I agree with the learned Lord Chief Justice of Northern Ireland that thenceforth the contents of the advertisement formed no part of her contract. Thenceforth the advertisement seems to me only significant as a matter of history and as showing that the appellant was (after February, 1949), and was intended to be, a member of the established or "permanent" staff of the board, whose service was regulated by the September conditions. For, with all respect to the noble Lord, Lord MacDermott, I do not think that the September conditions as a whole (and particularly Part V of them) applied to "temporary "employees." The final paragraph of Part III of the conditions seems to me to indicate that, in the case of temporary employees, only Part I of the conditions, that headed "Grades, Numbers "and Rates of Remuneration," would (in the absence of special terms of engagement) be applicable.

The sole question in the appeal, then, is whether, as regards determination of the service of "permanent" officers, the contractual terms are to be found exclusively in Part V of the September conditions, including paragraph 12, which has already been read to your Lordships. This question is one of the proper construction of the conditions and its difficulty is emphasized by the circumstance that your Lordships have disagreed upon it, as did the members of the Court of Appeal in Northern Ireland. My Lords, I have reached the conclusion that these September conditions should, upon their true interpretation, be taken as intended to comprehend the whole terms of the contracts of service of those to whom they are applicable. Much may turn upon the premise to a consideration of the meaning of the conditions—whether, in a contract of service made in the twentieth century with a statutory board such as the respondents (whose established officers participate in the pension scheme contained in regulations promulgated by the Ministry of Health and Local Government of Northern Ireland), it is correct to regard the common law right of a master to determine his servant's engagement as of so well-established and paramount a character that the contract should be interpreted as necessarily subject to that right (and to a corresponding right on the part of the servant), so that only the clearest express terms will exclude it. Such was the view of the learned Lord Chief Justice of Northern Ireland and Black L.J. It was observed in the course of the debate before your Lordships by my noble and learned friend, Lord Goddard, that in any contract of service of the Crown (e.g., in the Civil Service) there always resides in the Crown a right of determination, though, in the absence of misconduct or incapacity, its practical significance may be negligible. In the present case the learned judge at first instance, Curran J., decided the question

on the basis that the appellant was in truth a Civil Servant, a basis which has since been conceded to have been erroneous. But it is clear, as Lord Goddard pointed out, that in substantial characteristics the present contract is, and was intended to be, similar to the contract of a Civil Servant. It is, however, not a contract of service of the Crown and the paramount right of the Crown has no application to it. On the other hand, if the analogy was intended, should not the practical results have been intended also?

In my judgment, the September conditions, viewed as a whole, appear to be intended as truly comprehensive, and, in regard to determination, as exhaustive. It is to be noted that if the respondents' argument is correct, their prima facie right at law to determine the contracts of their senior staff (including, for example, the medical adviser who, by another provision of the conditions, must be a medical practitioner of at least 10 years' standing) and of their intermediate staff, is subject to the substantial qualification that the Ministry's approval must be first obtained (see Part I); for on this view I cannot regard the word "removals" as limited to dismissals for misconduct or incapacity. I refer also to paragraphs 5 and 8 in Part V ("Increments" and "Efficiency Bar"), both of which by their language assume that service will continue, though the officer has not shown himself "satisfactory" or "entirely suitable." I refer also to the elaborate provisions in regard to sickness payments in paragraph 19.

I turn to the all-important paragraph 12. It is true that the presence of the special provisions of paragraph 9 as regards oaths of allegiance, and of the provisions and inferences of paragraph 19 (3) (*h*) relating to the case of an officer incapable through illness of performing his part of the contract at all, show that paragraph 12 does not in its context exhaustively cover every case of determination. But it does not, in my judgment, follow that the paragraph is nevertheless subject to some overriding power of determination which finds no reference or allusion at all elsewhere throughout the conditions.

If paragraph 12 had ended with some such formula as "but "the employment of permanent officers shall not otherwise be "terminable," it could not, I conceive, have been contended that the board was still possessed of a vested right to determine any officer's employment upon reasonable notice. The paragraph does not, of course, so end, but it is introduced by the heading "Dismissal and Reduction in Rank, *and termination of employ-* "*ment otherwise.*" I am unable to accept the view of the heading that it is a mere summary of, and can have no effect upon, the paragraph which follows and the scope of which should be determined by a first reading of it without regard to the heading. The heading is part of the conditions, and according to ordinary principles of construction its last five words mean and would be taken by a reader to mean that in the succeeding

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paragraph would be found reference to the circumstances in which alone, apart from dismissal, a service contract might be terminated. If express provision is made elsewhere in the conditions for dismissal (as in paragraph 9) the exhaustive character of paragraph 12 is, no doubt, to that extent necessarily qualified. But I have been unable to agree that the paragraph 12 is further limited and, particularly, that its purpose is confined to an expression of specific limitations upon more general though undefined rights, on both sides, said to be implicit in the contracts of service. The express power to dismiss for gross misconduct would be inconsistent with that view, or, at best, otiose. Nor can I regard the dual requirement of inefficiency and unfitness as of substantial weight in favour of the respondents' view.

Emphasis was laid in the course of the argument for the respondents and in the judgments of the majority in the court below upon the absence of reciprocity introduced by the last sentence in the paragraph, "One month's notice in writing shall "be given by all permanent officers who wish to terminate their "employment with the board"; and it was stressed that the form of the words I have quoted rather assumed and defined than conferred a right on the officer's part to terminate his employment. In my judgment, the last-mentioned criticism is not more than a criticism of the elegance of the paragraph. In its context the last sentence, to my mind, is, and is intended to be, a complete statement of the officer's right of voluntary termination. And the argument upon reciprocity seems to me, with all respect to those who have taken a different view, to beg the very question which we have to decide. As a matter of practical common sense the situation of the employer board and that of one of its servants are very different. The loss or damage to the board occasioned by the departure of one of its servants would, save in very exceptional circumstances, be negligible. To a servant, certainly a servant in the position of the appellant, the security of employment with the board for the period of working life is of immense value.

I therefore conclude that the effect of the September conditions which the respondents put forward and made the contractual basis of the appellant's service was that, so long as she did not render herself liable to dismissal on one or other of the grounds expressly stated in her contract and was willing and able to serve the board, the appellant was entitled to continue in her employment for her life. Mr. MacDermott suggested that the respondents' offer of security of employment should, on the true effect of the conditions, be taken as subject to the qualification that the "job" for which the appellant was engaged remained available, having due regard to the nature and scope of the board's statutory activities. But all your Lordships were of opinion that such a qualification could not, as a matter of construction, be extracted from the conditions. If the power of termination upon reasonable notice

implicitly remains in the respondents, then the occasion and purpose of its exercise are irrelevant.

The result, on the view which I take, may be to saddle the respondents with contracts with their officers which they ought not reasonably to have undertaken or contemplated, though I do not accept the view (particularly in the light of the advertisement and her own sworn evidence) that the appellant herself could never have so regarded her prospects when, after receiving the conditions, she became one of the board's "permanent" officers. But as Scrutton L.J. observed in his judgment in *Reigate* v. *Union Manufacturing Co. (Ramsbottom) Ltd.*,[3] quoted by Porter L.J. in the court below: "The first thing is to see what the "parties have expressed in the contract; and then an implied "term is not to be added because the court thinks it would "have been reasonable to have inserted it. . . ."

For the reasons which I have tried to express I would allow the appeal.

Appeal allowed.

Solicitors: *Gouldens for J. Morris McKee, Belfast; Howlett & Co. for Cleaver, Fulton & Rankin, Belfast.*

F. C.

[3] [1918] 1 K.B. 592, 605.

[HOUSE OF LORDS.]

* NICHOLSON AND OTHERS . . . . . APPELLANTS;

AND

ATLAS STEEL FOUNDRY AND ENGINEERING CO. LTD. . . . . RESPONDENTS.

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Factory — Dust — Grinding of metals — Silica dust—Pneumoconiosis—Whether caused by breach of duty — Ventilation — Swing-frame grinders — Not "portable" — Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (*S.R. & O.*, 1925, *No.* 904), *reg.* 1—*Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 4 (1).

Factory—Onus of proof—Breach of statutory duty—Cause of injury—Silica dust—Pneumoconiosis.

A workman who had been employed for several years operating pneumatic hammers in the dressing shop at a steel foundry contracted pneumoconiosis and died. Siliceous dust was produced by the pneumatic hammer but, as regarded that implement, there was no obligation imposed by regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, to fit appliances to intercept the dust. In the dressing shop there were also in operation swing-frame grinders, which consist of a fixed upright post

† *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD COHEN and LORD KEITH OF AVONHOLM.

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supporting a horizontal beam able to swing round it in a complete circle and, suspended from the beam by a pulley block, chain and hook, the grinding part of the mechanism weighing five to ten hundredweight. It was disputed whether or not siliceous dust was emitted from the swing-frame grinders. At the end of the shop where the workman was employed there were no means of ventilation, but doors provided for the entry of men and vehicles; at the other end there was ridge ventilation in the roof:—

Held, that, on the evidence, the factory owners were in breach of their obligation under section 4 (1) of the Factories Act, 1937, to secure adequate ventilation of the room and consequently the siliceous dust from the pneumatic hammers remained in concentrated form longer than it would if there had been better ventilation and that, accordingly, owing to the default of the foundry owners, the workman was exposed to greater risk than he should have been; though it was impossible to quantify, even approximately, the particles which he must in any event have inhaled and those which he inhaled but need not have, the excess was not negligible, and the foundry owners were liable to his widow and dependants in damages.

Bonnington Castings Ltd. v. *Wardlaw* [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615 applied.

Held, further, that the swing-frame grinders were not "portable" and, accordingly, not within an exemption to regulation 1 relating to portable grinding machines.

Decision of the First Division of the Court of Session reversed.

Appeal from the First Division of the Court of Session.

The appellants were Mrs. Annie Nicholson (née Cleland), Caroline Nicholson, Alexander Nicholson and William Nicholson. They claimed damages from the respondent company, Atlas Steel Foundry and Engineering Co. Ltd., for the death of the deceased, Alexander Watson Nicholson, the husband of the first appellant and the father of the others. The appellants averred that he died of pneumoconiosis, contracted while he was employed by the respondent company in the dressing shop of their steel foundry and that his contraction of the disease was caused by the fault of the respondent company. The grounds of fault averred in the appellants' pleadings were in summary as follows: The appellants averred that the respondent company were in fault at common law as follows: (1) that they failed to provide and maintain effective dust extraction plant for two heavy swing-frame grinders; (2) that the ventilation provided by the respondents in their dressing shop was inadequate. The appellants further averred the respondents were in breach of their statutory duties under the Factories Act, 1937, and under regulations having effect by virtue thereof in respect: (1) that they failed to provide effective ventilation for rendering harmless all dust generated in the dressing shop as required by section 4 (1) of the Act, although it would have been practicable for them to have provided additional roof ventilators and openings in the walls; (2) that they failed to provide suitable dust-extraction plant for one of the swing-frame grinders, as required by regulation 1 of the Grinding of Metals (Miscellaneous Industries)

Regulations, 1925. The Lord Ordinary awarded damages to the appellants. The First Division reversed his decision.

The facts are fully set out in the opinions of Viscount Simonds, Lord Cohen and Lord Keith of Avonholm.

Gordon Stott Q.C. and *Alastair Johnston* (both of the Scottish Bar) for the appellants.

W. Fraser Q.C. and *D. Anderson* (both of the Scottish Bar) for the respondent company.

Bonnington Castings Ltd. v. *Wardlaw* [1] and *Davie* v. *Magistrates of Edinburgh* [2] were referred to in argument.

Their Lordships took time for consideration.

March 14. VISCOUNT SIMONDS. My Lords, the appellants are the widow and minor children of Alexander Watson Nicholson, who died on June 14, 1951, as the result of pneumoconiosis which he contracted while in the employment of the respondents at their Atlas Steel Foundry, Armadale.

They claim that he contracted this disease owing to the fault of the respondents, resting their case, first, on neglect at common law in that they did not provide adequate ventilation of their dressing shop by means of roof ventilation along its whole length and suitable openings in the walls; secondly, on the allegation that they failed to observe the obligation imposed by section 4 (1) of the Factories Act, 1937, in that they did not make effective and suitable provision for securing and maintaining by the circulation of fresh air the adequate ventilation of their dressing shop and for rendering harmless, so far as practicable, all fumes, dust and other impurities that might be injurious to health generated in the course of any process or work carried on there, and thirdly, on the allegation that they were in breach of the provisions of regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, in that they failed to provide dust extraction plants to the swing-frame grinders which they installed in 1938 and 1939.

Pneumoconiosis is an industrial disease of gradual onset, which is caused by the inhalation over a long period of dust containing minute siliceous particles. It is admitted by the respondents that the deceased inhaled while in their employment the particles which caused his illness and ultimately his death, but they contend that it was not proved that particles which were wrongfully emitted, or which, having been innocently emitted, were allowed, through inadequate ventilation, to remain within his breathing zone, made a material contribution to his illness. I am constrained to state the contention in this somewhat awkward way because it is common ground that the nature of the

[1] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

[2] 1953 S.L.T. 54; 1953 S.C. 34.

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deceased's work was such that he must inevitably have inhaled a quantity, even a large quantity, of noxious particles about which he could have no cause of complaint, and the only question is whether in addition to these particles he was, owing to the fault of the respondents, bound to inhale a number of other particles which made a material contribution to his illness. In determining whether a material contribution was made, I must apply the test recently laid down in this House in *Bonnington Castings Ltd.* v. *Wardlaw* [1] and say that a contribution is material unless the maxim "de minimis" can be applied to it. It is right that this should be so, for if, as the law now stands, the workman is, in certain circumstances, forced to inhale noxious particles of dust without having any legal ground of complaint, it must be doubly incumbent on the employer to safeguard him against any additional risk.

The deceased, during his periods of employment by the respondents, which were from 1934 to 1940, from 1942 to 1943, and again from 1947 to June, 1949, worked exclusively in the respondents' dressing shop, dressing steel castings by the use of a pneumatic hammer. In the course of that operation quantities of adhering moulding sand, when pulverised by the action of the hammer, were emitted in the form of dust which included a proportion of invisible siliceous particles to the inhalation of which he was exposed. So far he had no ground of complaint, though it may be a matter of wonder that such an operation should be permitted.

In addition to the dressing of the steel castings by means of the pneumatic hammer, an operation carried on by others besides himself, there were in his close neighbourhood in the same shop two so-called swing-frame grinders. It was in regard to those that the respondents were alleged to have been in breach of the regulation to which I have referred. Here two points of controversy arose. The respondents admitted that no dust-extracting appliances were fitted to these machines at the relevant dates, but they contended that it had not been proved that there was any adherent sand or, at any rate, any but a negligible amount of such sand on the castings when they were brought to the machines. Therefore, they said, there could have been no material contribution to the noxious particles inhaled by the deceased through this default. And, secondly, they said that, in any case, there had been no breach because, under a power accorded to him by the Act, the Chief Inspector of Factories had granted a certificate of exemption from the regulation to portable grinding machines or portable buffing machines as defined in the certificate and the machines in question came within the certificate. I propose to say only a very few words on either of these points. On the latter of them, upon which the Lord Ordinary was in favour of the appellant and their Lordships of the First

[1] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

Division unanimously against him, I will only say that I wholly agree with the reasoning and conclusion of my noble and learned friend, Lord Keith of Avonholm. It appears to me an artificial, even an extravagant, view to call these machines portable grinding machines, and there is nothing in the definition to drive me to it.

On the first point also there was a difference of opinion between the Lord Ordinary and the First Division. A pure question of fact is involved. The Lord Ordinary concluded that it could not be doubted that siliceous dust was given off by the swing-frame grinders in use during the deceased's period of employment in the dressing shop. The Lord President held that the evidence negatived any appreciable quantity of silica dust ever having emanated from the operation of the swing-frame grinders in this factory.

In this conflict of opinion I do not find it necessary to come to a conclusion and I do not regret it, for I must admit that I find that the evidence is particularly confusing and indecisive. Perhaps for that reason, I should not be right to differ from the judgment under appeal, but, as I am in favour of the appellants on the larger question of inadequate ventilation, they stand to gain or lose nothing by any opinion I might form on this question.

The same difference of opinion has arisen concerning the inadequacy of the ventilation of the shop. Here I can ignore the common law aspect of the case. The argument has revolved round the statutory duty imposed by section 4 (1) of the Factories Act, and it is clear that, if the appellants do not succeed on this question, they cannot succeed at common law. On the other hand, if they do succeed, that is all they want.

The Lord Ordinary found as a fact that the ventilation of the dressing shop was not effective, and that the respondents had failed in their duty both at common law and under statute. He held further that it was practicable for them to have made the ventilation at any rate more effective than it was. It is, however, a fair criticism of his judgment that he did not, before making his award of damages in favour of the appellants, consider whether there was a relevant causal connexion between the respondents' default and the illness of the deceased. *Wardlaw's* case [2] had not yet been decided in this House.

Upon appeal to the Inner House it was appreciated that it was necessary to establish a causal link between the default in providing proper ventilation and the onset or aggravation of pneumoconiosis. As the Lord President said: "As the Lord "Ordinary held, albeit with some hesitation, that the eastern "part was not ventilated as required by the statute, I do not feel "entitled to interfere with his conclusion on this question. The "important matter is, however, how far it takes the pursuers."

The relevant facts about the ventilation of the shop were

[2] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

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these. The deceased worked in the eastern half of the shop which had no roof ventilation at all, unlike the western half which had had ridge ventilation in the roof from a date before the eastern half was built. The only means of ventilation in the eastern half consisted of doors, which had not been provided for ventilation purposes but for the exit and entry of men and vehicles. Their effectiveness for ventilation could only be fortuitous and occasional. It is clear that there was no adquate ventilation. But as the Lord President says, how far does this take the appellants?

My Lords, I do not think that it can be wrong to approach this question from the angle that, if the statute prescribes a proper system of ventilation by the circulation of fresh air so as to render harmless, so far as practicable, all fumes, dust and other impurities that may be injurious to health, generated in the course of work carried on in the factory, and if it is proved that there is no system or only an inadequate system of ventilation, it requires little further to establish a causal link between that default and the illness, due to noxious dust, of a person employed in the shop. Something is required as was held in *Wardlaw's* case.[3] I was a party to that decision and would not in any way resile from it. But it must not be pressed too far. In the present case there was, in my opinion, ample evidence to support the appellants' case. The appellants rightly or wrongly by their pleadings assumed the burden not only of proving that there was a causal link between default and disease but also of proving that it was practicable for the respondents to have reduced the risk by the provision of additional roof ventilators and openings in the walls for the admission of fresh air.

It was common ground, as I have said, that the deceased could not avoid inhaling noxious particles of silica as he worked with his pneumatic hammer, but it must be obvious that the sooner the dust—a cloud of dust as it was called—was dispersed the fewer the particles he would inhale, and equally obvious that if there is no ventilation and no circulation of air the dispersal of the cloud will be delayed and the workman will remain in the concentration of particles which is of all things most dangerous. The question, then, is whether the respondent could have improved the ventilation by the method suggested by the appellants. In spite of some evidence to the contrary I do not hesitate to accept the evidence given by the appellants' expert witness Mr. George Victor Stabler. He had a wide experience of iron and steel foundries and their ventilation. He visited this foundry. Having indicated that he did not regard the ventilation as up to standard he was asked: "Q. What is your view as "regards the necessity of proper ventilation in such a shop as "this? A. It should be more than in this particular case in the "sense that it should be plain that there should be a higher rate

[3] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

"of change of atmosphere produced by some such things as continuous roof ventilators or the usual type of cyclic ventilation which many modern dressing shops are fitted with and which change the atmosphere six times an hour and that kind of thing." He was then asked: "Q. If some such form of ventilation had been present, would that have minimized the danger of the dust being unhealthy to the workers? A. It would have reduced the concentration."

The evidence of Mr. Stabler was in some degree confirmed by another expert, Mr. Whiteside, but he spoke only from a plan, and the appellants' counsel was prepared to make his stand on Mr. Stabler's evidence. Against this evidence must be set that of the respondents' experts. A Mr. John William Gardom, whose qualifications were unimpeachable, in his evidence in chief on this point said no more than that the general ventilation of the building was quite adequate. But his answers in cross-examination were such as might well justify the trial judge in preferring the evidence of Mr. Stabler. I must quote a few questions and answers: "Q. Why didn't you apply your mind to the question of the means of providing ventilation? A. The means of ventilation were quite satisfactory and could not be otherwise. What is more important to my own view is the extraction of any fumes or dust at any given point. Q. What were the methods for extracting fumes from the dressing shop where the men worked? A. Where the men worked none at all. Q. Do you regard that as satisfactory? A. I don't know how it could be improved at the present time. Q. I suggest a simple method of improving it would be to extend the louvres to the position in the roof above where the men were working? A. Yes. Q. So that the dust went up in the air? A. I would agree. Q. Do you think that the roof ventilators are valueless as ventilators? A. No, but I do as fume extractors." Then he was asked by the court: "Q. And also as far as dust extraction goes? A. Yes." I must admit that from these answers and from his further cross-examination I get little assistance and even if they do not support the appellants' case, which they might well be thought to do, at least they do not appear to me to outweigh the clear and unequivocal testimony of Mr. Stabler.

A second expert witness, Mr. A. W. Mason, was called by the respondents. I do not wish to underestimate his qualifications, but as the last question and answer of his cross-examination were as follows: "Q. You are not really in a position to say whether or not improved ventilation would render this dangerous dust harmless? A. No, I am not," I am not disposed to give much weight to his evidence.

I need not refer to the rest of the evidence. For it appears to me that it clearly established that dust containing dangerous particles of silica was emitted into the air by the operation of pneumatic hammers on the castings, that this dust hung about in concentrated form longer than it would have if there had been

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better ventilation, and that improved roof ventilators were practicable and would have effectively improved the conditions. It follows that owing to the default of the respondents the deceased was exposed to a greater degree of risk than he should have been, and, though it is impossible, even approximately, to quantify the particles which he must, in any event, have inhaled and those which he inhaled but need not have, I cannot regard the excess as something so negligible that the maxim "de minimis" is applicable. Accordingly, following the decision in *Wardlaw's* case,[4] I must hold the respondents liable. The interlocutor of the First Division should, in my opinion, be recalled and that of the Lord Ordinary restored. The respondents must pay the costs of the appellants here and below.

My noble and learned friend, Lord Oaksey, who is unable to be here, asks me to say that he has read and concurs in my opinion.

Lord Morton of Henryton. My Lords, I agree with the speech which has just been delivered by my noble and learned friend on the Woolsack.

Lord Cohen. My Lords, the appellants are the widow and children of the deceased Alexander Watson Nicholson who died of pneumoconiosis on July 14, 1951. He had, for periods aggregating over 9 years, been in the employ of the respondents, the last of such periods terminating in June, 1949, when, owing to the state of his health, he had to stop working. From the date of his retirement until his death he was mostly confined to bed.

Throughout his employment with the respondents he was employed in the dressing shop, his work consisting in operating a pneumatic hammer. Other tools to be found in the dressing shop were swing-frame grinders and double-headed grinders. Until changes effected recently it is common ground that the castings reached the dressing shop in a dirty condition (i.e., with a lot of sand on them) and that the operation of the pneumatic hammers necessarily created a cloud of dust which must have included some of the siliceous particles which are the cause of pneumoconiosis. It was admitted that the creation of this cloud was inevitable, but the appellants contended that had the respondents provided proper ventilation in the dressing shop in accordance with their obligations under section 4 (1) of the Factories Act, 1947, the cloud would have been more rapidly dispersed and rendered harmless so far as practicable. They also alleged that siliceous dust was generated in the operation of the swing-frame grinders, which mingled with the general atmosphere of the rooms because, in breach of their obligations under regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, the respondents had failed to provide suitable

[4] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

appliances for the interception and removal and dispersal of the said dust. The appellants also alleged fault at common law in respect of the respondents' alleged failure to provide safe plant and appliances and adequate ventilation, but I need not pursue the common law aspect of the matter, since the appellants admitted before your Lordships that they could not succeed at common law if they failed to establish the above-mentioned breaches of statutory duty.

The Lord Ordinary found that the alleged breaches of statutory duty had been proved. He gave his judgment before the decision of your Lordships' House in *Bonnington Castings Ltd.* v. *Wardlaw* [5] and approached the case on the basis that once the breaches of statutory duty were established the onus of proving that they had not contributed to the disease was on the respondents. He held that this onus had not been discharged and awarded the appellants damages totalling £3,300.

When the matter came before the First Division of the Inner House the Lord President and Lord Carmont agreed, or assumed in favour of the appellants, that the breaches of duty were established and Lord Russell did not differ from the Lord Ordinary's finding on that point but, approaching the matter in the light of the decision of this House in *Wardlaw's* case [5] that the onus of establishing causation lay on the appellants, the First Division held unanimously that the appellants had failed to discharge that onus.

In relation to the claim in respect of breach of regulation 1 the respondents had raised a preliminary point that the regulation had no application owing to a certificate of exemption granted by the Chief Inspector of Factories in exercise of his powers under the regulations. In October, 1926, he had exempted from regulation 1 "portable grinding machines, portable glazing machines "and portable buffing machines (i.e., grinding, glazing and "buffing machines without fixed foundations or suspensions "which are carried or propelled to the work)." The Lord Ordinary had rejected this argument but their Lordships of the First Division accepted it, Lord Carmont making his acceptance the principal ground of his decision on the claim under regulation 1.

My Lords, I will deal first with the claim in respect of alleged faulty ventilation. The breach of section 4 (1) is now admitted and I am unable to agree with their Lordships of the First Division that the appellants had failed to discharge the onus which admittedly rests on them of establishing that this breach caused or contributed to the disease from which the deceased died.

The particular defect in ventilation which the appellants pleaded in their condescendence was the failure to provide roof ventilators in the eastern half of the bay in which the deceased

[5] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

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worked and also openings in the walls for the admission of fresh air. In the course of the argument some discussion ensued as to whether it was open to the appellants to rely on anything in the evidence which went beyond this allegation. Mr. Stott admitted that he could not lead evidence directed to something he had not pleaded but claimed that he was entitled to rely on anything extracted from his witnesses in cross-examination or deposed to by the respondents' witnesses. This was disputed by Mr. Fraser. I do not find it necessary to decide the point for, accepting the Lord President's view that the appellants must be closely confined within their pleading, I am unable to agree with the Lord President that the addition of the additional roof ventilators would not on the evidence have mitigated the onset or development of the disease from which the deceased died.

Pneumoconiosis is a progressive disease. The longer a workman is exposed to an intense cloud the graver must be the risk of infection. In the present case it is clearly established by the evidence that at any rate down to 1949 the tool with which the deceased was working on dirty castings created a thick cloud of dust which must have necessarily included siliceous particles to an extent which cannot be classed as "de minimis." The respondents are admittedly not to blame for the generation of this cloud, but any failure to provide proper ventilation must, I think, lengthen the period during which the cloud remains intense. It seems to me to follow that the respondents' failure to provide adequate ventilation must increase the risk to which the workmen are exposed. Reading the evidence as a whole, I think it establishes that (to use the language of Lord Reid in *Wardlaw's* case [6]) "on a balance of probabilities the breach of "duty caused or materially contributed to" the injury.

Before considering the expert evidence, it should be mentioned that in the western half of the dressing shop there were four roof ventilators but in the eastern half in which the deceased worked there were none. The only other form of ventilation were doors which were opened from time to time.

The expert evidence called on behalf of the appellants was that of Mr. Stabler. The Lord Ordinary summarized his evidence as follows: "Mr. Stabler, pursuers' expert, expressed the opinion "that the ventilation in the dressing shop was inadequate for "the type of work being carried on, and below the standard "usual in such works in the Scottish area. He drew attention "to the absence of roof ventilation in that part of the dressing "shop in which steel dressing was done. As for the doors in the "shop, he conceded that they might have some small effect on "the circulation of air in their immediate vicinity but said that "the doors had been positioned for access and not for ventilation. "When visiting the dressing shop he had observed what he "described as dust clouds and noted that there was no material

[6] [1956] A.C. 613, 620.

"general horizontal movement of the dust, which indicated to "him that there was no marked draught at the working place. "He tested the dust with a konometer and found that it con- "tained a heavy concentration of fine siliceous particles, invisible "to the eye, and dangerous if inhaled. It was, he said, those "invisible particles that caused lung damage. In his view, "ventilation of the dressing shop was definitely sub-standard. "There should have been provision made for a higher rate of "change of atmosphere such as is produced by such devices as "continuous roofs and ventilators."

The expert witnesses called on behalf of the respondents were Mr. Gardom and Mr. Mason. The effect of their evidence on this point is summarized by the Lord Ordinary as follows: "Mr. Gardom, defenders' expert, considered that the ventilation "of the dressing shop generally was satisfactory. While he "agreed that ventilators should have been installed in the roof "of the eastern half, in his opinion roof ventilation did not assist "greatly in freeing the air inside the dressing shop of dust. Mr. "Mason, also a defenders' expert, and skilled in factory design "and layout, did not consider the atmospheric conditions unusual "for a dressing shop. They were, he said, reasonably acceptable. "They could have been better, but they could also have been very "much worse."

The Lord Ordinary preferred the evidence of Mr. Stabler but the Inner House held that the appellants had not discharged the onus which rested on them. The Lord President cited further extracts from the evidence of Mr. Gardom and Mr. Mason as follows: "Mr. Gardom, an expert of considerable experience who "was called for the defenders, stated (at pp. 205–206) that roof "ventilators were useless to extract the dangerous dust and that "the proper method was to extract the dust downwards. He "would not like to increase the roof ventilation for the purpose "of lifting this dust up. Mr. Mason, another expert for the "defenders, also stated (at p. 226) that ventilation was not the "proper way to remove this dust, and (at p. 230) in dealing "with the dangerous dust in steel factories, he says: 'As I "'see it the ventilation system would not cater for the dust "'removal . . . I cannot see the ventilation system providing "'for dust removal.' When asked as to whether, assuming "there were some very fine particles of dust, it was at all prac- "ticable to provide for the removal of this type of dust by a "system of ventilation, he replied: 'On the basis of the assump- "'tion it is very difficult to say, but I feel that even a forced "'system or mechanical system to remove the dust might be "'such as it would be uncomfortable.' This, indeed, seems "highly likely, as even in the absence of such a system there "is evidence that employees in the dressing shop complained to "the shop stewards about the draughts in the shop. Finally, "he says (at p. 233): 'I do not think any general form of "'ventilation would remove the dust.' The highest he puts it

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"for the pursuers is at p. 229, where he says: 'I can only say "'that a really efficient ventilation system against a less efficient "'one would remove the dust quicker, but I cannot see that the "'risk of the dust being breathed by the men would be more "'than slightly removed. It still means it will pass between "'them and the general ventilation system.'"

My Lords, like the Lord Ordinary I prefer the evidence of Mr. Stabler. Bearing in mind that pneumoconiosis is a progressive disease, that continued exposure to the dangerous dust increases the risk of infection, and that the most dangerous particles are the light particles which tend to rise, it seems to me that additional roof ventilators would, as Mr. Stabler said, have reduced the concentration and therefore mitigated the onset or aggravation of the disease. I am fortified in this view by some evidence given by the respondents' manager, Mr. Walker: "Q. What form of ventilation is there in the eastern half? "A. There is not really any planned ventilation, but according "to tests there is sufficient ventilation. Q. The answer is that "there is no form of ventilation in the eastern half at all? "A. I agree there is no form of roof ventilation. Q. You depend "entirely on the doors? A. More or less. Q. And you agree "with me that doors are not as satisfactory as roof ventilators? "A. I would say from recent knowledge. Q. Isn't it obvious "that ventilation by the doors will not carry the dust up in the "same way as roof ventilation? A. Well, that could be assumed. "Q. Isn't it perfectly obvious to anybody with a grain of common "sense? A. That is the usual form of ventilation."

It is also worth noting that Mr. Mason, when talking of the existing roof ventilators, said that the existing roof ventilators in the western half of the shop are a cumulative aid to the air extraction generally. I cannot resist the conclusion that the provision of more ventilators in the eastern half would have had a more direct effect on the air in that half.

For these reasons I think that on the balance of probabilities the appellants are entitled to succeed. I would respectfully adopt some observations made by my noble and learned friend, Lord Keith of Avonholm, in *Wardlaw's* case,[7] where he said: "The pursuer has, however, in my opinion, proved enough to "support the inference that the fault of the defenders has "materially contributed to his illness. During the whole period "of his employment he has been exposed to a polluted atmosphere "for which the defenders are in part to blame. The disease is a "disease of gradual incidence. Small though the contribution of "pollution may be for which the defenders are to blame, it was "continuous over a long period. In cumulo it must have been "substantial, though it might remain small in proportion."

Having reached this conclusion, it is not strictly necessary to deal with the question of the swing-frame grinders, but as your

[7] [1956] A.C. 613, 626.

Lordships were informed that the decision of the First Division on the preliminary point as to the effect of the certificate of exemption granted by the Chief Inspector of Factories in October, 1926, has been followed in other cases, and this point was fully argued before your Lordships, it would, I think, be desirable that your Lordships should express your opinions thereon. It is enough for me to say that for the reasons given by the Lord Ordinary and by your Lordships I am satisfied that the swing-frame grinders in the respondents' dressing shop do not fall within the exemption granted by the Chief Inspector of Factories of portable grinding machines.

In the result I would allow the appeal and restore the interlocutor made by the Lord Ordinary on April 19, 1955.

LORD KEITH OF AVONHOLM. My Lords, I agree that this appeal can be disposed of in favour of the pursuers on the question of ventilation alone, in which case some of the other points canvassed in the course of the argument need not be considered. But as all of the judges of the First Division expressed the view that swing-frame grinders were portable grinding machines and therefore were exempted from the application of regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, by virtue of the Chief Inspector of Factories' certificate of exemption, I would deal shortly with this matter. The views of their Lordships of the First Division, if passed over in silence by this House, might well be treated as binding in other cases raising the same point.

First of all, I observe that there are grinding machines which are clearly portable and about which no question can arise, grinders which can be carried or moved about at will within the shop and fitted to various air points for purposes of buffing or grinding. The swing-frame grinder in this case, in my view, consists of various parts. There is a fixed upright post attached to foundation plates in a concrete foundation sunk into the floor of the shop. Attached to the upper part of this post is a horizontal beam so adjusted as to swing in a complete circle round the post. This radial beam carries a pulley block and round the pulley runs a metal chain with a hook at one end. The grinding portion of the mechanism is attached to this hook and so can be raised or lowered to a suitable level and swung by means of the radial beam round the post so as to be brought above any casting waiting to be ground within the limits of the circle to which the mechanism can extend. The grinding part of the mechanism which can be unhooked was said to weigh five to ten hundredweights. Broadly speaking, the work can be said to be taken to this machine. In the case of the clearly portable grinders the machine is taken to the work. I cannot regard the mechanism described above as a portable grinding machine. The machine, in my opinion, must be looked at as a whole from the standpoint of the manner in which it is used.

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It is not legitimate to take it to pieces and treat the grinding part of the mechanism as the grinding machine. This is a swing-frame grinder and it ceases to be a swing-frame grinder if the grinding end is detached from the rest. The certificate of exemption does not purport to deal specifically with swing-frame grinders. It is said and as I understand it this was the ground of the views expressed by the judges of the First Division, that the grinding unit was without fixed foundations or suspension and could be carried or propelled to the work. But this at best could only be so on the view, which I have already rejected, that the machine is to be dealt with in parts. In any event, I should doubt whether the grinding unit when at work can be regarded as being without a fixed suspension. It is suspended to a chain which must be fixed even if its position may be adjustable. It was said that it might be attached to a crane and was at one time so used. Even so, I think it could be said to have a fixed suspension in comparison with portable machines carried about and plugged into air points. Nor do I think the machine can be said to be carried or propelled to the work by virtue of being rotated within a limited radius so as to be brought over castings brought within its reach. I think also that the reason stated for making the exemption, viz., that owing to the special conditions under which the machines were used compliance with regulations 1 and 17 was at present impracticable, lends support to the view that it was not intended to apply to swing-frame grinders. The application of exhaust apparatus to a clearly portable grinder is quite a different problem from such application to a relatively fixed apparatus like a swing-frame grinder. For these various reasons I am of opinion that the swing-frame grinder here in question was not a portable grinder and that it did not come under the certificate of exemption.

Coming to the question of ventilation, I agree that the employers here were in breach of section 4 (1) of the Factories Act, 1937. The judges of the court below have assumed this to be so but have held it not proved that this caused or contributed to the disease from which the deceased died. I have difficulty in seeing how this conclusion can be supported on the evidence. There is ample evidence that the atmosphere at the deceased's end of the dressing shop was often very bad and that dust from the operations carried on there hung about owing to inadequate ventilation. There was no roof ventilation at that end of the shop. The only ventilation was through two doors which were closed in winter, except when it was necessary to let in or let out men and material. This dust was due to the cleansing and grinding of steel castings that took place in the shop, and the dust necessarily included large quantities of the invisible and dangerous silica particles given off in these processes from the sand with which the castings were impregnated. It is an easy and natural inference, and in accordance with the medical evidence, to hold that the pneumoconiosis from which the

deceased suffered was due to the dangerous dust to which he was exposed in the course of his work with the defenders over a prolonged period of time. The view taken by the court below seems to be that the real cause of his disease was the noxious dust given off in the course of the deceased's working on castings with a pneumatic hammer, for which no fault could be attached to the employers, and that it is not proved that roof ventilation would have materially helped to lessen the deceased's exposure to this dust. Indeed, one view was that ordinary ventilation might merely disturb the noxious dust and bring it within the range of a workman who would otherwise escape. I am unable to accept these views. It would seem common sense that with a system of ventilators in the roof and louvres in the walls the current of air would draw the dust upwards and allow substantial quantities to escape. It would necessarily reduce the density of the dust which is proved in the evidence to have hung about and which was produced not only by the deceased's pneumatic hammer but from the other buffing and cleansing operations going on around him. It would also have reduced the amount that was allowed to settle on the floor and equipment which could be stirred up again by any draught or other disturbance. Thus the cumulative amount of dust inhaled by the deceased would have been appreciably diminished, and for the reasons given in *Bonnington Castings Ltd.* v. *Wardlaw*,[8] the pursuers here would be entitled to succeed. Some evidence given by defenders' witnesses was referred to by the Lord President but it does not modify the views I have expressed. The witness Gardom to whom he refers thought roof ventilators useless. He amplifies this in the following passage: "Q. Do you say that the roof "ventilation doesn't assist at all in freeing the air of dust? "A. Yes, it may take some of it up in the air, but I don't think "it is a good method and I would not like to increase the roof "ventilation for the purpose of lifting the air up. Q. It would leave the dust floating in the air? A. Yes." Roof ventilators would, no doubt, take the dust up in the air but I do not understand why they should not carry much of it into the open air. Passages from the evidence of the witness Mason are also quoted by the Lord President, but they do not seem to indicate appreciation of the problem of reducing the concentration of dust hanging about. The witness Stabler, a witness for the pursuers, had this matter clearly in view in the following passage of his evidence: "Q. What is your view as regards the necessity of proper ventila-"tion in such a shop as this? A. It should be more than in this "particular case in the sense that it should be plain that there "should be a higher rate of change of atmosphere produced by "some such things as continuous roof ventilators, or the usual "type of cyclic ventilation which many modern dressing shops "are fitted with and which change the atmosphere six times an

[8] [1956] A.C. 613.

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"hour and that kind of thing. Q. If some such form of ventila-"tion had been present, would that have minimized the danger "of the dust being unhealthy to the workers? A. It would have "reduced the concentration." No doubt some modern form of air conditioning might have improved the atmosphere of the shop more, or more quickly, though this is not pleaded by the pursuers. But the witness clearly regards roof ventilation as achieving the same result, even if less efficiently, and he is corroborated to some extent by Whiteside, another witness for the pursuers. When referring to methods of dealing with dust in steel foundries discussed in 1944 in a report made by a committee of which he was a member, Whiteside is asked: "Q. Were there as at that "date other practicable means of preventing the inhalation of "dust? A. I think what was intended there was the method of "suction or exhaust ventilation, that is the first line of defence. "That is to remove the dust from the atmosphere so that nobody "can breathe it in. General ventilation helps too."

In these circumstances, I consider that in consequence of the defenders' breach of section 4 (1) of the Factories Act, 1937, an excessive amount of dangerous dust was allowed to accumulate in the dressing shop, to which the deceased was exposed over a prolonged period, and that his death from pneumoconiosis must be ascribed at least partially to this fault of the defenders.

It is unnecessary to consider whether the deceased was exposed to a further quantity of dangerous dust from the working of swing-frame grinders in his vicinity without the provision of any dust extraction appliance. I am not satisfied that this may not have had some further cumulative effect in bringing about the deceased's illness. But I need not enter into this matter as it is enough that the pursuers are entitled to succeed on the ground of inadequate ventilation.

I would allow the appeal.

Appeal allowed.

Solicitors: *W. H. Thompson for D. G. M'Gregor, W.S., Edinburgh, and Digby Brown & Co., Glasgow; Sharpe, Pritchard & Co. for Hamilton, Kinnear & Beatson, W.S., Edinburgh.*

F. C.

[PROBATE, ETC., DIVISION.]

1957
Feb. 6, 7, 8.
Willmer J

*MINES v. MINES.

Legal Aid — Costs — Divorce — Defended petition — Security for costs ordered — Wife's case abandoned at conclusion of her evidence — Wife's nil contribution as assisted person—Legal aid fund in no better position to obtain costs than a wife — No order against husband for costs incurred by wife.

At the close of a wife respondent's evidence in a defended divorce suit the further prosecution of her defence, and of her cross-charges,

was abandoned; and the court, holding her case upon examination in court to be a hopeless one, granted the husband a decree. The wife was an assisted person with a nil contribution, and the husband, who was not assisted, had been ordered to provide security for her costs in the sum of £100. Upon an application on behalf of the wife—in effect on behalf of the legal aid fund—for her costs, at least up to security:—

Held that, (1) although in a sense the advent of legal aid had altered the privileged position of a wife in being able to recover costs upon the basis of the doctrine of necessaries, since she was now able to obtain the required legal assistance through the help of legal aid, the legal aid fund, having financed the wife's case, was entitled to stand in the shoes of the wife and to claim against the husband, just as the National Assistance Board might claim when it had had to maintain the wife.

But (2) the legal aid fund could be in no better position than the wife, if her case turned out to be a wholly worthless one, such as would formerly have justified the court in withholding costs from the wife.

(3) That although the local committee was not to be criticized for granting the certificate, since it could only be guided by what a party told it, the wife's case had been shown when subjected to cross-examination to be a hopeless one, and in such circumstances the husband ought not to be ordered to pay any of her costs, even though he had been made to provide security.

APPLICATION for costs in defended suit for divorce.

A husband presented a petition for divorce on the ground of desertion; the wife by her answer denied the alleged desertion and prayed for a decree of divorce on the grounds of cruelty and adultery. The wife had been granted a civil aid certificate with a contribution assessed at nil; the husband, who was not an assisted person, paid into court under an order for security for the wife's costs the sum of £100.

At the close of the wife's evidence her counsel, after a short adjournment to enable him to take instructions, stated that in view of the course which the case had taken and the evidence which the wife had given it would not be proper to continue to press the prayer in the answer nor to resist the prayer contained in the petition. The court accepted that decision as a very proper one, and pronounced a decree nisi in favour of the husband.

Application was made on behalf of the wife for an order for her costs and reference made to the £100 paid into court by way of security.

The case is reported solely upon the question of costs.

D. L. McDonnell for the wife. The wife is an assisted person whose contribution to the legal aid fund is nil, and it is submitted that in spite of the course which the case has taken it was a case which deserved to be investigated fully by the court and an order is applied for for costs in the wife's favour.

N. H. Curtis-Raleigh for the husband. It is appreciated that counsel for the wife must make this application which is, in effect, made on behalf of the taxpayer; but it is submitted that her cross-prayer and defence were quite unreasonable, and that the

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husband should not have to pay for them. It is appreciated that if no order for costs is made, the wife's costs will be paid by the legal aid fund; but she has been in the happy position of having been able to bring charges, however frivolous and however well she knew that they were frivolous. Although the legal aid authorities were guided by the statement which she made upon her application for a certificate, and the local committee presumably considered upon that statement that she had a sufficient case to put forward, she herself knew quite well, as her own evidence showed, that she had no defence to the charges made against her. [Rayden on Divorce, 6th ed., at p. 474: "Discretion "of court to give or refuse costs" was referred to.]

D. L. McDonnell in reply. So far as the legal aid fund is concerned the position is anomalous. The logical basis of an order for security for costs is that of a husband's liability to provide for her necessaries; but the court still exercises its jurisdiction to order security although the wife has been given legal aid—as was in fact done here—and it is submitted that unless a case is a frivolous one, which should not have been defended, the court should be slow to depart from its normal practice of giving the wife her costs, even though she loses, in a proper case.

Willmer J. This application for costs raises what to my mind is a difficult question. The reason why a wife is put in the privileged position of being able to ask for security for her costs from her husband (and even if she loses may in a proper case nevertheless recover her costs, at any rate up to security), is on the basis of the doctrine of necessaries. A wife cannot obtain the legal assistance necessary for the proper presentation of her case without paying for it, and apart from legal aid the only source to which she can ordinarily look for payment of such legal expenses is her husband.

It is perfectly true that, since the advent of the legal aid scheme, all that has in a sense been altered, because a wife is now in a position, in a proper case, to obtain the required legal assistance through the help of the legal aid committee. But against that it may be said, and I think rightly said, that the legal aid fund, having financed the wife's case, is entitled to stand in the shoes of the wife, just in the same way as the National Assistance Board is entitled to stand in the shoes of a wife whom they have had to maintain, and for that reason may claim against the husband.

To that, however, it is answered—and I think well answered—that the legal aid fund can be in no better position than the wife, and they must take her case as they find it. If it turns out to be a wholly worthless case, such as in the old days would have justified the court in withholding costs from the wife, then the legal aid fund must be in the same position.

I think that must be right, and in those circumstances it is necessary to look at the merits of the case. And when I say

that it is necessary to look at the merits of the case, I mean that one must not only pay regard to the fact that the case has been lost, but one must consider whether it was a case in which there ever was a reasonable prospect of success once the facts were known.

In this case the wife's case broke down on the wife's own evidence, and at the conclusion of the wife's evidence her counsel very properly, as I stated at the time, abandoned the further prosecution of the wife's answer, and abandoned the cross-charges which the wife made against the husband. In all the circumstances of the case I think that that was a completely proper decision. That means that when the case was examined in court—and even as pleaded it was never more than a rather thin case—it broke down completely.

I am not in any way criticizing the local committee of the legal aid fund for granting a certificate in this case. Those gentlemen who form the committee, and who give up their time to investigating these cases, can only be guided by what the parties tell them. In this case it must be the fact that the wife put up a case to the legal aid committee which she simply was not prepared to sustain when subjected to cross-examination in this court.

I think it may well be that if there had been no legal aid fund the case on behalf of the wife would never have been started at all. Be that as it may, since it has turned out to be a completely hopeless case once the facts were ascertained, I think in my discretion I ought not to order the husband, notwithstanding that he has been made to provide security, to bear any part of the wife's costs. It seems to me, having regard to the merits of the case as they are now known, that it would be a very great hardship on the husband if he were required to pay any part of the costs incurred on behalf of the wife in presenting such a hopeless case.

In those circumstances I exercise my discretion, in what I think most people would agree is the just and fair way in all the circumstances, by refusing the application made on behalf of the wife for costs.

There will be an order for the payment out of the security to the husband.

No order for the wife's costs.

Solicitors: *Graham Hooper and Betteridge, Brighton; H. P. & H. C. Rigby, Sandbach.*

J. B. G.

[MONMOUTH ASSIZES.]

1956
June 14.

Ashworth J.

* LEWIS *v.* HIGH DUTY ALLOYS LTD.

Factory—Dangerous machinery — Fencing — Dangerous combination of machinery and material—Metal-planing machine—Duty not applicable to part of machine not dangerous in itself although dangerous in conjunction with material being worked on—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1).

Negligence — Safe system of work — Oiling machines in motion — Employer's duty to give proper instructions and to see that they are carried out.

The plaintiff was employed by the defendants to oil and grease the machines in their factory. There were some 500 or 600 of these machines, of which only about 12 were dangerous to oil in motion. The plaintiff had been given no written instructions as to which machines ought not to be oiled in motion and the oral instructions which he had been given did not appear to have been very precise. One of the machines which it was dangerous to oil in motion was a Butler Automatic Planing machine. At the left of this machine was a bridge from which depended a plane or shaver. The block of metal to be planed, which was known as the die, was fixed to the moving table of the machine and travelled from side to side. As the die travelled towards the bridge it was shaved by the edge of the plane and in order to carry the shaving right across the die there was a mechanism on the bridge by which the plane traversed from side to side. At the lower end of the bridge there was a V-shaped recess, described as the V-slide. On November 15, 1954, the plaintiff was oiling this machine while it was in motion, when somehow he slipped and his left arm went forward and came into contact with the moving die. His arm was thus carried by the die towards the bridge and wedged against the V-slide, where it was badly crushed, causing the plaintiff serious injury. The plaintiff's claim for damages was based, first, on the contention that the defendants were in breach of their statutory duty to him under section 14 of the Factories Act, 1937,[1] and, secondly, on the contention that they were in breach of their common law duty to him to provide him with a safe system of work:—

[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

[1] Factories Act, 1937, s. 14: "(1) Every dangerous part of any "machinery, other than prime movers "and transmission machinery, shall "be securely fenced unless it is in "such a position or of such construc- "tion as to be as safe to every per- "son employed or working on the "premises as it would be if securely "fenced: Provided that, in so far as "the safety of a dangerous part of "any machinery cannot by reason "of the nature of the operation be "secured by means of a fixed guard, "the requirements of this subsection "shall be deemed to have been com- "plied with if a device is provided "which automatically prevents the "operator from coming into contact "with that part.

"(3) Any part of a stock-bar "which projects beyond the head- "stock of a lathe shall be securely "fenced unless it is in such a posi- "tion as to be as safe to every "person employed or working on the "premises as it would be if securely "fenced. The Secretary of State "may, as respects any machine or "any process in which a machine is "used, make regulations requiring "the fencing of materials or articles "which are dangerous while in "motion in the machine."

Held, (1) that the V-slide by itself was not a dangerous part of the machine and that the fact that the V-slide taken in conjunction with the material being worked on might form part of a dangerous combination of machinery and material did not give rise to a duty to fence.

Nicholls v. *F. Austin (Leyton) Ltd.* [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92 applied.

Per curiam. It may be that, although section 14 (1) covers parts of the machine and the paragraph at the end of section 14 (3) covers articles or materials, there is a statutory gap and that no statutory obligation is imposed upon factory owners where the danger arises indirectly through the conjunction of part of the machine with some part of the materials.

(2) That the defendants were in breach of their common law duty to the plaintiff in that they did not issue proper instructions to him to ensure that he did not oil any of the 12 dangerous machines when in motion, nor did they take any effective step to ensure that instructions not to oil such machines when in motion were carried out; but that the plaintiff was guilty of contributory negligence.

ACTION.

The plaintiff, Alfred Lewis, claimed damages against the defendants, High Duty Alloys Ltd., for breach of section 14 (1) of the Factories Act, 1937, and at common law, having slipped while oiling a planing machine and his arm being crushed between the component being planed and part of the machine.

The facts are fully set out in the judgment.

E. Ryder Richardson Q.C. and *Ian Fife* for the plaintiff.
G. G. Baker Q.C. and *H. J. Garrard* for the defendants.

The cases cited in argument are referred to in the judgment.

ASHWORTH J. The plaintiff, Alfred Lewis, is now aged 61. It is material to state shortly one or two facts regarding his previous history. In the course of the first Great War, in the year 1915, he sustained a very serious gunshot wound to his right hand, the result of which was to deprive him of the three middle fingers of that hand and to leave him with a hand which can be best described as something in the nature of a claw. In the course of years he has taught himself to use that right hand, or what remains of it, with considerable skill; and having seen him, for example, do up and undo buttons with that claw-like hand I am very favourably impressed by the courage and skill with which he has sought to overcome his handicap.

In the year 1940 he entered the employ of the defendants, High Duty Alloys Ltd. At first he attempted to do some hand-milling, but found it was too heavy for him. He then tried general labouring and fettling, still in the defendants' employ, but was unable to tackle that work successfully. In the year 1942 he was transferred to the maintenance branch, and, after a short spell, he then entered on what proved to be the material employment, namely, oiling and greasing.

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For over twelve years he carried on that employment without accident, but on November 15, 1954, his left arm was caught in a Butler Automatic Planing machine, and the accident thereby constituted gives rise to the present claim.

As one basis of the claim is a contention that the defendants were in breach of section 14 of the Factories Act, 1937, it is important that I should summarize a description of the machine. On the machine there is a table, 3 feet 1 inch above the floor level. On the table there is a square metal block, and the height of the block on the day in question was 15 inches, so that the total height of the block above floor level was 52 inches. At the left of the machine there is a metal apparatus, which was referred to as a bridge, and although that can be raised or lowered as occasion requires, it must be regarded as a static or permanent part of the machine. The block of metal, which throughout this case was described as the die, travels from left to right and back from right to left on the table. From the bridge there depends the plane or shaver, and, as the die travels towards the bridge, the edge of this plane shaves the die, and, to carry the shaving right across the block, there is a mechanism on the bridge by which the plane traverses from side to side. The rate at which the machine operates when in motion is, in my view, slow; but to be precise the following figures were accepted: In the course of a minute the machine travels sixteen times, eight times forward and eight times backward, and the length of the cut or stroke was accepted as being 14 inches. It is possible for the machine to be left in motion without an operator standing by, and at the moment of the accident the operator in question, Bayliss, was in fact absent. He had set up the machine and had been called away to a neighbouring machine, but his conduct in leaving the Butler machine is not to be criticized as it was perfectly safe for him to leave it there in motion.

It was the plaintiff's task to use an oilcan on this machine, and, indeed, on others. At the right end of the bridge there are three oiling points. To the left of those three points there is a screw mechanism, which the plaintiff also had to oil. At the left end of the bridge there are oiling points again. He had to oil the screw mechanism immediately to the right of those two points. In the centre of the bridge and on the top of the metal part there is a nipple, which the plaintiff had to oil, and one other. At the lower end of the bridge there is a V-shaped recess. That was described in part of the evidence as being a V-slide. Although I am anticipating the story, it is convenient to mention that the accident arose because the plaintiff's left arm was caught in that V-shaped recess by the die then moving towards the bridge. At the time of the accident there were something like 500 or 600 machines in the defendants' factory.

The question of great importance in this case concerns the safety or danger of oiling machines when in motion. I should perhaps state now that on the evidence of Mr. St. Aubyn, who

was called for the defendants, who struck me as being a conscientious and reliable witness, there were only about twelve machines that were dangerous to oil in motion. Twelve out of 500 is a very small proportion. It is surprising to note that no indication was placed on any of those twelve machines to remind workmen of the necessity for their own safety of seeing that they were stopped before any oiling was carried out. The evidence is quite clear that the defendants' representatives relied on an oral instruction to point out this danger to their workmen.

[His Lordship considered the evidence and continued:]

It is evident that if the plaintiff's account of the accident were correct, the plaintiff had finished his task of oiling when the accident happened, and it might have been open to the defendants to rest their case on the basis that no question of defect of system in regard to oiling arose. Indeed, in the statement of claim, in accordance with the plaintiff's own story it was pleaded that the plaintiff was turning away from the machine, which was in motion, and which he had been oiling, when he slipped, tripped and fell.

It is, in my view, greatly to the defendants' credit that they have not sought to have this case decided on the narrow basis that the plaintiff may have failed to make out the case which he put forward in his pleading. They have been content to let this case be decided on the issue whether, assuming that the plaintiff was in fact engaged in oiling the machine when in motion, he can still put forward a claim. The defendants' point of view is that the accident could not have happened in the way that the plaintiff alleges. Although there is no eye-witness of the accident, the operator heard the cry of the plaintiff and came round and found him trapped. What the defendants put forward as the explanation of that trapping of the plaintiff's left arm is that he must have been oiling the machine when it was in motion and somehow he slipped and his left arm went forward when the die was close to it and that, in that way, his left arm was crushed. I am not prepared to accept the plaintiff's account of the way in which the accident happened; and I do accept the view that his arm was trapped when he was oiling this machine when running.

The claim is put forward on two quite distinct bases. One of them involves an allegation that there is a breach of the Factories Act, 1937, and the other is based on common law negligence. It may be convenient to deal first with the claim under the Factories Act, 1937, and to dispose of it. Section 14 (1) provides that: "Every dangerous part of any machinery, other than prime "movers and transmission machinery, shall be securely fenced "unless it is in such a position or of such construction as to be "as safe to every person employed or working on the premises as "it would be if securely fenced: . . ." At the end of that section there is another paragraph which reads as follows: "The "Secretary of State may, as respects any machine or any

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"process in which a machine is used, make regulations requiring "the fencing of materials or articles which are dangerous while "in motion in the machine."

The only case of which any report is at present available, in which an accident occurring in circumstances such as those involved in the present case has been considered, was a decision of Finnemore J. in *Lenthall* v. *Grimson & Co. (Leicester) Ltd.*[1] It was decided by him at Leicester Assizes at the end of May, 1956—only about a fortnight ago. In that case a somewhat similar situation arose. The importance of the decision is that the learned judge took the view that there could be a breach of section 14 if the danger in question arose by reason of a conjunction of a part of the machine itself with the material which was being worked on it.

Other cases that have dealt with section 14, and in particular with materials that were being worked on a machine, have not gone that length, and, indeed, have not been directed to that issue; but there are passages in some of the reports which seem to me to lead to the view that where a danger arises by a combination of that sort, the statute has no application.

One of the cases to which I was referred was *Nicholls* v. *F. Austin (Leyton) Ltd.*,[2] in which Lord Simonds said[3]: "I "find nothing in this language"—that is, the language of the section—"to suggest that the section aims at protecting the "worker from any indirect danger arising out of the functional "operation of the machine." Lord Uthwatt said[4]: "The "contention of the appellant is that the phrase 'every dangerous "part,' in respect of which the obligation to fence is imposed by "subsection (1) of section 14, includes parts which are indirectly "dangerous in that they are liable to throw out material with "such force as to be liable to cause injury to the worker. "Acceptance of this contention involves the view—indeed it is "the substance of the contention—that the obligation imposed "by the subsection is to fence the machine, viewed as a single "operating unit, so as to avoid the possibility of danger arising "to the worker from its operation. My Lords, in my opinion "the subsection, whether it be read alone or be read in connexion "with the other provisions of the Act relating to machinery, "negatives the contention." Other cases where the same sort of issue has arisen are *Kilgollan* v. *William Cooke & Co. Ltd.*[5] and *Bullock* v. *G. John Power (Agencies) Ltd.*[6]

Although I am conscious that the distinction between this case and that decided by Finnemore J. may be so fine as to be non-existent, I am of opinion that the circumstances of this case do not disclose any breach of the Factories Act, 1937, by the

[1] (1956) unreported.
[2] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92.
[3] Ibid. 504.
[4] Ibid. 506.
[5] [1956] 1 W.L.R. 527; [1956] 2 All E.R. 294.
[6] [1956] 1 W.L.R. 171; [1956] 1 All E.R. 498.

defendants. The part of the machine about which complaint is made is the V-slide, and that I do not regard as a dangerous part of the machine taken by itself. What constituted the danger was the conjunction of the V-slide with a die, and the die is not part of the machine, it is material which is being worked by the machine. It may be that although section 14 (1) covers parts of the machine, and the paragraph at the end of section 14 covers articles or materials, there is a statutory gap, and that no statutory obligation is imposed upon factory owners where the danger arises indirectly through the conjunction of part of the machine with some part of the materials. For the purposes of this judgment it is enough for me to say that I am not satisfied that any breach of the Factories Act, 1937, has been made out.

That leaves the claim in common law negligence based upon the facts which I have found, namely, that the plaintiff was injured when he was engaged in oiling the machine in motion. Evidence was called regarding the instructions which had been given to the plaintiff. According to him, when he was first set on the task of oiling and greasing in 1942 he was taken round the machines by a man named Tommy Atkins, who showed him the machines, showed him the oiling points and the different oils, watched him while he himself was oiling, and then left him to carry on. At that time, according to the plaintiff, some of the machines were moving and some may have been stopped. Apart from that, according to the plaintiff, no further instruction was given him, and at no time was he reprimanded for oiling machines in motion, although it was his practice regularly to do so.

The defendants have called evidence to the effect that two other of their representatives gave instructions to the plaintiff, but at the highest those instructions only come to this, that the plaintiff was warned not to oil machinery in motion if in the plaintiff's view it was dangerous to do so. It was not suggested by either representative that they pointed out the specific machines which he should not oil when in motion. It was left to the plaintiff and to his discretion. I ask myself this question: Where you have in a factory twelve machines which it is dangerous to oil when in motion, is it right for employers to leave it to the workman's discretion without any further supervision or any indication on the machines themselves that they should not be oiled when in motion? It is true that in the course of twelve years during which the plaintiff was employed as an oiler he met with no accident; it is true that so far as the evidence goes no other oiler met with an accident through oiling machines in motion; it is true that, according to Mr. St. Aubyn, he was passing through the factory quite frequently and that no workman was ever seen to be oiling a machine in motion. In my view that does not discharge the defendants from a prima facie liability. I do not suggest for a moment that the evidence discloses a wholesale disregard of safety precautions by oilers or an acquiescence in such a disregard by the defendants, but, in my

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view, the defendants are at fault here for two reasons: first, because they failed to issue proper instructions to the plaintiff to ensure that he did not oil any of these twelve dangerous machines when in motion; and, secondly, because they took no effective step to ensure that instructions not to oil such machines when in motion were carried out.

Some of the evidence called for the plaintiff was not very attractive or reliable. None the less, the impression created upon me by the evidence is that there was quite a widespread practice of oiling machines in motion if the circumstances of the work rendered it inconvenient to wait for a stoppage, and the defendants must accept the position, in my view, that they had not taken sufficient or proper steps to ensure that oiling of dangerous parts is only carried out when the machines are at rest. It is on those two grounds that I find that they are guilty of a breach of the duty which employers owe to their employees.

[His Lordship considered the question of contributory negligence, found that the possibility of an arm being trapped between the die and the V-slide was a risk which any conscientious and competent workman ought to have taken into account, that the plaintiff had disregarded the ordinary principles of reasonable care, and assessed his liability at one-third. He continued:] Doing the best I can, the damages which I would award on the basis of full liability would have been £1,800; and I therefore award the plaintiff the sum of £1,200.

Judgment for the plaintiff for £1,200.

Solicitors: *W. H. Thompson; T. Haynes Duffell & Son, Birmingham.*

[BIRMINGHAM ASSIZES.]

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* HOARE *v.* M. & W. GRAZEBROOK LTD.

[1955 H. No. 205.]

Factory—Dangerous machinery—Fencing—Dangerous combination of machinery and material—Danger arising from "nip" between borer and component being bored—Duty to fence—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1).

The plaintiff was employed by the defendants as the operator of a vertical boring machine consisting of a slotted table 4 ft. 9 ins. in diameter, which, when working, revolved at about 14 revolutions per minute. The job to be bored was fixed to the table by means of an angle plate measuring approximately 22 ins. in length by 15 ins. in height, which was itself fixed to the table and fitted towards one side of it. The job was fixed to the angle plate by means of two arms running from the job to the angle plate. When

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[Reported by R. J. Toyn, Esq., Barrister-at-Law.]

the machine was in motion the table revolved carrying with it the angle plate and the job, which was bored by rotating around a tool fixed to a borer coming down from above. The plaintiff could not see into the job and therefore, in order to test the accuracy of the bore and its satisfactory progress, he followed the usual practice in the foundry, of which the management ought to have known, and placed his left hand against the borer to ascertain whether there was any vibration. Whilst so doing either his left elbow was struck by the angle plate coming round on the revolving table or he moved his elbow to avoid the angle plate, with the result that his hand slipped down the borer into the aperture being made in the job and was caught and injured. Relying upon section 14 (1) of the Factories Act, 1937, the plaintiff claimed damages for breaches of statutory duty in failing to fence either the rotating table, the angle iron or the borer in conjunction with the rotating job:—

Held, (1) that the rotating angle iron was a dangerous part of the machinery and ought to have been fenced and was the originating cause of the accident.

(2) That the defendants were further in breach of their statutory duty by failing to fence the "nip" created between the boring bar and the component being operated upon which together constituted a dangerous piece of machinery; but that in view of his contributory negligence the damages recoverable by the plaintiff should be reduced by one quarter.

Nicholls v. *F. Austin (Leyton) Ltd.* [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92; *Bullock* v. *G. John Power* [1956] 1 W.L.R. 171 and *Kilgollan* v. *William Cooke & Co.* [1956] 1 W.L.R. 527; [1956] 2 All E.R. 294 distinguished.

ACTION.

The plaintiff was employed by the defendants as the operator of a vertical boring machine. He had been similarly engaged for eleven years including about eight years on the machine concerned, and during all of that time he had worked it without real difficulty. At the time of the accident he was boring a hole in a mild steel axle-box. The machine consisted of a slotted table 4 feet 9 inches in diameter which, when working, revolved at some fourteen revolutions per minute. There was to be bored in the axle-box upon which the plaintiff was working a hole of approximately 6 inches in diameter and 9 inches in depth, for which purpose the job was fixed to the table by means of an angle plate which was itself fixed to the table. The job was fixed to the angle plate by means of two arms running from the job to the angle plate. The angle plate was some 22 inches in length by 15 inches high and was fitted towards the end of the table. When the machine was in motion the table revolved carrying round with it the job and the angle plate. For the purpose of making the bore there came down from above a borer to which was fixed a tool which operated by the job rotating around it, so that it gradually bored down the hole in the job. The borer worked gradually and moved slowly down with the work, taking about an hour and a quarter to make one cut right through the job and travelling with the tool during that time a distance of some 9 inches or more.

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The plaintiff set his machine in operation and turned his attention to another machine in his charge. By the time he returned to the borer he saw that the tool had worked down 2 or 3 inches from the top of the job. In order to make sure that the tool was working accurately, had not become blunted and was not marking the hole bored but was cutting it easily, he, following his usual practice (and according to the expert witness the practice of most other men), first of all got hold of the wheel at the top of the machine and put his left hand with its thumb and its knuckles against the borer making the hole. His object in doing that was to see if there was any vibration on the borer, because if there was any vibration on the borer he might have to stop the job and start again. Whilst his left hand was so placed on the borer the angle plate came round on the table revolving in an anti-clockwise direction and either caught his left elbow or caused him instinctively to move his elbow from the apparent danger, with the result that his hand slipped down the borer into the aperture being made in the job and was caught and injured. The plaintiff brought this action for damages for personal injuries relying upon section 14 (1) [1] of the Factories Act, 1937.

A. J. Flint for the plaintiff.
E. G. H. Beresford for the defendants.

Lynskey J. stated the facts and continued: The case for the plaintiff is put in three ways. First of all it is said that this rotating table with the slots cut in it—the slots existing apparently to hold things in position—is itself dangerous, having regard to its diameter and the fact that the worker has to work quite close to it, and ought to have been guarded to prevent danger. Secondly it is said—and this is the more important allegation—that whether the table ought to have been guarded or not, clearly the angle iron should have been guarded because, if it is usual for a man to test the bore by putting his fingers on it over the angle iron or where the angle iron may pass as it is rotating in this way, there ought to be a guard of some sort, a rail or something like that, to prevent contact with it. It was not guarded and the plaintiff alleges that if it had been guarded this accident would not have happened because the operating cause of his hand going into this aperture was the contact made against his elbow, or near his elbow, by this rotating angle iron. Thirdly, the plaintiff says that apart from that, quite clearly this borer, in conjunction with the rotating job, was a dangerous piece of machinery and ought to be guarded. He rests his claim purely upon those breaches of the statutory regulations and the failure to maintain fencing there if fencing had originally been provided.

[1] Factories Act, 1937, s. 14 (1): "Every dangerous part of any "machinery, other than prime movers "and transmission machinery, shall "be securely fenced unless it is in "such a position or of such construc-"tion as to be as safe to every person "employed or working on the pre-"mises as it would be if securely "fenced: . . ."

The first point I have to decide, of course, is whether the angle iron itself ought to have had some guard upon it. That depends upon what is the way these men generally do their work and what evidence I accept. I accept the evidence of the plaintiff here, supported as it is by the engineer he called, that in fact it is common practice and was the practice at this particular foundry or works, for the men to test whether their tools are working satisfactorily in jobs which they cannot see into—as the plaintiff could not see into this job—by using their hands to see if there is any vibration. [His Lordship referred to the evidence and continued:] It is something regularly practised by these men and the management ought to have known of it. If a man has to lean over a table which is nearly five feet in diameter carrying this rotating angle iron some 15 inches high it is quite clear—and in fact the expert called for the defendants agrees—that it is a dangerous part of the machinery. I am therefore satisfied that that rotating angle iron was a dangerous part of the machinery and ought to have been fenced and was the originating cause of this accident by knocking the plaintiff's hand for the moment out of control down the borer into the aperture.

The defendants say that even if that was a cause it was not the real cause of the actual injury. The real cause of the actual injury, they say, was the rotating component which was being bored. It is said on behalf of the defendants that I am bound by authority to hold that as the real cause of this accident was the rotating component and not the very slowly moving borer, under those circumstances there is no obligation to guard that part of the machine because it is not covered by the Act.

There have been a number of decisions about this and I have been referred to all of them. Three really important cases were cited. There was first of all *Bullock* v. *G. John Power (Agencies) Ltd.*,[1] which was before the Court of Appeal, and in which Denning L.J. referred to a speech of Lord Uthwatt in the House of Lords in *Nicholls* v. *F. Austin (Leyton) Ltd.*[2] and adopted that speech as being his view of what the law is, although Lord Uthwatt in that particular speech was giving an expression of views which were not shared by some of the other Law Lords present at the time. Although they did not dissent from him they gave rather different reasons. In each of those three cases, *Bullock* v. *G. John Power (Agencies) Ltd.*,[3] *Nicholls* v. *F. Austin (Leyton) Ltd.*[4] and the most recent one *Kilgollan* v. *William Cooke & Co.*,[5] it was a case where either wood or wire having passed through the machine was thrown out and caused the damage. In other words, in all those three cases the cause of the trouble was the component itself, the job and not the machine.

It is said that those cases bind me to hold that, in effect, I

[1] [1956] 1 W.L.R. 171, 174.
[2] [1946] A.C. 493, 506; 62 T.L.R. 320; [1946] 2 All E.R. 92.
[3] [1956] 1 W.L.R. 171.
[4] [1946] A.C. 493.
[5] [1956] 1 W.L.R. 527; [1956] 2 All E.R. 294.

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must look at the machine independently from the work, the job or the component, and that if the machine without the component in this particular part to which I am referred is not dangerous then I cannot hold it as a dangerous part of the machine. Equally it is said that, if it is dangerous by reason of the fact that the component makes it dangerous, then as the Secretary of State had made no regulations under section 14 (3) of the Act, there was no obligation to fence the component or job or article. I am afraid I do not accept that argument.

A similar case to this was that of *Victor Lentall* v. *Gimson & Co. (Leicester) Ltd.*[6] before Finnemore J., who had all these cases except the last one before him. That was a case where there was a moving table which carried the component under a bridge on the machine. The bridge itself when not in use, or when there was no component being worked upon in the machine, was quite safe, but what made it dangerous, of course, was the fact that when the component was carried under this bridge it created a nip. The result of that was that the bridge, which by itself was innocuous, as a result of the movement of the component was rendered dangerous and the two together formed a nip.

One has to have regard to the purpose of the Factories Act which is to protect operatives from danger; and if danger does exist from the operation of the machine, and if part becomes dangerous from the operation of the machine, it seems to me that that is a dangerous part of the machinery, and the fact that it is not so when no operation is taking place is quite irrelevant. What the Act requires me to look at is whether in fact when this machine is in operation, and being worked as it was designed to work, it becomes a dangerous part of the machinery as a result of the operation; not the component being dangerous but the operation of the machine making it dangerous.

That being so, I respectfully agree with Finnemore J. when in *Victor Lentall* v. *Gimson & Co. (Leicester) Ltd.*[6] he said of that case: "I think this case, although by no means free from "difficulty"—and I agree with him—"is not that case"—that is, not the case of the three cases referred to—"because it is not "a case where, for example, the casting came free and struck "the plaintiff or even toppled over and crushed him. What "happened here was that the casting, which was bolted to the "moving table, left a very small space indeed between itself "and an essential part of the machine, namely, the cylinder I "think we have been calling it, the pillar which supported the "bridge, and caused the danger which injured the plaintiff.

"I think these are somewhat matters of first impression. At "one time my first impression was inclined to be that this might "be within the principle of *Bullock* v. *G. John Power (Agencies)* "*Ltd.*[7] but, on reflection, I think it is not. I think when you have "got a case of this sort with your moving table and your pillar "or column, and the work which is put on to the table creates

[6] Unreported, May 24, 1956. [7] [1956] 1 W.L.R. 171.

"what has been called a nip, a place where a man can be "caught, that would then be a danger in the machine itself and "not merely a danger from the workpiece with which the machine "is dealing at the time. Therefore, I think that there would be "in this case a statutory duty on the part of the employers to "do something about it, to guard it, if it can be guarded or, of "course, to adopt another precaution such as having the bridge "wider and the pillar further away, in which case I suppose no "guard in the conventional sense would then be needed because "there would not be any danger."

With that I entirely agree. The previous decisions do not deal with this point, namely, whether a machine becomes dangerous in the operation it is intended to perform by reason of the component part creating a nip with a part of the machine which it is designed to come very close to. Does that make it a dangerous part of the machine? I think that it does. I agree, as I say, with Finnemore J., that it is not an easy case to decide, but I have no doubt about the matter. I think it is quite clear, having regard to the terms of the Act, and also having regard to the fact that section 16 deals with the maintenance of fencing and requires that fencing shall be maintained when the machinery is "in motion or in use." That looks to me as if the legislature were contemplating a piece of machinery which, although it was not in motion might still be in use, and if it might be in use and not in motion then there is only one inference I can draw: that the Act is intended to apply, not merely to moving parts of the machinery but to non-moving parts of machinery if they are dangerous or become dangerous in motion or in use. I think that is this case.

That being so, I think I am bound to hold that there has been a breach by the defendants of the statutory regulation, both in their failure to fence the revolving angle plate and also in failing to fence this nip which is created between the boring bar itself and the component which is being operated upon. The result is that, in my view, the plaintiff is entitled to succeed.

On the question of contributory negligence by the plaintiff, I feel that he was well acquanted with the machine and well accustomed to its use, and what he was doing was something he had done many times and apparently had done without risk or injury. He ought to have realized that the angle bar was coming round, and I think if he had taken a little more precaution he would have realized it. It is quite clear, looking at the machine itself, that he must have realized, and ought to have realized, that in fact this angle plate moving round was a source of danger, and in doing what he did he ought to have exercised more care. I think it was a case of familiarity breeding contempt. There was danger there which, I think, he appreciated, but on this particular occasion I think, having his mind on two machines and trying to attend to both of them, he may for the moment have forgotten. But I do think it is the sort of thing he

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ought not to have forgotten having regard to this machine, and I think that to some extent he was guilty of contributory negligence, although not a high degree.

It seems to me the proper sum I would have awarded here, the special damages having been agreed at £72 17s., had he not been partially responsible, is £2,072 17s. I shall assess his liability for this injury at a quarter and there will be judgment for three-quarters of that amount.

Judgment for the plaintiff.

Solicitors: *W. H. Thompson; E. P. Rugg & Co. for Buller, Jeffries & Kenshole, Birmingham.*

[PROBATE, ETC., DIVISION.]

1957 *Feb.* 11, 12, 27.

Lord Merriman P. and Collingwood J.

* PINNICK *v.* PINNICK.

Husband and Wife—Maintenance—Agreement—Separation—No agreement to maintain — Whether wife's rights as result of financial terms of separation distinct from those arising from subsequent change in her circumstances—Or from statutory right of National Assistance Board against husband — Whether husband liable to maintain.

At the hearing of a wife's summons on the ground of wilful neglect to provide reasonable maintenance the justices found that because the parting was consensual the husband was under a liability to maintain the wife and, having adequate means to do so, his failure was wilful. They did not consider the question of the existence of an agreement by the husband express or implied to maintain the wife.

From the order of the justices the husband appealed. It was argued for the wife at the hearing that the decision in *Baker* v. *Baker*, 66 T.L.R. (Pt. 1) 81 was no longer law and that a husband who had separated consensually from his wife was, therefore, liable to maintain her although there had been no agreement as to maintenance at the time of the parting.

The Divisional Court found that there had been no agreement to pay maintenance nor had there been any subsequent change of circumstances on the part of the wife:—

Held, (1) that the ascertainment of the financial terms on which a consensual parting took place, and the question whether some fresh need of the wife and notice thereof to the husband had occurred so as to entitle the court to find wilful neglect to maintain in spite of those terms, were separate and distinct questions.

Baker v. *Baker* [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81 and *Tulip* v. *Tulip* [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91 considered.

(2) That both those situations concerned the rights inter se of the wife against the husband and were not affected by considerations relative to the statutory right of the National Assistance Board against a husband whose wife was receiving national assistance.

National Assistance Board v. *Parkes* [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1 distinguished.

(3) That in the circumstances the wife was not entitled to be maintained by the husband and the appeal must, therefore, be allowed.

Baker v. *Baker* (supra) and *Price* v. *Price* [1951] P. 413; [1951] 2 All E.R. 580n. followed.

Dictum of Denning L.J. in *National Assistance Board* v. *Parkes* [1955] 2 Q.B. 506, 516–517 not followed.

APPEAL from the justices of the County Borough of Southampton.

The parties were married on July 26, 1952, their ages then being he 36 and she 22 years of age. There were no children. They lived with the wife's mother, having a sitting room and a bedroom for their exclusive use.

The marriage was not a happy one from an early stage—the wife said they had always been rowing and quarrelling over different things in the course of which they got to shouting at one another. The main cause of trouble between them was money matters—the wife was continually asking the husband for money, saying that she could not manage on the £6 10s. which he allowed her for housekeeping generally. The husband said he could not give her any more.

At the time of the parting in March 1956, they had ceased to have intercourse for between 12 and 18 months, and it was clear that they had lost whatever affection they might have had for one another. On the night of Sunday, March 26, 1956, a quarrel arose, in the course of which the wife reproached the husband with having neglected to give presents to herself and her mother some time previously—and he, therefore, told her that as she was always thinking about her mother she had better go and live with her. She went straight to her mother and never returned to live with her husband. The husband said that when he told her to go he just felt "down and out," and did not mean it to be for ever.

The wife issued a summons on the ground of the husband's wilful neglect to provide reasonable maintenance at the hearing of which before the justices of the County Borough of Southampton she said in her evidence in chief: "My husband last gave me "money on the Thursday before this Sunday. That was March "22. Since then I have not had anything from him. He has "only been paying my insurances which are 11s. After March 25 "I got his meals from the Sunday to the Thursday, because I had "been paid the housekeeping. From then onwards he kept "himself. There was nothing said about it. All he said was "that he was not going to keep me for the rest of my life. "I asked him about money for my own food and maintenance and "he said I had to go out to work and get my own money. I gave "up my work two years ago."

She also said in cross-examination: "He offered me the full "housekeeping money if I went back with him in our room. He "said I could have that money he had in his hands if I would "come back to his room. I refused."

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The husband said that after that date he asked her two or three times to come back. The wife said that he approached her only once, when he said that he had been to see a solicitor, and he "had to ask her" to come back.

At the hearing before the justices the husband stated that he wished his wife to come back despite all she said in court. The wife, however, said she would not return, because it would mean a life of misery were she to do so.

The justices' reasons for their decision were as follows:

"*In General.*

"Neither party cut a very impressive figure in the witness box "and it did appear to us that it was doubtful whether either had "ever had very much affection for the other, and we were quite "certain that what affection there had been had disappeared. "The [wife] appeared to be attempting, within the rather narrow "limits of her intelligence, to give the court an honest and "truthful account of the events leading up to these proceedings "but we felt that the [husband], although not attempting to be "deliberately untruthful, experienced great difficulty in seeing "himself in other than a favourable light. When considering the "evidence placed before us and the arguments addressed to us "by the respective solicitors, we came to the conclusion that in "fact the parting between husband and wife had been of a "consensual nature and that the husband had been guilty of "wilful neglect to maintain for the reasons we now state.

"*In Particular.*

"1. It was agreed by both parties that on the evening of "Sunday, March 25, 1956, the date of the original parting, there "was a quarrel between husband and wife which culminated in "the husband telling the wife to go to her mother's part of the "house, which she did. This quarrel was clearly the last of a "series which had occurred from time to time for one reason or "another, and it appeared to us that both parties had reached a "state where they found the continuance of cohabitation burden-"some and they were quite ready to part, although neither was "very capable of expressing their thoughts and feelings in words. "However, as far as we could judge from the somewhat self-"contradictory evidence of both parties, the husband wanted his "wife to go and she was very willing to part from him. It did "appear to us, however, that it was unlikely that at that time "the husband realised that he might still be under a liability to "maintain his wife.

"2. There was clear evidence that on two or more occasions "subsequent to the parting there had been some discussion "between the parties regarding maintenance for the wife, when "the husband stated that he would keep her if she returned to "him and it was suggested on behalf of the husband that this "should be looked on as an invitation by the husband to the wife

"to return to him and that a refusal by her thereby placed her "in desertion and put an end to any liability on the husband to "provide maintenance. We took the view, however, that there "was in effect, no invitation by the husband to the wife to return "but that rather he was merely stating his viewpoint that "whereas he could keep his wife if they were together he saw no "reason to do so while they were apart. We found support for "this view in the wife's evidence in chief, which we accepted, "that her husband had said that he was not going to keep her "for the rest of her life, and that when she asked about money "for her maintenance he said that she should go out to work and "get her own money.

"3. Having come to the decision as fact that the parting was "a consensual one, we were forced to the conclusion that the "husband was still under a liability to maintain his wife unless "and until she came to be in a state of desertion or committed "some other matrimonial offence. We were of opinion that there "had not in fact been any actual invitation by the husband to the "wife to resume cohabitation or any other act which could "properly be construed as putting an end to the agreement to live "apart, and we could not but decide that as the husband had "adequate means to maintain his wife his failure to do so was "wilful. We therefore made the order under the terms which, "having regard to the means and status of the parties, appeared "to us to be reasonable."

The order, dated July 13, 1956, made by the justices was for maintenance of the wife at a weekly rate of £4. From this order the husband appealed.

A. S. Trapnell for the husband.
A. J. Jenkins for the wife.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

Feb. 27. LORD MERRIMAN P., reading the judgment of the court, referred to the facts substantially as set out above and to the contention of counsel for the husband that the justices were wrong in finding that there had been no invitation by the husband to the wife to return subsequent to the original parting and continued: In our opinion it would not be right for this court, merely upon the use of the words "offer" and "refused," to reject the findings of the justices as to what actually occurred between the parties, particularly in view of the very careful consideration which they have clearly given to this question, and the reasons which they have advanced for the conclusion at which they arrived. For these reasons we feel obliged to reject the contention that the wife had disentitled herself to claim maintenance by the fact that she had become a deserter.

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The position then is that the parties had separated by mutual consent on the night of March 26, 1956, and that nothing had supervened to put an end to that consensual separation at the date of the hearing before the justices. But it is clear that the justices directed themselves that because the parting was originally a consensual one, and so remained, the husband was still under a liability to maintain the wife, and that having adequate means for that purpose his failure to do so was wilful. But they arrived at this conclusion without considering as a separate question whether there was any agreement on the part of the husband, expressed or implied, to maintain the wife in a state of separation.

This raises acutely the question upon what financial terms, expressed or implied, the consensual separation had taken place; and the further question whether, subsequently to the agreed separation, any change of circumstances had occurred so as to give the wife the right to complain of wilful neglect to provide reasonable maintenance for her. In substance the question is whether *Baker* v. *Baker*[1] correctly states the principles applicable to such a situation. If so there is no finding by the justices of any change of circumstances since the agreement to part. That, if there is such a change of circumstances, the jurisdiction of the court is not ousted by the terms upon which a separation is agreed, or by the punctual performance of those terms, is settled by the decision of the Court of Appeal in *Tulip* v. *Tulip*.[2]

It is, of course, open to this court, under rule 71 (6) of the Matrimonial Causes Rules, 1950, to draw all inferences of fact which might have been drawn in the court below. In our opinion it is impossible to extract from the evidence any express agreement on the part of the husband to pay maintenance to the wife as a separated wife.

As to an implied agreement, it was urged that the separation, though in the result consensual, was brought about by the husband's telling his wife to go; that though not living as man and wife, they still continued to live under the same roof, though not in that part of the house which had been the matrimonial home; that though he had refused to contribute to her maintenance in other respects, he had recognized his liability to the extent of continuing to pay her insurance to the amount of 11s. weekly up to the date of the hearing. In addition to this the wife had, to his knowledge, given up her work two years previously, and he agreed that she was a sick woman, and suffered from an ulcer; and clearly, in default of maintenance from him, she would be dependent on her widowed mother.

All these considerations, it was submitted, indicated that when the husband told her to go to her mother—admittedly not as a permanent arrangement—he must have contemplated paying

[1] [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81.

[2] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.

for her maintenance, and not leaving her to her own resources. Moreover, it was argued that the justices were right in holding that, in the case of a consensual separation, the husband was liable to maintain his wife unless and until she came to be in a state of desertion or committed some other matrimonial offence.

It is common ground that either on the Thursday, or, as we think, on the next day, Friday, the husband said (it may be on the advice of his solicitor) that she could have all the usual housekeeping money if she would return. Assuming that the justices are right in holding that this cannot be regarded as an invitation to the wife to return, but only as a statement of the husband's own point of view, it is plain that this point of view was that he was willing to maintain his wife in the matrimonial home, but not as a separated wife, and that the justices so found. That being so, it seems to us that it is impossible to imply any agreement to maintain her as a separated wife unless the liability to do so is implicit in a consensual separation.

This brings us to the consideration of *Baker* v. *Baker*.[3] The catchwords and headnote read as follows[4]: "Summary Jurisdic-"tion—Summons for wilful neglect to maintain—Liability of "husband where separation consensual. Unless some grave and "weighty matter justifies a wife in leaving home she is not "entitled to maintenance save in the exceptional case of a "consensual separation with an agreement attached to it that "the husband will maintain her."

In his judgment Lord Merriman P. said[5]: "There is no law "involved in this case; it is merely an application of the principle "that, if a wife is living separate and apart from her husband, "it is not enough for her to give evidence that her husband had "money and that she needed maintenance. The question is: "What was the nature of the parting? If the wife can prove "desertion, she is, of course, entitled to a maintenance order on "that ground. If the separation was consensual, then, if she can "prove—and Mr. Crispin accepted that the onus was on the "wife—that this was on the basis, express or implied, that the "husband undertook to be responsible for her maintenance, she "is entitled either to the agreed amount (if there was an agreed "amount), or to a reasonable amount under the section, "although she is living apart from her husband. But unless she "can show, where the separation was consensual, that the "husband had accepted a liability, expressed or implied, to "maintain her, she has no case at all."

Pearce J. said[5]: "In this case desertion has been negatived "and the wife's evidence makes it clear that there was here a "separation by consent. If by her evidence she could establish "that there was expressed or implied in that separation a con-"tinuing liability on the husband's part to support her, this

[3] (1949) 66 T.L.R. (Pt. 1) 81.
[4] Ibid.
[5] Ibid. 82.

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"order could stand, but her evidence has not done this, and "therefore, in my opinion, there has not been wilful neglect to "maintain, and the appeal should be allowed."

Baker v. *Baker*[6] has been consistently followed in the Divisional Court, particularly in *Starkie* v. *Starkie* (*No.* 2),[7] where[8] the history of the approval of *Baker* v. *Baker*[9] in *Chapman* v. *Chapman*[10] and in *Stringer* v. *Stringer*[11] is summarized shortly.

If that statement of the law is correct it applies directly to this case. But in delivering the leading judgment in *National Assistance Board* v. *Parkes*,[12] after giving examples,[13] to which there is no parallel in this case, of new circumstances which might arise to alter the situation where there was an actual agreement by the wife never to claim maintenance, Denning L.J. continued[14]: "If these facts are brought to the husband's "notice and he has the means to pay, then he is under a duty to "maintain her, notwithstanding the prior agreement that he "should pay nothing. The principle of *Tulip* v. *Tulip*[15] applies, "I think, just as much when there is an agreement to pay "nothing as when a fixed sum is to be paid; and it overrides "anything said previously in *Baker* v. *Baker*[16] and *Chapman* "v. *Chapman*.[17] But so long as the husband is ignorant of the "new situation he is under no such duty, and is not guilty of "wilful neglect to maintain her. That is, I think, the effect "of the decision in *Stringer* v. *Stringer*."[18]

It does not seem to us that there was any subsequent change of circumstances in the present case, since all the factors which were put forward in that behalf, such as the wife's state of health and her not having worked for two years, were already known at the time of the parting.

At this point we would observe that it is necessary to keep clearly in mind that the ascertainment of the financial terms upon which a consensual parting takes place, and the question whether some fresh need of the wife and notice thereof to the husband has occurred so as to entitle the court to find wilful neglect to maintain in spite of those terms, appear to be two separate and distinct questions. If so, there is no inherent conflict between *Baker* v. *Baker*[19] and *Tulip* v. *Tulip*.[20]

Chapman v. *Chapman*,[21] unlike *Baker* v. *Baker*,[22] *Stringer* v. *Stringer*[23] and *Starkie* v. *Starkie* (*No.* 2)[24] was a decision of the Court of Appeal itself. It is referred to in the judgment given

[6] 66 T.L.R. (Pt. 1) 81.
[7] [1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519.
[8] [1954] 1 W.L.R. 104.
[9] 66 T.L.R. (Pt. 1) 81.
[10] Unreported, April 4, 1951.
[11] [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373.
[12] [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1.
[13] [1955] 2 Q.B. 506, 516.
[14] [1955] 2 Q.B. 506, 516–517.
[15] [1951] P. 378.
[16] 66 T.L.R. (Pt. 1) 81.
[17] Unreported, April 4, 1951.
[18] [1952] P. 171.
[19] 66 T.L.R. (Pt. 1) 81.
[20] [1951] P. 378.
[21] Unreported, April 4, 1951.
[22] 66 T.L.R. (Pt. 1) 81.
[23] [1952] P. 171.
[24] [1954] 1 W.L.R. 98.

in this court by Lord Merriman P. in *Stringer* v. *Stringer*.[25] But on this occasion we think it is worth while to give more detailed consideration to what was said by members of the Court of Appeal in *Chapman* v. *Chapman*,[26] and to state the source of the quotations. The case was unreported but, in accordance with practice, a copy of the official shorthand note of the judgments vouched by the presiding Lord Justice was sent to Lord Merriman P., since a decision in which he was involved was being reversed.

The judgment of Asquith L.J. begins as follows: "This is a "husband's appeal from a judgment of the Divisional Court "of the Probate, Divorce and Admiralty Division, consisting "of the learned President and Wallington J. That judgment "varied a decision of the Dartford magistrates, whereby they "dismissed a wife's two summonses, one on the ground of "desertion and the other on the ground of wilful neglect to "maintain. The Divisional Court varied that order by allowing "the appeal so far as concerns the wilful failure to maintain, "while dismissing the appeal in relation to desertion. The "husband appeals from the first limb of this decision. The "learned President gave the leading judgment, with which "Wallington J. concurred. The way he dealt with the matter "was this. He first of all pointed out that the two summonses "do not necessarily stand or fall together. Often two such "summonses do so, and if the wife fails on desertion, she "substantially fails on wilful neglect to maintain, but that is "not necessary and inevitable. Sometimes—where, for instance, "the evidence is that the separation was consensual—she may "fail on desertion and win on maintenance; in cases, that is, "where the consensus impliedly includes a term that the wife "should be entitled to some support from the husband. If this "is the right inference from the evidence, the learned President "considered he was bound to draw it." After a full review of the evidence Asquith L.J. stated his conclusion that the inference drawn by the Divisional Court that the separation was consensual was wrong, in the following words: "In those circumstances, "with great respect, I am of opinion that the inference of con-"sensus cannot be supported; and, if it cannot, then there can "be no possible claim to maintenance. There is, indeed, "authority which has been cited to us, a case called *Baker* v. "*Baker*,[27] decided quite lately, which decides very clearly that, "even where a separation is admittedly consensual, it has to be "shown either that there was an express agreement to pay "maintenance or that such an agreement must be implied from "the circumstances. In this case I think the conclusion that "there was a consensus at all cannot be supported, and therefore "the other point does not really arise."

Birkett L.J. came to the same conclusion on a review of

[25] [1952] P. 171, 179.
[26] Unreported, April 4, 1951.
[27] 66 T.L.R. (Pt. 1) 81.

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the evidence, but added: "I agree with what my Lord has said, "and I do not think for my own part that, on the evidence before "the justices and the evidence before the Divisional Court, this "inference of consensus can really be supported; but I would "just like to add a final word. Assuming for the moment that "there has been, in the circumstances of this case, a consensual "separation, I do not think it by any means follows that an "inference is to be drawn that it was upon the basis that "attached to it should be an undertaking to provide mainten-"ance. I think, on the contrary, almost everything in the case "would appear to be against it," and, after referring to some passages in the evidence, he added: "It does not look, as I say, "upon the face of it, that any such inference could be drawn, "even if there had been anything in the nature of an agreement "to separate, that it should be upon the terms that he would "provide maintenance." But he was content to rest his decision on the view that there was no ground for the Divisional Court's drawing the inference of consensus.

Harman J. agreed with Asquith L.J.'s decision and the reasons therefor and had nothing to add.

It is, of course, true, as is recognized in *Stringer* v. *Stringer*,[28] that the approval of *Baker* v. *Baker*[29] in *Chapman* v. *Chapman*[30] was obiter in the sense that the Court of Appeal did not agree with the inference of fact drawn by this court that the separation was consensual. Nevertheless, the approval of *Baker* v. *Baker*[31] appears to be an integral part of the reasoning not only of Asquith L.J. but of Birkett L.J.

Next, it is important to appreciate the context in which Denning L.J. held that *Baker* v. *Baker*[32] was overruled. *National Assistance Board* v. *Parkes*[33] was an appeal from a decision of the Queen's Bench Divisional Court,[34] that unless a wife has committed adultery or is in a state of desertion, the National Assistance Board are entitled under sections 42 and 43 of the National Assistance Act, 1948, to recover contributions from her husband in respect of assistance given under the Act to the wife, even if there has been a consensual separation which would provide the husband with a good defence to a claim by the wife for maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949.

In the argument in the Divisional Court the attention of the court was called to *Baker* v. *Baker*,[35] *Stringer* v. *Stringer*[36] and *Chapman* v. *Chapman*.[37]

At the conclusion of his judgment Lord Goddard C.J. said[38]: "The cases which were cited to us from the Probate, Divorce and "Admiralty Division concern an entirely different state of things.

[28] [1952] P. 171.
[29] 66 T.L.R. (Pt. 1) 81.
[30] Unreported, April 4, 1951.
[31] 66 T.L.R. (Pt. 1) 81.
[32] Ibid.
[33] [1955] 2 Q.B. 506.
[34] [1955] 1 Q.B. 486; [1955] 2 W.L.R. 622; [1955] 1 All E.R. 700.
[35] 66 T.L.R. (Pt. 1) 81.
[36] [1952] P. 171.
[37] Unreported, April 4, 1951.
[38] [1955] 1 Q.B. 486, 498–499.

"They lay down that if there is a consensual separation, a wife "cannot avail herself of the provisions of the Summary Jurisdic- "tion (Separation and Maintenance) Acts and apply to the "magistrates' court for maintenance. She made her bargain "and she cannot take advantage of the provisions of those "statutes, and her only remedy is to go to the National Assist- "ance Board. If the board, coming to the conclusion that she is "destitute, relieve her, then, even though the husband could not "be made to pay under the Summary Jurisdiction Acts, he "would have to repay the Board under the National Assistance "Act."

Ormerod J. agreed, for the reasons[39] given by Lord Goddard C.J. Gorman J. also agreed,[40] but added that it was important to realize that they were concerned in these cases only with the rights given to public assistance in the National Assistance Act, 1948.

It is not clear to us why in affirming, as they did, the independent right of the board to recover from the husband a sum (limited, be it noted, by the amount of the assistance paid by the board under the National Assistance Act), it was necessary for the Court of Appeal to enlarge upon the rights inter se of the wife against the husband.

In dealing with this broader question and arriving at the conclusion that *Baker* v. *Baker*[41] had been overruled, Denning L.J. said[42]: "Separation by consent is not itself a bar to main- "tenance. The husband's duty to maintain the wife continues "(see *Price* v. *Price*[43]) . . ."

Now the point at issue in the latter case was whether in the somewhat peculiar circumstances the finding of the trial judge that the wife was genuine in her offer to return to the husband should be supported. In referring to *Price* v. *Price*[44] in connexion with *Baker* v. *Baker*[45] Denning L.J. is manifestly referring to that part of his judgment which is conveniently summarized in the headnote as follows[46]: "*Per* Denning L.J. The "offer made by the wife did not turn the husband into a deserter, "and at the present day she would not be granted a decree for "the restitution of conjugal rights, for her motive in offering to "return was not a sincere desire to re-establish a home but to "get maintenance, and it would be wrong that, impelled by that "motive, she should be able to make him a deserter, contrary "to the real truth of the case. But a husband is bound to "maintain his wife if she is ready to live under his roof, what- "ever her motive may be, so long as she has not been guilty of "some grave fault, such as adultery or cruelty, for the husband's

[39] [1955] 1 Q.B. 486, 499.
[40] Ibid.
[41] 66 T.L.R. (Pt. 1) 81.
[42] [1955] 2 Q.B. 506, 516.
[43] [1951] P. 413; [1951] 2 All E.R. 580n.
[44] Ibid.
[45] 66 T.L.R. (Pt. 1) 81.
[46] [1951] P. 413.

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"duty to maintain her depends on the fact that she is his wife, "not on the fact that he has deserted her."

Hodson L.J., who followed,[47] took exception to this statement of the law. After referring,[48] as Denning L.J. had done, to the judgment of Reading C.J. in *Jones* v. *Newtown and Llanidloes Guardians*[49] Hodson L.J. said[50]: "That passage draws attention to something which, I think, is perhaps not always clearly "remembered, namely, that the husband's obligation to maintain his wife is prima facie complied with by providing a home "for her. A wife has no right to separate maintenance in a "different home unless she can justify the fact that she is "living apart from her husband. If a woman, as the wife in this "case has done, leaves her husband, the right to separate maintenance is not destroyed but suspended, and as soon as she "expresses her willingness to go back, if that offer is rejected, "that suspension comes to an end. It seems to me to follow "from that that, although the question does not directly arise, "in that case, on the bare facts, as I have stated them, from "that moment onwards the boot is on the other leg and the "party who is approached and rejects the approach becomes "the deserter, and that that is the effect of the decision of the "Divisional Court in *Thomas* v. *Thomas*.[51]

"I should not have mentioned that point had not my brother "Denning mentioned that proceedings for restitution of conjugal "rights might differ in their result from proceedings under this "section. For my part I think that the proceedings under "section 23 of the Act of 1950 are on the same footing as "proceedings for restitution of conjugal rights: if a wife becomes "a deserter she would not be entitled to maintenance just "because she is a wife, that is to say, to separate maintenance. "The question of her right to maintenance may depend on "whether she is a deserter or whether she is deserted or "whether there is a contract between them. I do not think that "the law recognizes a sort of undefined condition where parties "are living apart in conditions which may be described as of "drift, or in some not very clearly defined condition in so far as "rights to maintenance are concerned. It is necessary that those "conditions should be clearly defined, and I think that they were "clearly defined by Lord Reading, C.J., in *Jones* v. *Newtown* "*and Llanidloes Guardians*."[52]

In this passage Hodson L.J. was, in effect, reiterating the identical principle stated in *Baker* v. *Baker*.[53]

Somervell L.J., who had given the leading judgment[54] and had held[55] that the trial judge's finding about the genuineness of

[47] Ibid. 419.
[48] [1951] P. 420.
[49] [1920] 3 K.B. 381; 36 T.L.R. 758.
[50] [1951] P. 413, 420.
[51] (1946) 62 T.L.R. 166; [1946] 1 All E.R. 170.
[52] [1920] 3 K.B. 381.
[53] 66 T.L.R. (Pt. 1) 81.
[54] [1951] P. 413, 415.
[55] [1951] P. 413, 416.

the wife's offer was in the circumstances conclusive, gave a supplementary judgment [56] in which he agreed with the observations made by Hodson L.J.

It would appear, therefore, that on this particular issue, though not on the main subject-matter of the appeal, the judgment of Denning L.J. was a minority or dissenting judgment. If this is the true view, it may be doubted whether it affords authority for the conclusion that *Baker* v. *Baker* [57] and *Chapman* v. *Chapman* [58] are overruled.

In his judgment in *National Assistance Board* v. *Parkes* Birkett L.J. said [59]: "I think I ought to say that the passage "from the judgment of Asquith L.J. in *Chapman* v. *Chapman*,[60] "which was so strenuously relied on, was a passage in which I "am fully satisfied he was not contemplating for one moment "the kind of situation which has arisen in the present case. "I say that for this reason: *Chapman* v. *Chapman* [61] was heard "on April 4, 1951. But another case, *Tulip* v. *Tulip* [62] was "heard the next day and the following day. The court reserved "judgment and delivered it on May 10. Asquith L.J. had "then become Lord Asquith, but he was a member of the court "which decided *Tulip* v. *Tulip*,[63] and, although he did not deliver "a judgment of his own, he expressly empowered me, in deliver-"ing the judgment of the court, to say that he had read it and "agreed with it."

With the greatest respect, it does not seem to us that the mere fact that *Chapman* v. *Chapman* [64] and *Tulip* v. *Tulip* [65] were heard on consecutive days, and that Asquith L.J. Birkett L.J. and Harman J. were party to both decisions detracts in any way from the authority of what was said about *Baker* v. *Baker* [66] by Asquith L.J., and impliedly by Birkett L.J. himself, in *Chapman* v. *Chapman*.[67] Indeed, Birkett L.J. himself seems to provide the reason for the distinction to which we have already referred between the two cases by saying, as he does, that in *Chapman* v. *Chapman* [68] Asquith L.J. was not contemplating the kind of situation which had arisen in *National Assistance Board* v. *Parkes* [69]—namely, that a wife who had actually covenanted not to claim maintenance had fallen on evil days, had had to seek national assistance, and the National Assistance Board had paid 39s. 6d. a week to the wife, which sum they were seeking to recover from the husband—whereas, in *Chapman* v. *Chapman* [70] what was being considered was the legal effect of a consensual separation on the assumption that there was no agreement expressed or implied to pay maintenance to a separated wife, and

[56] [1951] P. 413, 422.
[57] 66 T.L.R. (Pt. 1) 81.
[58] Unreported, April 4, 1951.
[59] [1955] 2 Q.B. 506, 522.
[60] Unreported, April 4, 1951.
[61] Ibid.
[62] [1951] P. 378.
[63] Ibid.
[64] Unreported, April 4, 1951.
[65] [1951] P. 378.
[66] 66 T.L.R. (Pt. 1) 81.
[67] Unreported, April 4, 1951.
[68] Ibid.
[69] [1955] 2 Q.B. 506.
[70] Unreported, April 4, 1951.

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in which there was no suggestion of a subsequent change of circumstances of which the husband had knowledge.

It seems to us that in view of this distinction between *Baker* v. *Baker*,[71] and *Tulip* v. *Tulip*,[72] and between both cases and *National Assistance Board* v. *Parkes*[73] which decided that the National Assistance Board had an independent statutory right to recover from the husband maintenance in the form of national assistance actually disbursed by the board to the wife, it is our duty to follow what was said by the Court of Appeal in *Chapman* v. *Chapman*,[74] and by the majority of the Court of Appeal in *Price* v. *Price*.[75] We recognize, of course, that these divergent views can only be reconciled, if not by the Court of Appeal itself, by the House of Lords, unless in the meantime they are resolved by legislation, if the Maintenance Agreements Bill, which was given a second reading in the House of Commons on February 15. 1957, becomes law.

We have already called attention to the careful way in which this case was tried. Nothing could have been clearer than the way in which the evidence is recorded and the reasons for the decision stated. As regards the law, the justices can hardly be blamed if they found some difficulty in directing themselves correctly in view of the circumstances to which we have called attention.

For these reasons we think that the appeal must be allowed, and the order of the justices set aside.

Appeal allowed.

Solicitors: *Maltz, Mitchell & Co. for Bernard Chill & Axtell, Southampton; White & Leonard for Wells, Woodford & Ackroyd, Southampton.*

E. J.

[71] 66 T.L.R. (Pt. 1) 81.
[72] [1951] P. 378.
[73] [1955] 2 Q.B. 506.
[74] Unreported, April 4, 1951.
[75] [1951] P. 413.

[COURT OF APPEAL.]

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Jenkins, Morris and Sellers L.JJ.

* VICKERS *v.* E. GOMME LTD.

[Plaint No. M. 231.]

Factory—Dangerous machinery—Fencing—Woodworking machine—Efficient guard—Meaning—Vertical spindle moulding machine—Portion of cutter exposed—Operative injured—Guard provided in compliance with regulation 17—*Whether additional safeguard of jig or holder necessary—Woodworking Machinery Regulations,* 1922 (*S.R. & O.,* 1922, *No.* 1196), *regs.* 17, 18.

By regulation 17 of the Woodworking Machinery Regulations, 1922: "The cutter of every vertical spindle moulding machine shall

"when practicable be provided with the most efficient guard having "regard to the nature of the work which is being performed."

By regulation 18: "For such work as cannot be performed with "an efficient guard for the cutter, the wood being moulded at a "vertical spindle moulding machine, shall, if practicable, be held "in a jig or holder of such construction as to reduce as far as "possible the risk of accident to the worker."

A vertical spindle moulding machine was provided with a guard which left a portion of the cutter exposed. The plaintiff, while operating the machine, injured his hand. He claimed damages from his employers alleging breaches of regulations 17 and 18 of the Woodworking Machinery Regulations, 1922. The county court judge held that there had been no breach of regulation 17, but that there was a breach of regulation 18. On appeal by the defendants:—

Held, that "an efficient guard" in regulation 18 meant a guard of unqualified efficiency; therefore, where employers complied with regulation 17 and provided the most efficient guard consistent with the performance of the work, and one best adapted to protect the employee in that work, they were nevertheless required to comply with the provisions of regulation 18 where the guard provided under regulation 17 left open a risk of accident to the operative; accordingly, although the defendants had provided a guard which complied with regulation 17, it was not "an efficient guard" within the meaning of regulation 18, and they were therefore in breach of statutory duty in not providing a jig or holder.

APPEAL from Judge Rawlins sitting at High Wycombe county court.

The plaintiff, William Vickers, sustained injuries while in the employment of the defendants, E. Gomme Ltd., furniture manufacturers at High Wycombe. The accident occurred on September 29, 1955, when the plaintiff was operating a vertical spindle moulding machine, and his left hand came into contact with a portion of the cutter of the machine, and he lost part of the thumb.

The plaintiff claimed damages against his employers alleging negligence at common law and breach of regulations 17 and 18 of the Woodworking Machinery Regulations, 1922.[1]

The county court judge rejected the claim at common law and under regulation 17. He found the defendants guilty of breach of regulation 18 and assessed the damages at £250. However, he held that the plaintiff was 75 per cent. to blame for the accident and therefore awarded the plaintiff £62 10s.

The defendants appealed against the finding that they were in breach of regulation 18. There was also a cross-appeal by the plaintiff on the question of the apportionment of damages, not relevant to the present report.

[1] Woodworking Machinery Regulations, 1922, reg. 17: "The cutter of "every vertical spindle moulding "machine shall when practicable be "provided with the most efficient "guard having regard to the nature "of the work which is being per-"formed." Reg. 18: "For such "work as cannot be performed with "an efficient guard for the cutter, the "wood being moulded at a vertical "spindle moulding machine, shall, if "practicable, be held in a jig or "holder of such construction as to "reduce as far as possible the risk "of accident to the worker."

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The following facts appear from the judgment of Jenkins L.J.: The defendants carried on a furniture manufacturing business at High Wycombe. The plaintiff at the time of the accident had been in their employment for rather less than a year, but he had a long experience in the trade and had had previous experience of the vertical spindle moulding machine. The machine included a table at which the operator stood. Facing the operator on the other side of the table there was a vertical board or screen (referred to as a fence) that ran the length of the table. In the centre of the fence there was a slot some 3 or 4 inches wide on a level with the surface of the table, through which protruded a segment of the cutter to the extent of $\frac{3}{8}$ inch (at the most) in order to enable the work for which the machine was designed to be done. The cutter was electrically driven and revolved anti-clockwise at high speed. Immediately above the slot through which the cutter protruded and $\frac{7}{8}$ inch above the surface of the table there was a block of wood some 6 inches wide, which projected horizontally $\frac{7}{8}$ inch from the fence at the back of the table, i.e., $\frac{1}{2}$ inch beyond the farthest point of protrusion of the cutter. Thus one found that over the slot through which the cutter protruded there was a block which protected the cutter from the point of view of anyone approaching it from above.

The wood treated on the machine consisted of long narrow lath-like pieces of wood known as rails, 13/16ths inch deep and rather wider than that. Thus, if placed on their broad side in front of the cutter, the rails would fill the vertical space between the surface of the table and the lower surface of the block immediately above the opening in the fence, except for a matter of only 1/16th inch. It was thus apparent that if the rail were squarely presented to the cutter and held firmly up against the fence it would not be possible for the operator to bring any part of his person in contact with the cutter.

On the table on the operator's right-hand side there was a flat L-shaped wooden member known as a back stop which could be adjusted so as to bring it further from or nearer to the cutter according to the length of wood being treated. The short leg of the L, at the right-hand end of the table, was in the shape of an arc with its concave side towards the table; the long leg of the L was placed along the length of the table nearer the front edge. On the left side of the table there was another device known as a front stop.

The method of working the machine was that the rail to be dealt with was placed on the table and positioned with its back end butting up against the angle of the L-shaped back stop, the position of that angle having been suitably adjusted beforehand. Then the rail was slanted till the fore end met the fence at the back of the table, the point at which it would do that being, of course, predetermined by the setting of the back stop and the length of the rail. Assuming that the motor driving the cutter

was running, the operator would place both his hands on the wood under treatment (or work-piece) pushing it away from him, keeping the butt end at all times in contact with the arc of the back stop. The effect of that operation, if properly carried out, would be to hold the fore end of the work-piece firmly against the screen at the desired point beyond the cutter, and as the work-piece followed the arc of the back stop it would pivot on a centre represented by the fore end, until the whole of its length came up flush against the fence. The action of bringing the wood into contact with the cutter was called "dropping on." The rail having been thus dropped on, it was essential that the operator should maintain the requisite degree of pressure on the rail away from himself and towards the screen. At the same time he had to push it towards his left in order that the portion of it desired to be cut should be drawn across the sharp edge of the cutter. If the machine were carefully operated in that way, there should be no appreciable risk of accident, for the cutter being masked or screened to the extent indicated by means of the wooden block above the orifice through which it protruded, its cutting edge would at all times be separated from the hands or person of the operator by the wood under treatment. Proper use of the back stop was, therefore, essential to the success of the operation, for it was only thus that a cut of the requisite predetermined length could be made. The back stop also had the importance, that if the fore end or the left-hand portion of the work-piece was not held with sufficient firmness at the time of dropping on, the phenomenon known as "kick-back" was liable to occur. That happened when the teeth of the cutter, instead of biting into the wood, simply struck it and pushed it away. If there was nothing at the butt end of the rail to prevent it moving entirely under the influence of the cutter in that way, there might be an accident; but if the butt end of the rail was up against the short arm of the back stop its movement would be arrested. Experience had shown that the back stop was, save possibly in exceptional circumstances, an effective protection against the danger of a kick-back. The effect of a kick-back could be to cause the hand (probably the left hand) of the operator to slip off the wood and come up against the cutter.

No suggestion of any improvement which it would be practicable to make upon that method of protection was made, and there was no evidence of any previous accidents, save in the isolated case of a chargehand in the employment of the defendants, who had cut himself when he was trying to mould a warped piece of wood and had removed the guard consisting of the block above the slot through which the cutter protruded.

Martin Jukes Q.C. and *John Hobson* for the defendants.
John Thompson Q.C. and *Douglas Bunn* for the plaintiff.

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The following cases relevant to the issues reported were cited in argument: *Latimer* v. *A.E.C. Ltd.*[2]; *Miller* v. *Boothman (W.) & Sons Ltd.*[3]; *Dickson* v. *Flack*[4]; and *Thurogood* v. *Van Den Burghs & Jurgens Ltd.*[5]

JENKINS L.J., having stated that the sole question in the appeal was whether the defendants were in breach of regulation 18 of the Woodworking Machinery Regulations, 1922, and having described the machine in question as set out above, continued: There is a certain amount of mystery about the way in which the present accident was actually brought about, but it appears that the plaintiff having come to work at 7.30 a.m. on the day of the accident, which was September 29, 1955, had by 7.45 a.m. done about 20 of these rails. Then he put a rail through the machine and found on inspection that a few inches down from the top of the bevelled cut which had been made—I take the top as being at the left-hand end of the rail as it went past the cutter—there was a slight protuberance. It was very small and hardly visible, but could be felt with the finger. The plaintiff was dissatisfied with this piece of work and thought if he put it through the machine again he would remove this slight inequality. He accordingly did so, and somehow or other the rail must have kicked back away from the screen and thus exposed the cutter, and the plaintiff's hand must have slipped off the rail and thus come into contact with the cutter.

The problem is to divine how this came about. The plaintiff, as I have said, was an experienced man, and if he had followed the usual routine, which he had done literally hundreds of times —I think he had cut more than 200 of these rails—and had simply put the imperfectly moulded rail past the cutter again in accordance with the usual routine, the accident would not have happened.

Inspection of the particular rail after the accident showed that it had been cut some 3 or 4 inches further up the fore end of it than the process required. The plaintiff could not account for this. He said he had as usual kept the butt end up against the back stop. But, if he had done that, it seems reasonably plain that the extra cut which was found on the rail could not well have been made, because if it had been properly positioned the whole of that part of the rail would have been beyond the cutter.

The most plausible theory of the way in which the accident happened appears to me (as it did to the judge) to be that the plaintiff for some reason or other positioned the rail some inches back away from the table so that its butt end was overlapping the back stop instead of being lodged up against it.

Having described the nature of the machine and the nature

[2] [1953] A.C. 643; [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.
[3] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.
[4] [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; [1953] 2 All E.R. 840.
[5] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

of the accident, I should now refer to the relevant regulations. As I have said, the only regulation the breach of which is now in issue is regulation 18, but for purposes of construction it is necessary to look also at the immediately preceding regulation 17. [His Lordship read regulations 17 and 18 and continued:] Those are the two vital provisions, regulation 17 being, as I think, vital because its construction has an important bearing on the construction of the actually relevant regulation 18.

I should perhaps refer also to regulation 19, which says: "A "suitable 'spike' or push-stick shall be kept available for use "at the bench of every vertical spindle moulding machine." As to that regulation, it appears that in fact "spikes" or push-sticks were available, but that their use in connexion with this particular machine would not be practicable, and accordingly nothing turns upon regulation 19 in this case.

It is not now in dispute that the defendants complied with regulation 17, but it is said nevertheless they are in breach of regulation 18. Mr. Jukes, for the defendants, contests that proposition, and his argument, as I understand it, is of this nature. He says that regulations 17 and 18 are alternatives, and that, once it is shown that the defendants complied with regulation 17, regulation 18 cannot touch them. He says that these regulations deal with two alternative situations: the first the situation where one can have a guard, in which case one is obliged to have the best guard one can; the other where one cannot have a guard, in which case one must, if practicable, provide a jig or holder.

That argument Mr. Jukes seeks to support in this way. He says that words in regulation 17 mean that one must provide the most efficient guard possible having regard to the nature of the work, and having done that one will have provided an efficient guard within the meaning of regulation 18. He says "the most "efficient guard" must be "an efficient guard," and he calls in aid the fact that no better guard for this particular kind of machine has been devised. He emphasizes the fact that where woodworking machinery is concerned, it is, generally speaking, impossible to carry out the requisite operations if there is anything in the nature of a complete screen or guard. If access to the cutter was completely blocked from every direction, it would be impossible to work the machine at all, for the wood could then never be brought into contact with the cutter.

After paying the best attention I can to Mr. Jukes's argument, I find myself unable to accept it. It seems to me that regulation 18 is designed to give protection, or additional protection, to persons operating the machine in cases in which they cannot be fully protected by a guard. I think that the words "with an "efficient guard" in regulation 18 mean something different from the words "the most efficient guard" in regulation 17. That becomes apparent if the experiment is tried of substituting for the words "an efficient guard" in regulation 18 the words "the

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"most efficient guard" from regulation 17. It is obvious that regulation 18 could not sensibly be made to read: "For such work "as cannot be performed with the most efficient guard having "regard to the nature of the work which is being performed . . ."

Returning to regulation 17, I think it places an obligation on the employer when practicable to provide (as indeed it says) "the "most efficient guard having regard to the nature of the work "which is being performed." That means, as I see it, that the employer must consider the work which is being performed and, having done so, must provide the most efficient guard consistent with the performance of that work and also, I think, the guard which is best adapted to protect the worker in the performance of that particular work. I think the words "having regard to" can be construed as having that double meaning. But quite plainly the most efficient guard having regard to the nature of the work which is being performed need not necessarily be a guard of unqualified efficiency. Indeed, what Mr. Jukes has told us about the position in regard to guards in this industry amply bears that out. There may be some processes or some types of moulding machine in which it is possible to have a complete guard. Mr. Jukes says the contrary, but for the purposes of construction I am not prepared to hold that these regulations were drafted on the assumption that this was an impossibility. So there may be cases in which a complete guard is possible; there may be other cases in which it is impossible consistent with the work in hand to provide a guard that has anything more than a very moderate or qualified degree of efficiency, so that it still leaves open the risk of that which a guard is designed to prevent, namely, the contact of the person of the operator with the cutter. That, then, seems to me to be the effect of regulation 17.

Then when one comes to regulation 18 I think its intention is to provide additional protection for the operatives to meet the risk from which the best guard it is possible to provide (if indeed it is possible to provide any guard) does not sufficiently protect them. I think in the context of regulation 18 "an efficient "guard" means a guard of unqualified efficiency. A parallel was suggested in the course of the argument with section 14 of the Factories Act. It was pointed out that, as has been authoritatively stated, "securely fenced" in that section does not mean "somewhat securely fenced" or "fairly securely fenced"; it means "securely fenced." Although one must not press the parallel too far, because I think that "securely" has a more absolute connotation than the word "efficient," yet I think the comparison is not without value.

In my view then, "an efficient guard" in regulation 18 means a guard of unqualified efficiency. To my mind that conclusion is borne out by the concluding words of regulation 18, namely, the words "shall, if practicable, be held in a jig or holder of such "construction as to reduce as far as possible the risk of accident "to the worker." That, I think, suggests that regulation 18

might be read in this way: "For such work as cannot be "performed with a guard which will protect the worker from "accident, then the wood being moulded on a vertical spindle "moulding machine shall, if practicable, be held in a jig or holder "of such construction as to reduce as far as possible the risk of "accident to the worker." Where the guard (if there is one) falls short of efficiency in the above sense, it is a guard which leaves open a risk of accident, and regulation 18 is designed to remedy that state of affairs by requiring as an additional precaution the use of a jig or holder so as to reduce the risk of accident to the worker as far as possible.

I should add that to my mind no assistance is to be derived in the construction of these two regulations from the argument that this will require a jig or holder to be used in almost every case, as an efficient guard in the sense I have ascribed to it is barely to be found throughout the whole woodworking industry. I cannot regard that argument as having any weight. The jig or holder only has to be used if practicable. It is not an expensive apparatus so far as I know or difficult to use. If it is unduly difficult to use in any particular case, then no doubt, within the meaning of the regulation, it would be held impracticable to use it.

The point of construction is a short one and does not admit of any great elaboration, but having read and re-read the two regulations and heard interesting arguments on either side I have come to the conclusion that the judge was right in holding that the defendants were here in breach of regulation 18.

Mr. Jukes had a second argument against that conclusion. He said: "Be it so, supposing regulation 18 does apply, never-"theless it does not touch the defendants because their guard "is an efficient guard." For that proposition he relies on the evidence in the case and bases on that evidence much the same arguments as are commonly raised in answer to a claim based on negligence at common law. He says that this machine is a machine of a well-known type, one which has been widely used for many years, which is illustrated with apparent approval in the Ministry of Labour's publication "Safety Hints on the Use "of Woodworking Machinery." It is, moreover, a machine in connexion with which accidents are of extremely rare occurrence. Therefore, he says, it is an efficient guard, efficiency being a question of fact and degree.

In my view that argument fails. The question here is whether there is an efficient guard for the cutter. Simply looking at this machine it is obvious that there is a segment of the cutter which, from the point of view of approach at the level of the table, is not guarded at all. Anyone's hand slipping along the table could come in contact with the cutter at any time when there was not a work-piece blocking up the orifice through which the edge of the cutter protrudes. Accordingly, physically speaking and simply looking at the machine, one finds that there is not in fact an

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efficient guard for that part of the cutter. The fact that the machine has been worked in safety, save in very exceptional cases, for many years, does not seem to me to carry the argument any further. Its successful history and good record as regards accidents, in my view, is not due to the fact that there is an efficient guard for the cutter; it is due to the fact that it is a well-designed machine, so arranged that a properly instructed person, using reasonable skill and care and adhering to the proper routine, can use it without any serious risk of his hand coming in contact with the cutter. That is a different matter from the question whether there is an efficient guard for the cutter, and in my view there is not such a guard within the meaning of regulation 18.

It follows, therefore, that this second argument affords, to my mind, no ground for disagreeing with the judge's conclusion. It is not in dispute that it is practicable to use a jig or holder in this case. In fact the defendants, like good employers, introduced the use of a jig very shortly after the accident, but it is not in dispute none was provided before the accident.

For these reasons I am of opinion that the appeal fails.

[His Lordship then considered the plaintiff's cross-appeal and held that it was impossible to disturb the apportionment.]

Morris L.J. I have reached the same conclusions. The construction of regulation 18 of the Woodworking Machinery Regulations raises questions of some difficulty. The aim of the regulations is clearly the securing of the maximum of safety. There is an emphasis on the obviating of all unnecessary risks. Regulation 3, for example, provides: "Sufficient clear and unobstructed space shall be maintained at every *woodworking machine* while in motion to enable the work to be carried on without unnecessary risk." Regulation 11 provides: "A suitable push-stick shall be kept available for use at the bench of every *circular saw* which is fed by hand, to enable the work to be carried on without unnecessary risk." Regulation 21, which is dealing with the guards and appliances required by the regulations, concludes with the sentence: "The guards shall be so adjusted as to enable the work to be carried on without unnecessary risk." Regulation 22, which I need not pause to read, has an emphasis on safety.

There is, however, in the regulations a recognition of practical difficulties: the relentlessness of positive obligation is relaxed at times when safety measures are not practicable. I hope that I am not being unduly critical of the language of regulation 17 if I say that the wording of it is not without a certain literary blemish. But the meaning of it does, in my view, emerge. The phrase "the most efficient guard" is to be construed in its context. It is followed by the words "having regard to the nature of the work which is being performed." The nature of the work will vary from time to time, but the nature of the work will point to and denote the measure of the obligation to guard.

Having regard to what is being done, there must, always when practicable, be the most efficient guard. This means the guard that most nearly approaches to being an efficient guard There is a recognition that the performing of certain work will not be possible if there is an efficient guard, but if some kind of guard can be provided while particular work is being done, then that kind of guard must be provided, and it must guard to the greatest extent possible. I read regulation 17 as meaning that the cutter of any vertical spindle moulding machine must, when practicable, be provided with as good a guard as can be provided having regard to the work being done. As the work being done may render it impossible to have the protection that a guard properly so called would afford, then as much protection as is possible must be given.

If that is the correct view of regulation 17, the question then arises whether regulation 18 follows upon it or whether, as the employers submit, it is alternative. They submit that if regulation 17 is complied with, then regulation 18 does not apply. This raises the question as to the meaning of the phrase in regulation 18, "an efficient guard." It seems to me that it would be surprising if the words "the most efficient guard" in their context in regulation 17 mean just the same as the words "an "efficient guard" in regulation 18. If they mean the same, and if regulation 17 denotes the best guard that can be used having regard to the work being performed, then the opening of regulation 18 would read: "For such work as cannot be performed "with the best guard that can be used having regard to the work "being performed . . ." Such a construction obviously leads to an absurd result.

It is submitted by the employers that regulation 18 is providing for a situation where work cannot be performed when there is a guard of any kind for the cutter. But this, in my judgment, is not what regulation 18 says. Such a view of the matter gives no meaning to the word "efficient." If regulation 18 had been intended to provide for a situation where work cannot be performed if there is even some modified or partial form of guard (if such a situation is possible), then the regulation could have begun with the words: "For such work as cannot be performed with a guard "for the cutter . . ." or "For such work as cannot be performed "with any kind of guard for the cutter . . ."

It was further submitted by the employers that if "an efficient "guard for the cutter" denotes one that will so guard the cutter as to prevent a person who is working from getting into contact with it, then no such guard is possible. It was submitted that if the words "an efficient guard" were so understood, the opening words of regulation 18, that is to say, the words: "For such work "as cannot be performed with an efficient guard for the cutter," would be otiose. For it was submitted that no work can be performed with an efficient guard for the cutter if by that is meant a guard which will be effective to protect people from the

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peril of getting a hand in contact with the cutter. So it was said that if the words "an efficient guard" are so interpreted, then regulation 18 could simply have been worded so as to impose an obligation to use a jig or holder whenever practicable.

I do not feel able to accept this submission and furthermore I see no reason to assume, for the purposes of construction, that it was thought to be beyond the wit of man to devise some guards which, at all events for some processes or for some situations, could be used while work is being performed and which would be efficient in the sense of achieving the purpose of the guard by preventing an employee from making contact with the cutter or being affected by the dangerous attributes of cutters revolving at the rate of many thousands of revolutions a minute. In my judgment "an efficient guard" is a guard that properly or effectively guards. That means one that guards an employee from the perils to which he is exposed from cutters.

Mr. Jukes submitted that the word "efficient" is one that introduces a question of degree. There may be a context in which there is a question of degree, but this is not so, in my judgment, in the case of the words "efficient guard." It is, however, recognized that efficient guarding of cutters may not be possible when certain work is being done with vertical spindle moulding machines. There is, however, no general exemption from guarding. The way in which it works out, as it seems to me, is this: under regulation 17 the test of what is practicable is introduced, and there is an obligation to advance as far as is possible towards achieving efficient guarding. If work is being performed at a time when efficient guarding can be achieved, then there is no obligation to use a jig or holder under regulation 18. But when work is being performed which does not permit of having cutters efficiently guarded, then under regulation 18, provided it is practicable, the wood being moulded must be held in a jig or holder and such jig or holder must be of such construction as will achieve the object of the safety regulations, that is to say, the object of reducing as far as is possible the risk of accidents to the worker.

If these conclusions are correct then the second point taken by Mr. Jukes does not arise. He submitted that there was an efficient guard in this case within the meaning of regulation 18. If the construction that I have put upon those words is correct, then it is clear that there was no efficient guard in this case. I think, therefore, that the appeal fails.

[His Lordship then considered the plaintiff's cross-appeal and said that he did not think it would be appropriate to disturb the conclusion reached by the trial judge on that matter.]

Sellers L.J. I agree with both my Lords in the construction they have given to regulation 18. In the course of the argument I have had doubt as to whether that construction was the interpretation which the regulations intended. Regulation 17

would seem to recognize that the conditions of work may not permit (and perhaps they very rarely would permit in fact) a wholly effective guard to be used. It might be, having regard to the work in hand, that the best guard possible (which I think is what "most efficient guard" means) in the circumstances would leave a negligible risk and would afford almost complete safety. On the other hand, the best guard possible (the most efficient guard) might be of very little safety value at all.

The construction which is put upon regulation 18, as the court thinks it should be put, involves this: over that range, starting from almost complete security, from the minimum degree of danger up to a high degree of danger, with the use of differing kinds of guards under regulation 17, the two regulations read together would in every such case further require that a jig or holder should be used. If that is so, one might have contemplated that regulation 17 itself would have incorporated the obligation to use a jig or a holder as an additional protection to be used in conjunction with the most efficient guard. Regulation 17 as it stands still leaves the question as to what is to be done where no guard at all could be used, where the task in hand was of such a nature that it was not possible to have any sort of guard and therefore the "most efficient guard" could not be applied. A regulation was necessary to deal with that position and it might be envisaged that regulation 18 came into force in order to provide that where no guard could be used then a jig or holder must be used so as to reduce as far as possible the risk of accident to the worker.

There is reason to think that an interpretation such as that has been the one which has been followed in practice from as far back as 1922. But when one comes to read regulation 18 strictly, as we have had to do in this case, it does seem to me that it is impossible to ignore the word "efficient" in regulation 18 and to treat it as if regulation 18 was only dealing with the circumstance where no guard of any sort could be used. "Efficient "guard," I agree with the court in thinking, means in regulation 18 a guard which gives complete safety. The regulation, so read in conjunction with regulation 17, involves that notwithstanding that the most efficient guard has been used, if there is still an element of danger existing a jig or holder must be used. There is no term in regulation 18 referring to regulation 17 and there is nothing expressly which links them up, but I have come to the conclusion that regulation 18 should be read in that way.

If it appears that it is impracticable, as my Lord has pointed out, for a jig or holder to be used that will excuse the employer under regulation 18. If, having regard to the minimal amount of risk that there may be in many cases where, under regulation 17, a machine is provided with the "most efficient guard" (which may be in fact a very efficient but not completely efficient guard), and it is found that it is really unnecessary for safety to

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go to the added trouble of using a jig or holder, then I apprehend that the regulations could by the appropriate machinery of the Act be modified to meet that situation.

On those grounds, I hold that the appeal must be dismissed. The county court judge came to the correct view on the interpretation of regulation 18.

[As to the plaintiff's cross-appeal, his Lordship did not feel justified in saying that the county court judge had come to a wrong conclusion in the apportionment which he made.]

Appeal dismissed.
Cross-appeal dismissed.
Leave to the defendants to appeal to the House of Lords.

Solicitors: *Gregory, Rowcliffe & Co.; Shaen, Roscoe & Co.*

C. J. E.

[CARLISLE ASSIZES.]

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Jan. 22, 30; *Feb.* 12.
Streatfeild J.

*GIBB *v.* UNITED STEEL COMPANIES LTD. AND ANOTHER.

Master and Servant—Employment of servant of another—Employment pro hac vice — Dock worker — National Dock Labour Board — No contract between board and master stevedores—Transfer of servant from harbour authority to master stevedores—Liability for injury to servant.

The plaintiff was employed as a dock worker at the port of Workington by a steel company who acted as master stevedores until 1943 when a national pool of dock labourers was formed, and thereafter he was employed by the harbour board, who became the "registered port transport employers" under an agreement made between them and the National Dock Labour Corporation. Under the national scheme only the harbour board could initiate the special machinery for securing the dismissal of the plaintiff, but the corporation undertook to engage such dock workers as the board might request and to pay to them individually the wages received in bulk from the board. There was no contract between the corporation and the company, but the company put the harbour board into funds in order to enable the latter to meet their legal obligations to the corporation in respect of wages. The company, after 1943, continued to act as master stevedores for all cargoes arriving at the port (of which 95 per cent. were their own) as they had done before 1943. In an action by the plaintiff against the company and the harbour board claiming damages for personal injuries sustained by him during the unloading of a ship on the ground, inter alia, of a breach by his employers of their common law duty:—

[Reported by E. Somerset Jones, Esq., Barrister-at-Law.]

Held, that in the circumstances, the plaintiff, although legally the general servant of the harbour board, was pro hac vice the servant of the company even though there was no contract between them and the corporation.

Denham v. *Midland Employers' Mutual Assurance Ltd.* [1955] 2 Q.B. 437; [1955] 3 W.L.R. 84; [1955] 2 All E.R. 561 referred to.

ACTION.

The plaintiff, Ernest Gibb, was employed as a dock worker at the port of Workington by the first defendants, who acted as master stevedores, until 1943 when the National Dock Labour Corporation (afterwards called the National Dock Labour Board) came into existence. The corporation formed a national pool of dock workers with a scheme of guaranteed wages, and as part of the machinery for paying wages the corporation required the various harbour authorities to become the "registered port trans- "port employers." In 1943 the second defendants, Workington Harbour and Dock Board, entered into an agreement with the corporation whereby they undertook to pay to the corporation in bulk the total wages earned by the dock workers and the corporation undertook to pay over the wages to the dock workers individually. The corporation engaged such dock workers as the second defendants requested and only the second defendants could initiate the special machinery for securing the dismissal of a dock worker.

The second defendants were the legal owners and occupiers of the docks, railways and cranes, etc., and the whole of their redeemable debenture stock was held by the first defendants. Of the cargoes arriving at the port of Workington, 95 per cent. were for the first defendants. The first defendants, after 1943, continued to act as master stevedores and, although there was no contract between the corporation and the first defendants, the latter put the second defendants into funds in order to enable them to pay the dock workers' wages to the corporation.

On June 29, 1953, while working as one of a gang of dock workers loading railway wagons with coal-duff being discharged from a ship, the plaintiff was crushed between the buffers of two railway wagons. He brought this action claiming damages on the ground, inter alia, that either the first or second defendants, as his employers, were in breach of their common law duty to provide a safe system of work. (An allegation that the second defendants were guilty of breaches of regulation 3 of the Locomotive and Wagon Regulations, 1901, was not pursued, it being conceded—in the view of Streatfeild J., rightly—that the regulations had no application to the circumstances of the case. His Lordship rejected a further allegation against the second defendants that they were guilty of negligence in failing to maintain the railway track in a safe condition.) It was contended by the second defendants that the services of the plaintiff had been transferred, pro hac vice, to the first defendants.

The facts more fully appear in the judgment.

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GIBB v. UNITED STEEL COMPANIES LTD.

Robertson Crichton Q.C. and *Godfrey Heilpern* for the plaintiff.

R. H. Forrest Q.C. and *C. Q. Henriques* for the first defendants.

D. J. Brabin Q.C. and *Guthrie Jones* for the second defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Garrard* v. *Southey (A. E.) & Co.**; *Johnson* v. *Beaumont (A. H.) Ltd.*†

Cur. adv. vult.

February 12. STREATFEILD J. read a judgment (at Liverpool Assizes) in which he stated the facts, held that there was a failure to provide a safe system of work and that the plaintiff was not guilty of contributory negligence, assessed the damages at £7,550, and continued: Finally there arises the question as to which of the defendants were at the time of the accident the plaintiff's employers, who owed him the duties at common law, breach of which renders them liable to pay these damages. The United Steel Companies Ltd. contend that at all material times the plaintiff was and remained the general servant of the Harbour Board. The Harbour Board contend that, although the plaintiff was in law their general servant, his services at the material time had been transferred, pro hac vice, to the United Steel. I agree with Mr. Brabin that this is a pure question of fact to be determined on the whole of the evidence, and is not resolved simply by determining who engaged the plaintiff, and paid his wages, and had the right to dismiss him. The proper test is: "Who has the right at the moment to control the manner of "the execution of the acts of the servant": see *Mersey Docks and Harbour Board* v. *Coggins and Griffiths*.[1] That was a case concerning a crane-driver hired, with his crane, by the Harbour Board to stevedores, where it was held that, notwithstanding an express agreement to the contrary between the parties, the crane-driver remained the general servant of the Harbour Board, because the hirers had no right to control the method of execution of his work, though they could direct him what work he was to do. The onus on the general employers to prove that the services of their general servant were transferred to another is a heavy one; but there may, on the facts, be a great difference between the services of a technical craftsman and those of a labourer: see Lord Uthwatt.[2] Reference is also made to *O'Reilly* v. *Imperial Chemical Industries Ltd.*[3]

What, then, was the position of the plaintiff on the facts? The Workington Harbour and Dock Board was incorporated by Act of Parliament in 1903. They are the legal owners and

* [1952] 2 Q.B. 174; [1952] 1 T.L.R. 630; [1952] 1 All E.R. 597.

† [1953] 2 Q.B. 184; [1953] 2 W.L.R. 1153; [1953] 2 All E.R. 106.

[1] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

[2] [1947] A.C. 1, 22.

[3] [1955] 1 W.L.R. 1155; [1955] 3 All E.R. 382.

occupiers of the docks, railways, locomotives, cranes and other equipment, and they employ as their servants the crane-drivers, engine-drivers, shunters and platelayers, and are responsible for the maintenance of the docks and equipment. The Harbour Board have issued redeemable debenture stock, the whole of which is held by the United Steel Companies Ltd.; and 95 per cent. or more of the cargoes arriving at the Port of Workington, consisting of iron ore, Welsh coal, steel rails and sleepers, are for the United Steel. For the handling of this traffic United Steel Companies Ltd. maintained an office of their shipping department on the Harbour Board's premises. In 1944 one Bridgwater was appointed the manager of United Steel's shipping department, and ran that office. At that time there was, in the same office, a separate clerk and manager of the Harbour Board; but in 1947 Bridgwater took on that position also, so that in one office on the Harbour Board's premises he was both the manager of the shipping department of United Steel and clerk and manager of the Harbour Board, dealing almost exclusively with the United Steel Companies' cargoes.

Before 1943 United Steel were unquestionably the "master "stevedores." Whenever cargoes were discharged, United Steel directly employed the dock labourers, including the plaintiff, and paid their wages. Had this accident occurred before 1943, it would have been quite unarguable that United Steel were not his employers. He was then, without doubt, their general servant. In 1943 the National Dock Labour Corporation (afterwards called the National Dock Labour Board) came into existence, which formed the dockers into a national pool of dock labourers, with certain advantages to the men of guaranteed wages. As part of the machinery for paying wages the National Dock Labour Board insisted upon the various harbour and dock authorities becoming the "registered port transport employers" under the scheme. Accordingly, the Workington Harbour and Dock Board became so registered, and on June 25, 1943, entered into a written agreement with the National Dock Labour Corporation, whereby they each undertook to carry out the dock labour scheme as applied to Cumberland. Under this agreement the Harbour Board undertook to pay to the corporation, on or before each Monday, the total wages earned by the dockers for the week ending the previous Saturday, which the corporation were due to pay to the men the following Thursday. Various other financial arrangements were made for different classes of workers, and the Harbour Board undertook to pay all proper claims for injury sustained by any docker while in their employment. The National Dock Labour Corporation undertook, as agent for the employers, to engage such dock workers as they might request, and pay over to the dockers individually the wages received in bulk from the employers.

I was not shown the National Scheme, but was informed that under it, only the Harbour Board could initiate the special

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machinery for securing the dismissal of a dock worker. Further, it was the Harbour Board who alone had power to negotiate with the Transport and General Workers' Union, as to rates of pay. This change of circumstances in 1943 undoubtedly altered the plaintiff's status. In law he clearly became the general servant of the Harbour Board, and he himself told me that he regarded himself as employed by the Harbour Board. So he was—as general servant; but that does not prevent his services being transferred, pro hac vice, to others, so as to render those others liable to him for their negligence, or liable to third parties for his negligence.

The question is whether the general employers, the Harbour Board, have discharged their onus of proving that the plaintiff was the temporary servant of United Steel to such an extent as to give them the right of controlling the method of carrying out his work, as opposed to merely directing him what work he had to do. As to this the facts are somewhat striking: Although, as between the National Dock Labour Board and the Harbour Board, the Harbour Board were the employers and paid the wages, as between the Harbour Board and United Steel the position was very different. Bridgwater in his dual capacity told me that even after 1943 United Steel remained the master stevedores. Whenever a cargo came in for United Steel he, in his capacity as the manager of their shipping department, inquired from them what wagons they had available, and the number of gangs of dockers they required for unloading. He then, as agent for United Steel, indented for the dock labour required. He summarized this by saying: "When I was giving orders, I do "not merely *think* but I *know*, I was acting as manager of the "shipping department of the United Steel Companies Ltd."

This is, in my view, confirmed by the method of payment of the dockers. Although the Harbour Board were legally liable to pay the men's wages to the National Dock Labour Board, it was the United Steel who put them in funds to do so. And the position of the payment of the dock labourers is particularly striking. Bridgwater rendered two invoices. One was in respect of the specific wages which the Harbour Board were to pay as such to the dock workers and their foreman. The other was in respect of their charge for the cranage and haulage, which charge included the use of cranes and locomotives, as well as the wages of crane-drivers, engine-drivers and shunters. This is a strong indication indeed that, with regard to the dock workers —whose wages were invoiced in specie—United Steel were "master stevedores," whereas with regard to harbour equipment and services the Harbour Board were acting as an ordinary harbour authority.

This view is confirmed when one considers what happened to the remaining 5 per cent. of the cargoes arriving at Workington for other consignees. In such cases the consignees asked the Harbour Board (who they knew were the registered employers

under the National Scheme) to arrange for the dock labour. But the Harbour Board did not invoice to the consignees for the wages to be paid for such labour, but invoiced them to the United Steel as master stevedores, who in turn invoiced over to the other consignees. This is the strongest possible evidence that United Steel were master stevedores, not only for their own cargoes, but for *all* cargoes arriving at the port of Workington.

It is not without significance that the Harbour Board have an employers' liability policy in which these dock labourers are not included, whereas United Steel have a very large global employers' liability policy, in which dock-labourers generally in any ports where their cargoes are handled (including Workington) are included in the schedule for the purpose of fixing their premium. If in fact dockers in the plaintiff's position are not the servants of United Steel, it is odd that no witness was called on their behalf to tell me that it was a mistake that dockers (legally employed by the Harbour Board) should be included in their own policy. And nobody from United Steel ventured to tell me that Bridgwater is wrong in his very strong assertion that in giving orders for dockers, and giving orders to dockers, he was acting as manager of the shipping department of United Steel Companies Ltd.

Mr. Forrest contended that a man's service cannot be transferred to another and his own position changed without his knowledge and consent, and he prays in aid the absence of any contract between United Steel and the National Dock Labour Board. He referred to *Denham* v. *Midland Employers Mutual Assurance*,[4] which, however, turned upon the question of the liability of an insurance company under a policy confined expressly to employees engaged under contracts of service. The judgments of Denning and Romer L.JJ. make it quite clear that, although no liability arose under the policy unless there was a contract of service, that does not prevent the transfer of the use and benefit of the services of a servant to temporary employers, pro hac vice, so as to make them liable to third parties for the servant's negligence, or liable to the servant for their own negligence.

I agree with Mr. Brabin's final observation that if this is not a case of the transfer of the services of a general servant to other employees, pro hac vice, then it is time for the Court of Appeal or House of Lords to say that the doctrine no longer exists. On this overwhelming evidence I have no doubt whatever that at the material time the plaintiff, though legally the general servant of the Harbour Board, was, pro hac vice, the servant of United Steel; and this is no less the case because in practice he was never anything else, when engaged to handle a cargo at Workington Docks. That being the case, the duty to take reasonable care to lay down and enforce a reasonably safe system of work lay fairly and squarely, and in law, on the shoulders of United

[4] [1955] 2 Q.B. 437; [1955] 3 W.L.R. 84; [1955] 2 All E.R. 561.

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Steel, who had full power to direct the method in which the plaintiff carried out his work; and this is no less so where they put him to work on premises of which another legal entity was the owner and occupant. Having failed in that duty, and that being the cause of this disastrous accident, the plaintiff is entitled to judgment against United Steel Companies Ltd. for the sum of £7,550 with costs. There will be judgment for the Workington Harbour and Dock Board, also with costs.

Judgment for the plaintiff against the first defendants.
Judgment for the second defendants.

Solicitors: *Sumner & Singleton, Whitehaven; Noel J. Noble, Barrow-in-Furness; Clutterbuck, Trevenen & Mawson, Carlisle.*

[COURT OF APPEAL.]

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1957
Mar. 7, 8, 11, 12; *Apr.* 11.

Jenkins, Morris and Sellers L.JJ.

* BRIDGES (INSPECTOR OF TAXES) *v.* HEWITT. SAME *v.* BEARSLEY.

Revenue—Income tax—Employment—Voluntary payment—Transfer of shares—Transfer in compliance with wishes of deceased shareholder—Transfer expressed to be in consideration of transferee remaining in service of the company—Whether nature of transfer changed by deed so as to make shares taxable—Schedule E—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 156, *Sch.* 9, *r.* 1.

The business of public company was built up by the work of two of the directors, the secretary and the managing director, but the majority of the shares were held by F. H., who died in 1936. The two directors had understood that F. H. would leave each of them a reasonable number of shares by his will; F. H. did not do this but left all his shares in the company in trust for his wife for life and thereafter to his two sons. The sons felt under a duty to transfer a number of shares to the directors. Nothing was said about the transfers being a reward or remuneration for past services, but deeds of transfer of 8,000 shares to each director were executed in 1945, stating in each case that the transfer was "In "consideration of the covenantee [the director] continuing his "present engagement" with the company "until the expiry of four "years from the date hereof." The transfers were intended to take effect after the death of the widow of F. H., but the shares were in fact transferred to the directors in 1953. The Inspector of Taxes claimed that the shares were taxable under Schedule E for the year 1953–1954 as profits of their office or employment. On appeal:—

Held (Jenkins L.J. dissenting), that the deeds did not of themselves negative the view that the transactions were by way of gift; the shares received by the managing director were not a profit from his office as such, because they were not received by way of remuneration for services rendered as managing director; although they were received while the recipient was managing director, they represented an expression of gratitude or a testimonial for what he had done

before he became a director or managing director. The same considerations applied to the company's secretary and, accordingly, the shares transferred to both directors were not taxable.

Decision of Danckwerts J. [1957] 1 W.L.R. 59; [1956] 3 All E.R. 789 reversed.

APPEALS from Danckwerts J.

Ernest Bearsley and Walter Manning Hewitt were assessed for income tax under Schedule E (as provided for in section 156 of, and the Ninth Schedule to, the Income Tax Act, 1952),[1] for the year 1953–1954 in respect of shares transferred to them. The Commissioners for the Special Purposes of the Income Tax Acts held that the value of the shares did not represent income assessable under Schedule E. The Inspector of Taxes appealed from those decisions.

The case stated in respect of Bearsley so far as material provides:

1. At meetings of the commissioners on December 15, 16 and 17, 1954, Ernest Bearsley appealed against an assessment to income tax, Schedule E, made upon him for the year 1953–1954 in the sum of £50,465.

2. The questions in issue were (a) whether £36,000, the value at July 27, 1953, of 8,000 shares in Meccano Ltd. transferred on that day to Bearsley by the brothers Roland and Douglas Hornby, was income, assessable under Schedule E, from Bearsley's office or employment as managing director of Meccano Ltd.; (b) if the value of the said shares did not represent such income, whether the value of covenants to transfer them made by the Hornby brothers on December 30, 1945, represented such income; (c) if any income was assessable, whether such income was properly assessable for the year 1953–1954.

3. At the same time as the present appeal we heard the appeal of Hewitt against an assessment to income tax, Schedule E, made upon him for the year 1953–1954. The facts in the present appeal do not materially differ from those in Hewitt's appeal.

4. In June, 1908, Meccano Ltd. (hereinafter called "the company") took over a business of constructional and mechanical toy manufacture, which had been begun in the early part of the present century by Frank Hornby. Practically all the shares in the company were allotted to Frank Hornby.

5. Frank Hornby had been greatly helped in building up

[1] Income Tax Act, 1952, s. 156, para. 1 of Sched. E: "Tax under "this Schedule shall be charged in "respect of every public office of "employment. . . ."

Sched. 9, r. 1: "Tax under "Schedule E shall be annually "charged on every person having or "exercising an office or employment "of profit mentioned in Schedule E, "or to whom any annuity, pension "or stipend chargeable under that "Schedule is payable, in respect of "all salaries, fees, wages, per-"quisites or profits whatsoever there-"from for the year of assessment, "after deducting the amount of "duties or other sums payable or "chargeable on the same by virtue "of any Act of Parliament, where "the same have been really and bona "fide paid and borne by the party to "be charged."

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the company's business and in running it, when it had become successfully established, by Bearsley, Hewitt and George Jones.

The careers with the company of these three persons were as follows:—

(*a*) Bearsley joined the business in 1907. He became a director of the company in 1919 and managing director on the works side as from October 1, 1936, under an agreement of February 15, 1937. That agreement was to run for 10 years as from October 1, 1936, and Bearsley undertook that he would not while a director or within three years after ceasing to hold office as director engage in the business of constructional or mechanical toy manufacture. On the expiration of that agreement no fresh service agreement was entered into, but Bearsley continued to carry out his previous duties with the addition of a share of the work previously carried out by Jones. That was provided for by a resolution of a directors' meeting held on October 8, 1946, which also provided for increased remuneration. Bearsley was still acting as director and managing director.

(*b*) Hewitt joined the company as secretary without a service agreement in 1913, becoming a director in 1932. He was appointed secretary as from October 1, 1936, by an agreement dated April 1, 1937, the agreement to run for ten years. That agreement contained a restrictive covenant similar to the one in Bearsley's agreement referred to above. On the expiration of that agreement no fresh service agreement was entered into, but, as in Bearsley's case, Hewitt continued to carry out his previous duties with the addition of a share of the work previously carried out by Jones. That arrangement also was provided for by the above-mentioned resolution of the directors' meeting of October 8, 1946. He ceased to be secretary in January, 1951. In October, 1952, he became ill, and in October, 1953, he resigned his directorship.

(*c*) Jones joined the business in 1908. By the same agreement of February 15, 1937, under which Bearsley had been appointed managing director on the works side of the company's business, Jones was appointed managing director on the marketing and sales side. He became ill in 1945, did not attend the office after October or November, 1945, or render any services after that time, and he died in April, 1949, having remained a director until his death . . .

6. (*a*) During Frank Hornby's life (he died on September 21, 1936) Bearsley, Hewitt and Jones all wished to have a fairly substantial holding of shares in the company. They wanted the shares for reasons of security, and also as giving them a standing with the employees of the company commensurate with their respective important positions; for they were in fact the backbone of the company, had helped Frank Hornby to build up the company's business, and were very largely in their different capacities responsible for its successful running once it had been firmly established.

(*b*) Frank Hornby did from time to time transfer to these three persons comparatively small batches of shares during his lifetime and he had also transferred shares to his two sons . . .; but he did not transfer the number of shares to which these three persons thought they were in justice entitled. The matter had been mentioned by him several times and he had said that he would look after Bearsley and his two colleagues. In the case of Bearsley the discussion at the time usually resulted in some increase in remuneration, which was not what Bearsley wanted; for he was satisfied with his remuneration, and what he wanted was an increased shareholding so that people might know what he was in the company.

(*c*) The relations of all three persons with Frank Hornby were good, and though he was . . . chary of transferring shares to them during his lifetime, they all had the impression that he would leave each of them a reasonable number of shares by his will.

7. Frank Hornby died on September 21, 1936, and by his will he left all his shares in the company in trust for his wife for life and thereafter to his two sons, Roland and Douglas, in equal shares absolutely. Roland and Douglas were already directors of the company, and Roland was appointed chairman soon after his father's death.

Frank Hornby's wife was 76 when he died, and she did not die till October, 1953. . . .

8. Bearsley, Hewitt and Jones were very surprised and disappointed that Frank Hornby had not left them any shares in the company by his will, and they decided to approach the Hornby brothers about the matter; for reasons immaterial to the present case they did not make that approach till 1945. Before doing so Bearsley and Hewitt discussed the matter, and Bearsley said he would ask for a total of 20,000 shares.

9. (*a*) Some time in the last quarter of 1945 Bearsley and Hewitt had a meeting with Roland Hornby, . . .

(*b*) Roland Hornby agreed at once that Bearsley, Hewitt and Jones should have 20,000 shares between them. Roland Hornby's view was that his father had been remiss in not leaving shares by his will to these three persons. Nothing was said suggesting that the shares were to be a reward or remuneration for past services, but Roland Hornby thought the shares should have been left in recognition of the work of these three persons with the company. No condition was suggested that Bearsley and Hewitt should continue in the service of the company (their service agreements were due to expire on September 30, 1946), or that the shares were remuneration.

(*c*) As Roland Hornby held only 12,000 shares and Douglas Hornby only 10,000, it was never contemplated that the Hornby brothers should transfer any of their own shares; it was understood that the shares should come on the death of Frank Hornby's widow from the trust fund in which she had a life interest. . . .

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(*d*) . . . Eventually it was agreed that Bearsley should have 8,000 shares, Hewitt 8,000 and Jones 4,000.

(*e*) Since the arrangement arrived at at this meeting involved that no shares could be transferred to Bearsley, Hewitt and Jones till after the death of Mrs. Frank Hornby, it was left to Hewitt to make arrangements to implement the agreement.

10. (*a*) Hewitt got in touch with his solicitor, Dawson, the senior partner in a firm of Liverpool solicitors, who acted for Bearsley, Hewitt and Jones in the subsequent transaction.

(*b*) Hewitt asked Dawson whether there was any way in which the arrangement arrived at at the meeting referred to in the previous paragraph could be incorporated in some document.

(*c*) Dawson knew Douglas Hornby, who would have to transfer some shares under the above-mentioned arrangement, quite well, and considered him rather an erratic person; and apart from this personal knowledge he considered that any document embodying the arrangement should be made as binding on the Hornby brothers as possible. It was also Hewitt's wish that the Hornby brothers should be bound as strongly as possible.

(*d*) Dawson had the idea firmly fixed in his mind that it was always a good thing to have a consideration in a deed, even though the transaction was a voluntary disposition. With this idea in mind he drafted a document which expressed a consideration moving from the covenantees (Bearsley, Hewitt and Jones) as follows:

"In consideration of the covenantee continuing his present "engagement with Meccano Ltd. until the expiry of four years "from the date hereof. . . ."

The idea of inserting a consideration in the document was entirely Dawson's. The reference to the expiry of four years was due to a misinterpretation of the restrictive covenant in the service agreements of Bearsley, Hewitt and Jones (see paragraph 5 hereof).

(*e*) Dawson's draft was sent to the solicitors acting for the Hornby brothers; these solicitors returned the draft with certain alterations.

(*f*) A copy of this draft showing the alterations made by the solicitors acting for the Hornby brothers is annexed hereto, marked "D."

(*g*) As appears from our decision, we consider that the evidence contained in subparagraphs (*d*) to (*f*) of this paragraph was inadmissible.

11. On December 30, 1945, deeds of covenant were entered into as follows: (a) (1) Between Roland Hornby and Bearsley and (2) Roland Hornby and Hewitt, whereby Roland Hornby covenanted to transfer 4,000 shares each to Bearsley and Hewitt within three months of the death of Mrs. Frank Hornby. The consideration moving from the covenantees was expressed to be their continuing in their present engagements with the company for four years. (b) Between Roland Hornby and Jones in similar

terms, except that Roland Hornby covenanted to transfer 2,000 shares in the company, and the consideration moving from Jones was his continuing his present engagement with the company for six months. (c) Three deeds of covenant by Douglas Hornby in terms the same as those referred to in (a) and (b) of this paragraph. (d) All the above deeds were executed by Roland and Douglas Hornby respectively, and counterparts were signed by Bearsley, Hewitt and Jones respectively.

12. (a) Hewitt became ill in October, 1952. The company had only a small pension scheme and Hewitt was maintaining his three sisters. He became apprehensive as to his financial position and pressed for the transfer of the shares without waiting for the death of Mrs. Frank Hornby. (b) On July 27, 1953, although Mrs. Frank Hornby was still alive, all the shares which Roland and Douglas Hornby had by the deeds of covenant of December 30, 1945, covenanted to transfer after her death, were transferred to Bearsley, and (c) Jones having died in April, 1949, his shares were transferred to his executors. . . .

The commissioners decided that neither the value of the shares nor the value of the covenants to transfer them represented income assessable on Bearsley under Schedule E.

The deed of covenant made on December 30, 1945, between Roland Hornby and Ernest Bearsley (thereafter called the "covenantor" and "covenantee" respectively), there were the following recitals: "Whereas the covenantor now holds ordinary "shares in Meccano Ltd. in excess of 4,000 and under the will of "his deceased father Frank Hornby will on the death of his "mother Clara Hornby become absolutely entitled to further "ordinary shares in the said company. And whereas the "covenantor desired to mark his appreciation of the past services "of the covenantee in the employment of the said company and "also desires that the covenantee shall remain in the employ-"ment of the said company for a certain period."

Clause 1 of the deed was as follows: "1. In consideration "of the covenantee continuing his present engagement with "Meccano Ltd. until the expiry of four years from the date "hereof the covenantor for himself and his legal personal repre-"sentatives hereby covenants with the covenantee that he the "covenantor will after the date of the death of the said Clara "Hornby and within three months after such date transfer and "assign to the covenantee absolutely and free from any lien "charge or other incumbrance and without any payment there-"for by the covenantee 4,000 Ordinary Shares in Meccano Ltd. "or the equivalent thereof if the capital be increased and will "execute in due form a written transfer in respect of such shares "sufficient to vest the full equitable title to such shares in the "covenantee and will use his best endeavours to procure that "the covenantee shall be registered as the holder of such shares "in the register of members of the said company."

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By clause 2 the covenant bound the covenantor's legal personal representatives and required them to assume liability for the death duties (if any) in respect of the shares.

By clause 3: "If the covenantee shall die before he has "become registered as the holder of the said 4,000 shares then "his legal personal representative shall be entitled to the benefit "of the covenants and agreements hereinbefore contained."

Clause 4 provided in effect for liquidated damages payable by the covenantor in the event of performance of the covenant being prevented by the sale of shares by the covenantor or the trustees of Frank Hornby's will.

The case stated in respect of Hewitt contained the additional statement that when the payment was made to him in 1953, he had ceased to be secretary of the company, and the payment was therefore not assessable under Schedule E for the year 1953–1954. The findings and decision of the commissioners were otherwise identical with those in the case of Bearsley.

The Crown appealed in both cases.

Danckwerts J. held that the transfer of the shares would, apart from the terms of the deeds, have been an act of bounty, but the deeds by introducing the element of consideration had altered the nature of the transaction, and the acquisition of the shares was therefore linked with the services of the directors as officers of the company and taxable for years 1953–1954 as a profit of their office.

Hewitt and Bearsley appealed.

N. E. Mustoe Q.C. and *H. H. Monroe* for the appellant taxpayers, Hewitt and Bearsley.

F. N. Bucher Q.C. and *Sir Reginald Hills* for the Crown.

The following cases, in addition to those referred to in the judgments, were cited in argument: *Chibbett* v. *Robinson* [2]; *Reade* v. *Brearley* [3]; *Tilley* v. *Wales* [4]; *Edwards* v. *Bairstow* [5]; *Wilson* v. *Nicholson, Sons & Daniels Ltd.* [6]; *Leeland* v. *Boarland* [7]; *Rogers* v. *Hadley* [8]; *Turner* v. *Forwood* [9]; *Charles Hunt Ltd.* v. *Palmer* [10]; *Brocklesby* v. *Merricks* [11]; *Heasman* v. *Jordan* [12]; *Henry* v. *Foster* [13]; *Haythornthwaite & Sons Ltd.*

[2] (1924) 9 T.C. 48.
[3] (1933) 17 T.C. 687.
[4] [1943] A.C. 386; 59 T.L.R. 178; [1943] 1 All E.R. 280; sub nom. *Wales* v. *Tilley*, 25 T.C. 136.
[5] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48; 36 T.C. 207.
[6] [1943] 2 All E.R. 732; 25 T.C. 473.
[7] [1946] 1 All E.R. 13; 27 T.C. 71.
[8] (1863) 8 H. & C. 227.
[9] [1951] W.N. 189; [1951] 1 All E.R. 746.
[10] [1931] 2 Ch. 287.
[11] (1934) 18 T.C. 576.
[12] [1954] Ch. 744; [1954] 3 W.L.R. 432; [1954] 3 All E.R. 101; 35 T.C. 518.
[13] (1932) 16 T.C. 605.

v. *Kelly*[14]; *Stainer's Executors* v. *Purchase*[15]; and *Allen* v. *Trehearne*.[16]

Cur. adv. vult.

April 11. The following judgments were read:

JENKINS L.J. stated the facts and continued: I propose in the first instance to consider the question of tax liability on the footing that if there was any liability to tax at all the taxable receipt consisted of the value on July 27, 1953, of the shares transferred on that date to the appellants respectively (namely, £36,000 in each case), which accordingly constituted a receipt of the year 1953–1954; putting aside for later consideration the appellants' alternative argument to the effect that if, contrary to their main contention, there was any liability to tax at all, the taxable receipt consisted of the value as at the date of the deeds of covenant (namely, December 30, 1945) of the benefits conferred on them respectively by those deeds, which would be a receipt of the year 1945–1946 and accordingly out of time for the purposes of assessment; and also the special contention put forward on behalf of Hewitt to the effect that the relevant office in his case was that of secretary which he ceased to hold in January, 1951, whereas the shares were not transferred until July 27, 1953.

The statutory provisions relevant to the two appeals are to be found in section 156 of, and the Ninth Schedule to, the Income Tax Act, 1952. [His Lordship read the relevant parts of paragraph 1 of Schedule E as set out in section 156, and rule 1 of the Rules applicable to Schedule E as set out in the Ninth Schedule, and continued:] These provisions do not materially differ from their predecessors in previous income tax legislation. It is clear that the appellants are taxable under Schedule E in respect of all profits from their respective offices or employments under the company. The question is whether the benefits they received in the shape of the value of the shares transferred to them respectively were profits from those offices or employments within the meaning of the Act.

We were referred, as was the judge, to many of the numerous authorities in which the courts, dealing with the particular facts of particular cases, have held benefits received by holders of offices or employments to be or not to be profits arising therefrom so as to attract or, as the case may be, escape liability to tax under Schedule E.

The following much quoted passages state the general principles to be applied:

[14] (1927) 11 T.C. 657.

[15] [1952] A.C. 280; sub nom. *Gospel* v. *Purchase* [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071; sub nom. *Purchase* v. *Stainer's Executors*, 32 T.C. 367.

[16] [1938] 2 K.B. 464; 54 T.L.R. 826; [1938] 2 All E.R. 698; 22 T.C. 15.

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In *Herbert* v. *McQuade* [1] (the Clergy Sustentation Fund case) Henn Collins M.R. said: "Now that judgment, whether or not "the particular facts justified it, is certainly an affirmation of a "principle of law that a payment may be liable to income tax "although it is voluntary on the part of the persons who made "it, and that the test is whether, from the standpoint of the "person who receives it, it accrues to him in virtue of his office; "if it does, it does not matter whether it was voluntary or "whether it was compulsory on the part of the persons who "paid it. That seems to me to be the test; and if we once get "to this—that the money has come to, or accrued to, a person "by virtue of his office—it seems to me that the liability to "income tax is not negatived merely by reason of the fact that "there was no legal obligation on the part of the persons who "contributed the money to pay it."

Stirling L.J. said [2]: "I think that a profit accrues by reason "of an office when it comes to the holder of an office as such— "in that capacity—and without the fulfilment of any further or "other condition on his part; and what we have to determine is "whether the sum in question does so come to the holder of "this office."

In *Blakiston* v. *Cooper* [3] (the Easter offerings case), Lord Loreburn L.C. said this: "In my opinion, where a sum of "money is given to an incumbent substantially in respect of his "services as incumbent, it accrues to him by reason of his office. "Here the sum of money was given in respect of those services. "Had it been a gift of an exceptional kind, such as a testimonial, "or a contribution for a specific purpose, as to provide for a "holiday, or a subscription peculiarly due to the personal "qualities of the particular clergyman, it might not have been "a voluntary payment for services, but a mere present."

In *Seymour* v. *Reed* [4] (the cricketer's benefit case), Lord Cave L.C. said, after referring to the relevant statutory provisions: "These words and the corresponding expressions contained in "the earlier statutes (which were not materially different) have "been the subject of judicial interpretation in cases which have "been cited to your Lordships; and it must now (I think) be "taken as settled that they include all payments made to the "holder of an office or employment as such, that is to say, by "way of remuneration for his services, even though such pay- "ments may be voluntary, but that they do not include a mere "gift or present (such as a testimonial) which is made to him "on personal grounds and not by way of payment for his "services. The question to be answered is, as Rowlatt J. put "it: 'Is it in the end a personal gift or is it remuneration?' "If the latter, it is subject to the tax; if the former, it is not."

[1] [1902] 2 K.B. 631, 649; 18 T.L.R. 728; 4 T.C. 489.

[2] [1902] 2 K.B. 631, 650.

[3] [1909] A.C. 104, 107; 25 T.L.R. 164; sub nom. *Cooper* v. *Blakiston*, 5 T.C. 347.

[4] [1927] A.C. 554, 559; 43 T.L.R. 584; 11 T.C. 625.

I would also refer to the recent case in this court, *Moorhouse* v. *Dooland*,[5] which may be said to be of the same order as the earlier cases above referred to, inasmuch as it concerned the liability to tax of the proceeds of collections on the ground which a Lancashire League professional cricketer was entitled to have made on his behalf by the terms of his contract with the club employing him and the rules of the league. All these cases, save *Seymour* v. *Reed*,[6] went against the taxpayer on their particular facts.

I come next to *Cowan* v. *Seymour*,[7] which is somewhat nearer the present case, in that it concerns a sum of money paid by the shareholders of a company to its secretary and liquidator, the company being in the final stages of liquidation, and the sum in question being the surplus available for distribution amongst the members. Atkin L.J. quoted the passages from Henn Collins M.R.'s judgment in *Herbert* v, *McQuade*[8] and Lord Loreburn's speech in *Blakiston* v. *Cooper*,[9] to which I have already referred, and continued[10]: "So I should say the question here is whether "if a sum of money is given to the secretary or liquidator sub-"stantially in respect of his services as secretary or liquidator, "it accrues to him by reason of his office. The question there-"fore in this case is whether this payment was made to the "appellant in respect of his services as secretary or liquidator."

Younger L.J. said[11]: "And in the same connexion it is to "be observed, as has already been pointed out by the Master of "the Rolls, that this payment was not made by the natural "paymaster, the company, under which the so-called office of "profit was held, and moreover it is, as I think, notwithstanding "Mr. Edwardes Jones' argument, clearly not a perquisite which "might very naturally be paid by somebody else. That circum-"stance is, of course, not in any way conclusive at least in "connexion with an office still held, for which I would refer to "the observations in *Herbert* v. *McQuade*[12] already read by "Atkin L.J. But it may be a very relevant circumstance, and "when it is remembered that this payment, if made by the "company, the natural paymaster at the time when it was "made, would have been ultra vires and illegal, and that the "payment can only be justified as one by the individual contri-"butories out of their own moneys, the circumstance lends "further weight to the view that this was not a profit by reason "of the office at all, but was really a gift by persons in the "position of beneficiaries who had appreciated and it may be "had benefited by the personal exertions of the holder of the "office while he held it."

[5] [1955] Ch. 284; [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93; 36 T.C. 1, 12.
[6] [1927] A.C. 554.
[7] [1920] 1 K.B. 500; 36 T.L.R. 155; 7 T.C. 372.
[8] [1902] 2 K.B. 631, 649.
[9] [1909] A.C. 104, 107.
[10] [1920] 1 K.B. 512.
[11] Ibid. 516.
[12] [1902] 2 K.B. 631, 649.

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In the result, the claim to tax on the sum provided by the shareholders was rejected. Great weight was attached to the fact that the office had ceased when the payment was made, and some to the circumstance that the amount in question was provided by the shareholders individually and not by the company, "the natural paymaster." But the case does seem to me to show quite clearly that a benefit conferred on the holder of an office or employment under a company may be a profit of the office or employment for tax purposes although conferred by shareholders of the company and not by the company itself.

Cameron v. *Prendergast* [13] provides authority for the proposition that a lump sum paid by a company to the holder of an office under the company in consideration of a promise on his part to serve the company in that office even for an unspecified period which might be a matter only of days is in the hands of the recipient a profit from his office and taxable accordingly.

Salmon v. *Weight* [14] provides authority for the proposition that money's worth, such as a right conferred by a company on a salaried director to subscribe at par for shares in the company of a market value greater than par, will if conferred in respect of the recipient's office constitute a profit of the office for tax purposes.

If the present appeals fall to be judged simply by reference to the deeds of covenant, then in my judgment the terms of those deeds are fatal to the appellants. Under the deeds the appellants became entitled to receive from the two Hornby sons money's worth in the shape of the shares to be transferred on their mother's death to the appellants respectively, and in each of the deeds this benefit was expressly stated to be conferred "in consideration of the covenantee continuing in his present "engagement with Meccano Ltd. until the expiry of four years "from the date hereof."

As I have said, it is clear from *Cowan* v. *Seymour* [15] that a benefit provided for the holder of an office or employment under a company may be a profit of that office or employment although provided by shareholders and not by the company itself, the "natural paymaster." An actual example of such a case is to be found in *Patrick* v. *Burrows* [16]; and although where the character of the benefit is a matter of inference the circumstance that it was so provided may tend against the conclusion that it was in the nature of remuneration, that circumstance cannot displace that conclusion where the benefit is expressly described in a formal document as being in consideration of the recipient continuing to serve the company in the office or employment

[13] [1940] A.C. 549; 56 T.L.R. 499; [1940] 2 All E.R. 35; sub nom. *Prendergast* v. *Cameron*, 23 T.C. 122.

[14] (1935) 51 T.L.R. 333; sub nom. *Weight* v. *Salmon*, 19 T.C. 174.

[15] [1920] 1 K.B. 500.

[16] (1954) 35 T.C. 138.

which he holds, which, as appears from *Cameron* v. *Prendergast*,[17] stamps it unequivocally as remuneration.

The special commissioners found it possible to hold that even if the matter was to be decided by reference to the deeds alone nevertheless the shares were not remuneration provided for by the appellants in respect of their offices or employment with the company.

I find it impossible to accept that view.

Mr. Mustoe, for the appellants, contended that the whole history of the matter must be examined and the effect of the deeds must be considered in the light of the circumstances and events leading up to and surrounding their execution.

Mr. Bucher, for the Crown, very fairly admitted that the matter could not be determined by reference to the deeds alone, but he claimed that when all the surrounding circumstances were looked at the Crown must still be entitled to succeed.

Certain evidence adduced on behalf of the appellants was rejected by the special commissioners as inadmissible. This was evidence directed to explaining the reasons for the insertion in the deeds of the consideration moving from the appellants in the shape of their continuing in their "present engagements" with the company for four years.

Mr. Bucher submitted that the special commissioners were right in rejecting this direct evidence of intention. Mr. Mustoe, while he did not go so far as to claim it was admissible for the purpose of nullifying the deeds of covenant as merely fictitious or colourable documents, said (in effect) that it could be used to show that the consideration consisting of the appellants' continuing their present engagements with the company was never an essential element in the transaction but was introduced, as it were, by a side-wind, not as a stipulation which the Hornby brothers had propounded or insisted on as a condition of their promise to transfer the shares on their mother's death, but as an embellishment recommended to the appellants by their own solicitor because he considerered that its inclusion would strengthen the appellants' position in the event of the Hornby brothers being disposed to change their minds.

Once this circumstance is taken into consideration, then, according to Mr. Mustoe's submission, the transaction reveals itself as being substantially a matter of gift and not a matter of remuneration: see *per* Lord Loreburn L.C. in *Blakiston* v. *Cooper*[18] and Atkin L.J. in *Cowan* v. *Seymour*.[19] This involves the assumption, in all probability well founded, that the Hornby brothers would have transferred the shares whether the consideration moving from the appellants had been inserted in the deeds of covenant or not, and for that matter would have done so if the appellants had been content simply to rely on their oral undertaking, their substantial motive being to make good Frank

[17] [1940] A.C. 549.
[18] [1909] A.C. 104, 107.
[19] [1920] 1 K.B. 500, 512.

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Hornby's testamentary shortcomings by according to the appellants the tangible recognition of their loyal and efficient service which Frank Hornby had been under a moral obligation to accord to them by his will.

Having regard to the principles stated by the House of Lords in *Inland Revenue Commissioners* v. *Duke of Westminster*,[20] which was in a sense the converse of the present case, inasmuch as the attempt to go behind the deed was there made by the Crown, I think Mr. Bucher is well justified in his support of the commissioners' view on this point. But Mr. Bucher goes on to submit that this evidence if admitted affords no assistance to the appellants, and here again I find myself in agreement with him.

If in response to the appellants' representations Frank Hornby had in his lifetime transferred to each of them 8,000 shares in the company, it may be that such shares could, in all the circumstances of the case, and on the principles laid down by the authorities to which I have referred, properly have been held to have been given by Frank Hornby and received by the appellants as a present made in token of their long and successful business association with him, and not as remuneration.

If Frank Hornby had given the appellants substantial holdings of shares in the company by his will, as in effect he had promised to do, it seems clear that such shares would have come to the appellants purely by an act of testamentary bounty on the part of Frank Hornby wholly removed from the sphere of remuneration.

The result would, I think, in all probability have been the same if the appellants had rested content with the Hornby brothers' oral and purely voluntary promise to transfer to each of them 8,000 shares in the company on Mrs. Hornby's death, and the shares had been transferred simply by way of performance of that promise. If the transaction had taken this form, then I think there would, on the facts found, have been strong support for the view that the Hornby brothers were by a pure act of bounty making good their father's omission to leave the appellants by will the shares which he was under a moral obligation to leave them having regard to the part they had taken in the building up of the company's business, and to his promise, or what the appellants took as amounting to a promise by him, to provide them with substantial holdings of shares in this way. It would then, as I think, hardly have been possible to maintain that the shares were given by the Hornby brothers or received by the appellants as remuneration and not as a mere present.

But the appellants did not rest content with the simple promise of the Hornby brothers, and in the result the deeds of covenant were brought into existence. As I have already indicated, I think these deeds are on the face of them fatal to the appellants' case; and even if all questions of admissibility are

[20] [1936] A.C. 1; 51 T.L.R. 467; sub nom. *Westminster (Duke)* v. *I. R. C.*, 19 T.C. 490.

resolved in their favour I can find nothing in the extrinsic evidence to displace that conclusion.

The evidence, admissible or inadmissible, directed to explaining how it was that the consideration moving from the appellants in the shape of their continuing their "present engagements" with the company came to be included in the deeds of covenant as executed is thus summarized in paragraph 10 of the case stated with respect to Bearsley.

[His Lordship read paragraph 10 of the case, and continued:] Treating the whole of this evidence as admissible, I cannot see that it comes to any more than this:

The Hornby brothers were ready and willing, in the circumstances stated at length above, to transfer the shares to the appellants on Mrs. Hornby's death purely as a matter of bounty without any consideration or condition with respect to the appellants continuing in the service of the company. The appellants on Mr. Dawson's advice conceived that it would be more advantageous to them, and put them in a stronger position, if instead of their taking the shares purely as a gift, and relying simply on the Hornby brothers' voluntary promise to transfer them on Mrs. Hornby's death, the transaction was carried out as a transaction for valuable consideration under which the Hornby brothers would transfer the shares to them in consideration of their continuing their "present engagements" with the company. Accordingly, Mr. Dawson prepared his draft deed of covenant in this form, the submission of which to the Hornby brothers' solicitors was tantamount to a request that the transaction should be carried out in this way. The approval by those solicitors of the draft submitted to them with the alterations to which I have referred, the acceptance of such alterations by Mr. Dawson, and the execution by the Hornby brothers of the deeds of covenant in the form of the draft as altered, signified that the Hornby brothers acceded to the appellants' request, and bound the Hornby brothers to carry out the transaction on the terms stated in the deeds as executed. There is no reason to suppose that the Hornby brothers would not have been quite content to give purely voluntary covenants, or that the inclusion of the consideration moving from the appellants in the deeds as executed was a matter to which they attached any importance. It can, I think, fairly be assumed that they regarded themselves simply as carrying out the moral obligation they felt themselves to be under. So far as the appellants were concerned, they no doubt regarded the deeds simply as securing to them on Mrs. Hornby's death the shares which they conceived to be morally their due. The fact remains that under Mr. Dawson's advice the appellants chose to take the shares not simply as a gift but on the terms of the deeds, based as they were on the draft propounded by Mr. Dawson. The appellants (in effect) asked that the benefit should take that form, and the Hornby brothers gave it to them in that form. Given in that form, and accepted in

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that form, it seems to me that by the plain terms of the deeds it must necessarily be held to have been given to the appellants, and accepted by them, in their capacity of managing director in the case of Bearsley, and of director and secretary in the case of Hewitt, and in consideration of services to be rendered by them to the company in those respective capacities. To argue, as did Mr. Mustoe, that the transaction was substantially a matter of bounty in which the consideration expressed in the deeds played an insignificant and indeed nominal part seems to be to confound the motive for conferring the benefit with the character of the benefit conferred.

I do not think the mistake as to the effect of the restrictive covenants in the service agreements which is said to have led to the selection of four years as the period for which the appellants were to continue in their "present engagements" with the company can affect the result. I confess I am not clear as to the precise nature of the mistake. The position was that at the date of the deeds the service agreements had only about nine months to run, and the restrictive covenants were in the cases of Bearsley and Jones for the period of three years from their respectively ceasing to be directors of the company, and in the case of Hewitt for the period of three years from his ceasing to be secretary. The suggestion, apparently, is that the service agreements were mistakenly regarded as continuing until the expiration of the periods of restriction imposed by the restrictive covenants. That would make approximately three years from the dates of the deeds of covenant. It is to be noted, however, that no such mistake can have led to the fixing of six months as the period of continuance in his "present engage-"ment" stipulated in the deeds of covenant in favour of Jones, which was no doubt attributable to the state of his health. I think all one can do in the circumstances is to take the consideration to be as expressed in the deeds as they stand. The "mistake," whatever its exact form, only had the effect of making the consideration moving from the covenantees more valuable in the case of the appellants than the parties may have thought.

Nor, in my opinion, is the result altered by the circumstance that in the end the shares were in fact transferred on July 27, 1953, when Mrs. Hornby was still alive. These transfers were, I think, clearly made in pursuance of and in satisfaction of the Hornby brothers' obligation under the deeds of covenant and not as a new departure.

Although no new service agreements were entered into after the expiration of the ten-year agreements on September 30, 1946, I think that having regard to the minutes of the board meeting of October 8–11, 1946, the appellants must be taken to have duly continued their "present engagements" with the company for the stipulated period of four years from the date of the deeds of covenant.

For these reasons I am of opinion that the judge came to a right conclusion on the main question involved in these appeals.

As to the alternative contention to the effect that the proper subject of assessment consisted of the value of the rights acquired by the appellants under the deeds of covenant in December, 1945, which constituted income of the appellants for the financial year 1945–1946: on the footing that the appellants fail in their main contention the position was that by the deeds of covenant the Hornby brothers covenanted that, in consideration of the appellants continuing their respective engagements with the company for four years from the date of the deeds, the Hornby brothers would transfer to them on the death of Mrs. Hornby the specified number of shares in the company by way of remuneration for the services rendered by them to the company during that period. The time at which the appellants were to receive this additional remuneration for their services to the company for this further period was thus fixed by the terms of the bargain as the death of Mrs. Hornby, or, to be strictly accurate, the expiration of three months from her death. In fact, the appellants duly completed their four years' further service in Mrs. Hornby's lifetime, and the shares were transferred to them shortly before her death, although the Hornby brothers would have been entitled to withhold such transfer until three months after the happening of that event. I see no reason for treating the stipulated remuneration, that is, the shares, as received or receivable on any earlier date than that on which the shares were actually transferred, which, as I have said, was in fact earlier than the date on which the Hornby brothers were obliged under the deeds of covenant to transfer the shares to the appellants. In *Salmon* v. *Weight*[21] the benefit held to constitute remuneration consisted of an immediate right to subscribe at par for shares worth in the market substantially more than par. In *Tait* v. *Smith*[22] it was held that the taxpayer was wrongly assessed for the year 1949–1950 in respect of the surrender value of an endowment policy on his life which, under the terms of his service he had become entitled to have immediately transferred to him in 1946. I do not think that either of these cases, on which Mr. Mustoe relied, supports his contention that in the present case the taxable profit consisted of the value of the rights conferred by the deeds of covenant at the date of those deeds, and not of the value of the shares at the date when they were transferred. On this point I need say nothing further beyond expressing my complete agreement with the reasoning and conclusions of the judge.

A further point taken below to the effect that the value of the shares should be spread for tax purposes over the four years during which the appellants were respectively to continue their engagements with the company was, as I think rightly, rejected by the judge, and Mr. Mustoe has not pursued it in this court.

[21] 51 T.L.R. 333. [22] (1954) 35 T.C. 79.

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As to the special point taken in Hewitt's case to the effect that as Hewitt ceased to hold the office of secretary to the company in January, 1951, whereas the shares were not transferred until July 27, 1953: on this point, which does not appear to have been dealt with by the judge, I see no reason to differ from the special commissioners' conclusion to the effect that the engagement referred to in the deeds of covenant with him was not exclusively his engagement as secretary. He continued to hold for the requisite period of four years the combined offices of director and secretary which he held at the date of the deeds of covenant with him, and after he ceased to hold office as secretary he continued in office as a director of the company and was still in that office at the date when the shares were transferred. Accordingly, I do not think Hewitt can escape liability to tax on the ground that at the date of the transfer he had ceased to hold any relevant office under the company.

Finally, I think it is plain that the special commissioners' decision in favour of the appellants was a decision on a mixed question of fact and law and, therefore, open to appeal. This is sufficiently demonstrated by the large number of cases in which appeals on similar questions have been entertained.

It is not without regret that I find myself constrained to reach a conclusion adverse to the appellants, as it may well be that if the transaction had been differently carried out the appellants could have received the same benefits free of the heavy inroads which the law, as I understand it, now requires to be made upon them for tax. But the effect of the deeds appears to me to be inescapable.

For my part, I must accordingly hold that the judge was right in the conclusion to which he came, and that the appeals fail and should be dismissed. But a different conclusion has been reached by both my brethren, and the result will therefore be as indicated in the judgments they are about to deliver.

Morris L.J. The appellant, Bearsley (with whose appeal I propose first to deal), was assessed under Schedule E for the year 1953–1954 because he was managing director of Meccano Ltd. Having that office or employment he was chargeable "in "respect of all salaries, fees, wages, perquisites or profits whatso-"ever therefrom for the year of assessment." When on July 27, 1953, the brothers Roland and Douglas Hornby transferred shares in Meccano Ltd. worth £36,000 to Bearsley, did Bearsley become chargeable to income tax for the year 1953–1954 under Schedule E on £36,000 so as to make him assessable for that year in the sum of £50,465? That is the question raised in his appeal. It is not suggested that Bearsley received these shares worth £36,000 as salary for his services as managing director: nor as fees: nor as wages. The Crown do not invoke the word "perquisites." The Crown case is founded upon the words "profits whatsoever therefrom for the year of assessment." It

is said, therefore, that the result of the transfer of shares from the two brothers was that Bearsley received £36,000 from his office as managing director for the year 1953–1954.

The word "therefrom" must be construed in its context. A profit accruing by reason of holding an office or employment may be a profit "therefrom." This may be so even though some payment which is received is not made by the employer of the recipient, and even though the payment is made voluntarily. The profit need not necessarily be in the form of a cash payment. The conception which is introduced by the word "therefrom" is that some taxable remuneration may accrue to a person by reason of his having or exercising an office or employment of profit. The reference is to what is received by the holder of an office or employment in that capacity: to the holder of the office or employment as such. This was pointed out by Lord Cave in his speech in *Seymour* v. *Reed*.[23] Lord Cave L.C. said[23]: "These words and the corresponding expressions contained in "the earlier statutes (which were not materially different) have "been the subject of judicial interpretation in cases which have "been cited to your Lordships; and it must now (I think) be "taken as settled that they include all payments made to the "holder of an office or employment as such, that is to say, by "way of remuneration for his services, even though such pay-"ments may be voluntary, but that they do not include a mere "gift or present (such as a testimonial) which is made to him on "personal grounds and not by way of payment for his services. "The question to be answered is, as Rowlatt J. put it: 'Is it in "'the end a personal gift or is it remuneration?' If the latter, "it is subject to the tax; if the former, it is not."

In his speech in the same case, Lord Phillimore, having referred to some of the authorities, said[24]: "My Lords, I do not "feel compelled by any of these authorities to hold that an "employer cannot make a solitary gift to his employee without "rendering the gift liable to taxation under Schedule E. Nor do "I think it matters that the gift is made during the period of "service and not after its termination, or that it is made in "respect of good, faithful and valuable service."

It does not seem to me that the words and meaning of the deeds of covenant can be affected or altered by any evidence as to how the wording of the deeds of covenant came about. It is not submitted on behalf of the appellants that the consideration stated in the deeds should be regarded as either fictitious or illusory. I agree with Danckwerts J. that evidence is not admissible to contradict the plain terms of the deeds by attempting to show that the intentions of the parties were to give a meaning to the provisions of the deeds contrary to the words which the deeds plainly contain.

If the evidence which the commissioners regarded as admissible was received and regarded only to the extent that it threw

[23] [1927] A.C. 554, 559. [24] Ibid. 571.

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light on the question as to whether the appellants received remuneration for services, then I consider that there was no objection to it.

But I consider that the case must be approached on the basis that the deeds of covenant fully mean what they state.

When, therefore, Bearsley received shares worth £36,000 in July, 1953, while he was still managing director, did he receive them as a profit from his office? Was he receiving remuneration for his services or was he receiving a personal gift?

The deeds of covenant show that the Hornby brothers had two desires in December, 1945. First, they wanted to show appreciation of Bearsley's past services in the employment of the company. Those services extended in the first place over the period of twelve years from 1907 to 1919. That was before Bearsley became a director. From 1919 Bearsley was a director and from 1936 he was a managing director. Secondly, the desire was that Bearsley would continue his then existing engagement with the company for four years from December 30, 1945. Bearsley could only do so if the company wanted him to do so. The company were not parties to the deed of covenant. If Bearsley continued to hold office as managing director after October 1, 1946 (when his ten-year contract was due to expire) then he would be paid by the company for his services in that office: he would be paid such sums (and they were considerable) as would be arranged by him with the company.

The continuing in office was made the consideration for a legally enforceable covenant to transfer the shares. It need not now be considered what would have been the position if Bearsley had been willing to continue to serve the company but the company had not required his services. In fact, he continued to serve and he was still serving when he received the shares. He received them before he was actually entitled to receive them under the covenant, for he received them while Mrs. Clara Hornby was still alive.

Once Bearsley had continued to serve the company for the four-year period he became entitled to the shares on the death of Mrs. Clara Hornby. After serving for the four-year period he might then have retired—but he would still have been entitled to the shares. His receipt of the shares in July, 1953, had nothing to do with his employment as managing director at that time. If the shares had been transferred strictly in accordance with the deeds the transfer would not have been until within three months after October, 1953, when Mrs. Clara Hornby died. But the right to the shares would then have arisen whether Bearsley had already retired or not. If he had already retired from the company he would not have been assessable under Schedule E. He was, however, still in office, and he received what was worth £36,000. He certainly did not receive the shares in respect of any services rendered during that year. Nor did he receive them in respect of any services rendered since

the end of the four-year period after the deeds of covenant. He would not have received them but for what he had done in the past, that is, (a) in all the years before 1945, and (b) in the four years after December 30, 1945. But the question which arises is whether he received them as remuneration or as a personal gift. In one sense Bearsley received the shares by reason of his office. Had he not held the office he would not have had them. But that merely shows that he would not have had the shares (either as remuneration or as a gift) if he had not given many years of service to the company down to December 30, 1949. The mere fact that the arrangement between the Hornby brothers and Bearsley resulted in the latter having a legally enforceable right does not, in my judgment, necessarily show that Bearsley was to receive remuneration so as to be chargeable under Schedule E. The Hornby brothers made it a condition of their promise that Bearsley would go on serving the company for four years. They did not exact from him a promise that he would continue to serve the company. I cannot think that if Bearsley had decided to retire from the company within the period of four years from December 30, 1945, he would have been in breach of contract vis-à-vis the brothers Hornby. It was for him and the company to decide whether he should continue. Bearsley could not, therefore, contract with the Hornby brothers in positive terms that he would serve the company. But the Hornby brothers in effect said: "Because of your good work in the past we will at some uncer-" tain future date transfer to you some shares that will come to "us provided that you go on serving the company for four "years." It does not seem to me that the promise that they made has the attributes of remuneration, or that it lacks the features of a personal gift. It was a personal gift which was to be made provided that further remunerated service was for a period rendered to a limited company that would pay full remuneration for the value of such service.

The shares were not, therefore, to be transferred as payment for services to be rendered in the four-year period. Indeed, the deeds recite that one part of the desire of the covenantors was to mark their appreciation of Bearsley's past services.

It may be difficult to describe in precisely accurate language the features of payments or benefits received which must attract tax and the features of those which will not. The general distinction as outlined by Lord Cave is between payments made by way of remuneration for services and payments made by way of personal gifts. Yet some payments may seem to have a blend of both these elements. The tip given to the taxi-driver is in one sense a gift: a particular tip may be somewhat above what would normally be expected by the taxi-driver and may reflect a bountiful impulse. Yet all the tips received, including the specially generous one, must be regarded as being by way of remuneration for services. But on the other hand, it seems to me that a payment which has the attributes of being a personal

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gift does not necessarily lose those attributes merely because the gift is in recognition of services, or because the donor agrees to bind himself so as to be compellable at law to make the payment. So it seems to me that the fact that the position in the year 1945 was that Bearsley would only gain his benefit if to his past services he added that of staying the course for four more years does not cause his benefit, when received, to be remuneration for services rather than a gift.

The present case differs entirely from *Cameron* v. *Prendergast*.[25] In that case a director wished to resign, and a letter was written to him asking him not to do so, and he was told that "in consideration of your acceding to this request, the company "will, within 21 days or by such instalments as you will accept, "pay you the sum of £45,000 0s. 0d. and will embody their "undertaking so to do in a formal deed reciting this letter." The director did not send in his resignation, and two weeks later the company executed a deed which annexed the letter and provided that for the consideration referred to in the letter the company agreed to pay the director the sum of £35,000 on the date of the deed and a further £10,000 on March 31 following. It was held that the sum received arose from the office as director and was properly assessable under Schedule E. The sum of £45,000 was the remuneration paid by the company to the director for his services as director. Lord Russell of Killowen put the matter thus[26]: "The question is whether the sum of "£45,000 which was paid to Mr. Cameron was a profit from his "directorship. I feel no doubt, upon the facts of this case, that "it was. It was paid to him in his capacity of a director, and as "a consideration for his agreeing not to cease giving his services "as a director to the company, an agreement which, as Lux-"moore L.J. pointed out, necessarily involves an agreement to "continue to render those services. Money paid as a considera-"tion for such a bargain appears to me clearly a profit from his "directorship."

Lord Romer said[27]: "Nor does it matter that the sum is so "large as to present the appearance of a capital rather than an "income payment. If a company chooses to pay a director's "remuneration in a lump sum it can, no doubt, lawfully do so. "But the sum nevertheless represents income whatever its "amount, and will be taxable as such. Remuneration which, if "paid by instalments over a number of years, would be income, "is income though paid once and for all in a lump sum; just as "much as the capital consideration for a sale (say) of land is "capital even though payable by instalments spread over a "number of years."

The fact that a payment which can properly be regarded as a gift may involve a measure of recognition of faithful service was pointed out by Lord Phillimore in the above cited passage from

[25] [1940] A.C. 549.
[26] Ibid. 560.
[27] Ibid. 563.

Seymour v. *Reed.*[28] The cricketer in that case had given good service; he had earned well of his supporters; he had given pleasure to lovers of the game; he had deserved well of the club whose fortunes he had advanced. But the gate money at his benefit match was held to be a personal gift and not a profit or perquisite arising from his employment. It was his little "nest "egg," as Lord Dunedin[29] called it in his speech, in the course of which he recalled Lord Macnaghten's reminder that income tax is a tax upon income.

The circumstance that a large payment is to be made by someone other than an employer may be a considerable indication, though by no means a conclusive one, that the payment is not by way of remuneration. Remuneration is, as a rule, something that an employer has arranged or contemplated or at least knows about. This is so even though payments may come other than from the employer and may depend upon the liberality of others. In *Moorhouse* v. *Dooland*[30] the contract of employment laid it down in great detail when the cricketer could expect or receive the contents of collecting boxes sent round the cricket field.

Remuneration for services is generally effected by systematic and recurring payments, though this is certainly not always so.

Remuneration has further the element of reward or payment for some specific services rendered.

Where some payment, and particularly some non-recurring payment, is received from someone other than an employer it will probably only have the attributes of remuneration in those classes of cases where it is reasonable to expect that remuneration would come other than from the pocket of an employer. Thus, as pointed out above, the cricketer in *Moorhouse* v. *Dooland*[30] arranged with his employers that for his services he would receive certain amounts in addition to what they paid him direct: those amounts would accrue to him when his performances were sparkling: he could expect the payments and he was entitled to them. The taxi driver in *Calvert* v. *Wainwright*[31] was in the employment of a limited company. He received a definite wage, and tips were no part of the bargain. But he was clearly assessable in respect of the tips which he received from passengers in the capacity of taxi driver. A tip is in the ordinary way given as a remuneration for services rendered. Similarly, a waiter may expect to receive, and will usually receive, gratuities from those whom he serves: the waiter receives the gratuities in respect of his services: he receives them by way of remuneration for his services even though the payments are voluntary and are not made by the employer of the waiter.

[28] [1927] A.C. 554, 571.
[29] Ibid. 560.
[30] [1955] Ch. 284.
[31] [1947] K.B. 526; 63 T.L.R. 199; [1947] 1 All E.R. 282; 27 T.C. 475.

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In *Blakiston* v. *Cooper*[32] the voluntary Easter offerings given to the incumbent of a benefice were assessable. Lord Loreburn L.C. said[32]: "In my opinion, where a sum of money is given "to an incumbent substantially in respect of his services as "incumbent, it accrues to him by reason of his office. Here the "sum of money was given in respect of those services. Had it "been a gift of an exceptional kind, such as a testimonial, or a "contribution for a specific purpose, as to provide for a holiday, "or a subscription peculiarly due to the personal qualities of the "particular clergyman, it might not have been a voluntary pay-"ment for services, but a mere present. In this case, however, "there was a continuity of annual payments apart from any "special occasion or purpose, and the ground of the call for "subscriptions was one common to all clergymen with insufficient "stipends, urged by the bishop on behalf of all alike." It was pointed out by Lord Ashbourne[33] that the offerings had been made for several years to the appellant as the vicar of East Grinstead and were made in response to a systematic appeal initiated by the bishop and supported by the churchwardens to induce collections to eke out slender stipends. In all the circumstances it was clear that the offerings were received by the vicar as vicar and that they formed part of the profits accruing by reason of his office.

In the passage which I have cited Lord Loreburn pointed out that where a sum of money is given to an incumbent substantially in respect of his services as incumbent it accrues to him by reason of his office. Where this is the case it matters not that the payment made is voluntary. If from the point of view of the recipient the money is received "in respect of "services," or, as Lord Cave put it in the later case of *Seymour* v. *Reed*,[34] "by way of remuneration for his services," then the receipt is, I think, a profit from the office held; or in the language that applied in *Cowan* v. *Seymour*,[35] it would be a profit "accruing by reason of" the office held. A profit may accrue by reason of an office when it comes to the holder of an office as such. Payments that come to the holder of an office as such are payments which from the recipient's point of view have the features of remuneration. The Easter offerings for the incumbent in *Blakiston* v. *Cooper*[36] were given to the incumbent as such and were given to supplement income. In *Herbert* v. *McQuade*[37] a beneficed clergyman received for several years an annual grant from a body incorporated with the object of providing adequate remuneration for beneficed clergy: he received the annual sums by virtue of his office so that his remuneration in that office should be augmented. In those cases there was also what Lord

[32] [1909] A.C. 104, 107.
[33] Ibid.
[34] [1927] A.C. 554, 559.
[35] [1920] 1 K.B. 500, 512.
[36] [1909] A.C. 104.
[37] [1902] 2 K.B. 631.

Phillimore in *Seymour* v. *Reed*[38] described as "an element of "periodicity."

In contrast to those cases there might be cases (see the judgment of Younger L.J. in *Cowan* v. *Seymour*[39]) where a payment is made to someone by way of a gratuity on ceasing to hold an office—or a gift after someone had left an office: or there might be a gift by way of "testimonial" to someone still holding an office (see speech of Lord Loreburn in *Blakiston* v. *Cooper*[40]): or there might be personal gifts to the holder of an office as marks of esteem and respect (see speech of Lord Ashbourne[41] in the same case): or there might be "a donation, honoris "causa" (see judgment of Lord Coleridge C.J. in *Turner* v. *Cuxon*[42]).

In the present case the transactions of the transfers of the shares seem to me to lack the elements of remuneration. Bearsley had been paid and was paid for his services by the company that employed him. It is important also to remember that in October, 1946, Bearsley's remuneration was revised. The directors took note of the fact that his agreement had expired and of the fact that owing to the illness of Jones additional duties were devolving upon Bearsley, and of the fact that no increase in the salary of any director had been made since 1936. There was no suggestion of paying heed to any expectation that Bearsley might have of receiving shares. Bearsley's salary was raised; so also was his rate of commission on the net profits of the company. His work was not of a nature such that he would ever expect to look to any other source of remuneration than the company. From no other source could there be commissions and there were no gratuities. The shares were not measured in number so as to be equated to the worth of certain services rendered. It is plain that the shares would never have been transferred but for the fact that Bearsley had rendered years of valuable service. That service had helped to make the shares of Frank Hornby valuable. That circumstance might have led Frank Hornby to make some bequest of shares to Bearsley. But when the brothers Hornby agreed in 1945 that they would in due course make over to Bearsley some part of the capital assets which later would be theirs, the arrangement would not in my judgment constitute remunerating Bearsley but was rather the making of a gift to him.

In their personal capacities and from their personal possessions and actuated by their personal motives of doing what they thought that their father might have done by his will, the brothers were willing to make a gift provided that Bearsley served the company for four years more. The gift might have accrued to Bearsley after he had retired and would in any event accrue

[38] [1927] A.C. 554, 570.
[39] [1920] 1 K.B. 500, 512.
[40] [1909] A.C. 104, 107.
[41] Ibid. 108.
[42] (1888) 22 Q.B.D. 150, 152; 5 T.L.R. 133; 2 T.C. 422.

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at a time when a testimonial for a lifetime of faithful service would not be inapposite.

The fact that the brothers entered into deeds of covenant does not by itself negative the view that the transactions were by way of gift. Donors are frequently willing to deny themselves the opportunity of changing their minds about their intended gifts. I agree with the judge that the acquisition of the shares was "linked up with" the services of Bearsley as an officer of the company. Bearsley had served in the past and was not to get his shares unless he served the company for four years from December, 1945. In one limited sense Bearsley was to receive his shares by reason of his office—for if he had not served and held office in Meccano Ltd. he would never have had the shares. But I do not think that it follows from this that the shares were profits from the office.

In my judgment the shares were not a profit from the office of managing director because they were not received by way of remuneration for services rendered as managing director. They were received while Bearsley was managing director, but they represented an expression of gratitude or a testimonial for what he had done, including what he had done before ever he became a director or managing director. Once the condition for the receipt of the shares was satisfied, then the shares were to be received by Bearsley whether he continued in office or not. The mere fact that when he received the shares he was still in office cannot by itself convert the receipt of the shares into a receipt as remuneration for services unless the receipt otherwise possessed that quality or attribute. The kind of gift which Lord Phillimore [43] envisaged as being free from liability to tax even though made by an employer to an employee, and even though made in respect of faithful service, does not lose its immunity because made while the employee still remains in service. Accordingly, the fact that someone who receives a benefit is the holder of an office does not by itself prove that what he received was a profit from the office. That has to be decided by considering on the evidence whether what was received was received as remuneration for the services rendered in the office.

If contrary to the view which I have formed the shares which were transferred must be regarded as remuneration to Bearsley, then, as the deeds show, the remuneration (if such it was) was in respect of his services (a) in the years 1907 to 1919, (b) in the years from 1919 to 1936 during which he was a director, (c) in the years from 1936 to December 30, 1945, when he was managing director, (d) in the four years from December 30, 1945, to December 30, 1949, during which he continued as managing director. I find it difficult to see why the entire

[43] In *Seymour* v. *Reed* [1927] A.C. 554, 571.

remuneration, if such it was, should be regarded as being a profit "from" his office of managing director.

On the view which I have formed the same general considerations apply to Hewitt's case as apply to Bearsley's case. The shares transferred to Hewitt were by way of gift or testimonial and not by way of remuneration. He was secretary from 1913 to 1951; he was a director from 1932 to October, 1953. He was assessed for the year 1953–1954 because he was a director. The shares which he received in July, 1953, were partly in recognition of his work as secretary and partly in recognition of his work as a director. In my judgment they did not, when received, constitute a profit from his office as director for the year 1953–1954.

For these reasons it does not seem to me that the decision of the special commissioners was founded upon a misconception of the law or proceeded upon a view of the facts which could not reasonably be entertained. I consider, therefore, that the appellants were not assessable in respect of the value of the shares which they received, and I would allow the appeals.

SELLERS L.J. In the tax period 1953–1954 the appellant Hewitt was a director of Mecanno Ltd. until October, 1953, when he resigned on account of ill health. He had ceased to be secretary of the company in January, 1951. The appellant Bearsley in the same tax period was managing director of the company.

On July 27, 1953, the two appellants received 8,000 shares each in Meccano Ltd. on two transfers to each of them of 4,000 shares each from Roland and Douglas Hornby. The value to each of the appellants of the transferred shares was £36,000, and the Crown included in each case these sums in an assessment to income tax, Schedule E, making a total assessment of £39,022 in the case of Hewitt and £50,465 in the case of Bearsley. There is no indication that in the financial year under review, or indeed in any immediately preceding year, either of the appellants rendered any abnormal or unusual services to the company meriting such enhanced remuneration. On the contrary, Hewitt as a director only and in ill-health would apparently have been much less active than in any year during his long tenure of the secretaryship on relatively modest remuneration.

On the face of things it would seem unreasonable and against good sense that shares in the hands of the Hornby brothers, which were part of large holdings which were not subject to income tax except in respect of the dividends paid thereon, should cease to be capital and become income of the recipients by the transfer to the two appellants, who from their long association with and their devotion to the company were well qualified to have some substantial stake and standing as shareholders of the company. It created a more equitable distribution of the share capital.

The special commissioners, who had heard substantially the

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same arguments as have been advanced before us on behalf of the Crown (and which appear to have been advanced similarly before Danckwerts J.) held clearly that the value of the shares was not income from the office or employment of either of the appellants.

Although this decision cannot be treated as if it were a finding of a jury, in so far as it embraces a view of the facts it is of real importance. It must, however, be regarded as a decision of mixed law and fact and therefore open to review.

The charging power relied on by the Crown is contained in rule 1 of the Ninth Schedule of the Income Tax Act, 1952, dealing with the rules applicable to Schedule E.

The Crown do not allege that the £36,000 was in either case a salary, a fee, a wage or a perquisite, but they say it was a profit from the respective offices or employments of the appellants.

The fundamental question is in each case, was the £36,000 in share value transferred to each appellant a gift or a profit from his position with the Meccano company? Each had an office with the company. Was this windfall a profit "therefrom"?

At the outset it was intended to be a gift. It was not prompted by and was not in respect of any special services rendered to the donors. The transactions were inspired by high motives and with the intention of fulfilling moral obligations. The transactions could have been carried out in accordance with the intention of the Hornby brothers without any documents at all except the transfer forms, and there is no real reason to think they would not have been fulfilled. There was no need to introduce anything of a business character into them. In all the circumstances, so large a sum in value, and a transfer of shares in the company, indicate bounty and generosity rather than remuneration in respect of the appellants' respective employments. (The facts are to be contrasted with those in *Salmon* v. *Weight*,[44] where clearly tax liability arose.)

These matters need not be stressed. Had it not been for the deeds Danckwerts J. would have found in favour of the appellants and would have been satisfied that the shares in question were gifts. Without the deeds I do not feel any doubt that that would have been the right view to take.

The judgment continues as follows[45]: "But the transaction "was changed. It was conceived that it was desirable to "introduce the element of consideration in order to make the "promises legally enforceable, and the consideration which was "selected was a promise by Bearsley and Hewitt to continue "serving in their offices with the company for four years from the "date of the deeds of covenant. In this way, the acquisition of the "shares under the terms of the deeds irretrievably was linked up "with the services of the taxpayers as officers of the company. It

[44] 51 T.L.R. 333.

[45] [1957] 1 W.L.R. 59, 68; [1956] 3 All E.R. 789.

"seems to me to be impossible to deny that under the obliga-"tions created by the deed the shares were received by the "taxpayers by reason of their offices, and, therefore, as profits "of these offices."

Jenkins L.J.'s judgment has taken from one of the deeds the recitals and clause 1, and I do not repeat those extracts, but I would read in addition only clause 3: "If the covenan-"tee shall die before he has become registered as the holder "of the said four thousand shares then his legal personal "representative shall be entitled to the benefit of the covenants "and agreements hereinbefore contained." The company was not a party to the deeds. The continuation in the employment was, therefore, not in the hands of the appellants alone, and I do not read the deeds as containing a promise by the covenantee in each case to remain four years in his existing engagement with Meccano Ltd. It would seem that if four further years of service were not fulfilled the consideration would have failed. There was, however, an express covenant by the Hornby brothers to transfer and assign the shares within three months of the death of Mrs. Clara Hornby, and as she was 93 when she died in October, 1953, it might have happened that the three months would have expired before the four years had run.

There is no need to seek to solve complications which might have arisen in that event.

Hewitt's written contract as secretary dated April 1, 1937, and Bearsley's written contract as managing director dated February 15, 1937, expired on September 30, 1946, but both appellants were retained in their respective offices at enhanced remuneration by minutes of the directors in meetings held on October 8 and 9, 1946.

No provision seems to have been made for their duration, and both employments would appear to have been terminable by reasonable notice. As far as the issues arising on these appeals are concerned, I see no difference between the cases of the two appellants.

In my opinion, the effect of each deed as drawn is that the service of four years as stipulated was a condition to be fulfilled before the Hornby brothers could be called on as a matter of law or legal obligation to transfer the shares within the specified date, that is, within three months after the death of Mrs. Clara Hornby, their mother. The fact that the transfer date was expedited has, as I see it, no effect on the questions involved in this appeal.

In this way the transfer of the shares is "linked up" with the respective offices, but the question is whether that necessarily or on a reasonable view involves that the transfer was a payment of remuneration for services rendered to the company or a profit of the employment. I would not regard the transfer as having those attributes or of such a character.

The effect of the deed was, as I appreciate it, to make the

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transfer contingent on the appellants remaining four years with the company, but it imposed no duty or obligation on them to serve the company. Once the condition of four years' service had been fulfilled, as it in fact was by the end of 1949, the appellants became entitled to the shares whether they were in office, or in retirement, or dead, as clause 3 of the deed makes the benefits accrue to the covenantee's estate in case of death before completed transfer. The two appellants were, in fact, in office with the company at the time of the receipt of the shares, but that was an irrelevant circumstance in no way affecting the transfer. Jones had died, and the transfer was to his executors. Hewitt would have been in retirement if the transfer had been three months after Mrs. Hornby's death and had not been advanced.

I would hazard this illustration, realizing the pitfalls in so doing, but in an endeavour to reveal an essential feature of the case. If a father promised his son 10,000 shares in the family company, from his own holdings, if the son would remain four years with the company at normal and proper remuneration for his work with it, and the condition was fulfilled and the shares transferred, it would not, in my view, make the value of the shares remuneration or profit of the son's employment in the year in which the transfer took place, or at all. There would be a "link" with the business and the recipient's employment, but the character, nature and quality of the transaction, as I see it, would be the same, or substantially so, as if the father had made the same offer of shares to the son and fulfilled it on the basis that the son would not marry for four years. The contingency would be different, but the transfer would be a gift in each case.

The special commissioners have taken the view that such link as there was with the office or employment was not sufficient to make the transfer either remuneration or profit therefrom. In my judgment, that was not a wrong view to take.

Such a payment (treating it as £36,000 in money) cannot be related to any express or implied term of the appellants' contracts of employment or of their directorships, or as any "incident" of that class of employment. Nothing of the kind was contemplated as a means of supplementing the remuneration which the company was from time to time agreeing to pay for the services of these two gentlemen.

I have read beforehand the judgment of Jenkins L.J., who has reviewed the authorities with such clarity and completeness that I have relied on the many extracts without repeating them or adding to them in this judgment. I would agree with Danckwerts J. that none of the cases cited is conclusive. It is, I feel, hardly necessary for me to add that I have reached my decision with great deference, as it is not in accord with the conclusions of Jenkins L.J. and the trial judge.

I will deal briefly with the other issues raised before us, on which I am in agreement with Jenkins L.J., and with the

judge. I do not think the evidence with regard to how the deeds came to be drawn up in the terms they were is admissible any further than the commissioners were prepared to allow it, but even if it can be regarded I doubt if it makes any effective difference.

It is not, in my view, in harmony with the tax provisions that if the transactions fell within the terms of Schedule E the income was the value of the rights acquired by the appellants when the deeds were entered into. I agree with the judge when he says[46]: "If the conclusion is correct that the transfers of the "shares were profits of the taxpayers' offices and remuneration "for the services to be performed by them, they were paid for "those services when the shares were transferred to them "(though the shares were not immediately realized), and assess-"able accordingly."

As I think that conclusion is not correct, I would allow the appeals and restore the decision of the special commissioners.

Appeals allowed.
Leave to appeal to the House of Lords.

Solicitors: *Lightbounds, Jones & Crean for Owen, Dawson & Wynn-Evans, Liverpool; Solicitor of Inland Revenue.*

C. J. E.

[46] [1957] 1 W.L.R. 59, 69.

[CHANCERY DIVISION.]

* *In re* MILLER, GIBB & CO. LTD.

[No. 001 of 1955.]

1957
Mar. 26, 27.
Wynn-Parry J.

Insurance — Subrogation — Liquidation of assured — Insurer's equity — Export credit guarantee.

On June 5, 1951, the Export Credits Guarantee Department of the Board of Trade issued a shipments policy of indemnity to a company which carried on the business of exporters. Under the terms of the policy the Department guaranteed to pay to the exporter 90 per cent. of the amount of any loss sustained in respect of goods sold and shipped from the United Kingdom to any buyer in the countries specified in the schedule thereto, which included Brazil, by reason of, inter alia, "the operation of a law ". . . or regulation having the force of law, which in circumstances "outside the control of the exporter or of the buyer prevents, "restricts or controls the transfer of payments from the buyer's "country to the United Kingdom." The policy further provided that any sum recovered by the exporter or the Department, after the date at which the loss was ascertained from the buyer or any other source, should be divided between the Department and the exporter in the proportions of 90 and 10.

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On January 12, 1952, the company exported certain machinery to a company in Brazil, and this shipment was declared under and covered by the policy. The price of the goods was £2,880 4s. 9d.

In July, 1952, the buyer made payment accordingly into a bank at Recife for the account of Martins Bank, who were acting for the company. The transfer of this payment from Brazil to the United Kingdom was, however, prevented by Brazilian currency exchange regulations, and in January, 1953, the company made a claim against the Department for 90 per cent. thereof, which the Department paid to Martins Bank on February 10, 1953.

The company was ordered to be wound up on December 6, 1954.

In a letter dated November 13, 1954, the Department gave notice to Martins Bank of their claim to be subrogated to the rights of the company with respect to the payment from Recife when received.

In January, 1956, the bank received the full purchase price in sterling from Recife plus accrued interest, and the Board of Trade claimed 90 per cent. thereof:—

Held (it being agreed that the policy was one of indemnity), that as a result of the payment made by the Department to the company on February 10, 1953, the Department by reason of the nature of the contract became subrogated to the rights of the company; that, accordingly, if (which did not happen) the sum claimed had been received by the company, the company would thereupon have become trustees thereof for the Department; and that, therefore, in the circumstances, having regard to the scope of the doctrine of subrogation, the Board of Trade were entitled to the sum claimed.

Castellain v. *Preston* (1883) 11 Q.B.D. 380 and *King* v. *Victoria Insurance Company Ltd.* [1896] A.C. 250; 12 T.L.R. 285 applied.

Adjourned summons.

By an Export Credits Guarantee Department (Shipments) Policy (No. V. (S) 51/10814/9), made on June 5, 1951, between the Exports Credits Guarantee Department of the Board of Trade ("the Department") and Miller, Gibb & Co. Ltd. ("the "exporter"), the Department agreed, in consideration of the premium paid and to be paid by the exporter to the Department as specified in the schedule, subject to the terms of the policy "to pay to the exporter a percentage of the amount of any loss "as hereinafter defined which he may sustain in respect of goods "sold and shipped from the United Kingdom to any buyer in the "countries specified in the schedule hereto [which included "Brazil] by reason of the following causes . . . (iii) The operation "of a law or of an order, decree or regulation having the force of "law, which in circumstances outside the control of the exporter "or of the buyer prevents, restricts or controls the transfer of "payments from the buyer's country to the United Kingdom."

By the terms of the policy it was provided (inter alia) as follows: "2. This guarantee shall apply in respect of all ship-"ments complying with the conditions hereof and made by the "exporter between April 1, 1951, and March 31, 1952, of goods "wholly or partly produced or manufactured in the United "Kingdom.

"3. The percentage of the amount of any loss which the "Department hereby agree to pay shall be [85 per cent. in

"certain immaterial events] 90 per cent. where the loss is due "to any other cause covered by this guarantee.

"6. The Department will pay to the exporter the sum hereby "guaranteed immediately after the loss has been ascertained, "and such loss shall be ascertained: . . . (iii) where the loss is "due to the operation of a law or of an order, decree or regula-"tion having the force of law, which in circumstances outside "the control of the exporter or of the buyer prevents, restricts "or controls the transfer of payments from the buyer's country "to the United Kingdom, six months after the due date of "payment. . . .

"7. Any sums recovered by the exporter or the Department "after the date at which the loss is ascertained from the buyer "or any other source shall be divided between the Department "and the exporter [(i) the amount payable in case of insolvency "or failure to pay within 12 months of the due date of payment]; "(ii) in any other case in the proportions of 90 and 10."

Condition 5: "Upon payment by the Department the "exporter shall take all steps to effect recoveries from the buyer "which may be necessary or expedient or which the Department "may at any time require, including if so required the institution "of legal proceedings against the buyer by and in the name of "the exporter, and the Department shall have the right at any "time to require the exporter to transfer to the Department his "rights under any contract in respect of which payment has been "made as aforesaid for the purpose of effecting recoveries in "such manner as the Department may consider necessary or "desirable."

On January 13, 1953, the company made a claim under the policy in respect of goods to an invoice value of £2,880 4s. 9d. shipped by them to Sociedade Auto Electrica Ltda., of Rua de Palma 295, Recife, Pernambuco, Brazil. The material facts relating to this claim were:—

The shipment had been included in the shipment declared by the company to the Department under the policy of the month of January, 1952.

The company drew on the buyers a sight draft for £2,880 4s. 9d., payable in sterling against presentation of documents and instructed Martins Bank Ltd. to arrange for its presentation and collection in Brazil.

For the purpose of making this collection Martins Bank Ltd. instructed the Bank of London and South America, Recife, Brazil, and sent them the bill for collection on January 23, 1952.

The Bank of London and South America presented the bill for payment on January 30, 1952, but, as the buyers were prevented under Brazilian currency exchange regulations then in force from paying in sterling, the bill was not then paid. The documents of title to the goods were not accordingly released to the buyers at this time and the goods remained until July, 1952, with the Brazilian Customs authority.

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In July, 1952, in order to avoid a sale of the goods by the Customs, the Bank of London and South America, on the instructions of the company, released the documents of title on payment by the buyers to that bank of a sum in Brazilian currency equivalent to the sterling value of the bill, the buyers undertaking to make good any difference arising from a change in the rate of exchange between the date of the payment and the date on which the Brazilian currency could be remitted to the company in England. The reason for this latter provision was that Brazilian exchange control regulations at that date did not permit the Brazilian currency to be remitted to England. The payment was made by the buyer to the Bank of London and South America on July 28, 1952, for the account of Martins Bank Ltd., who were acting for the company.

The transfer of this payment from Brazil to the United Kingdom was thus prevented by Brazilian currency exchange regulations then in force, and on January 13, 1953, the company made a claim in the aforesaid terms against the Department for 90 per cent. of the amount of the invoice for £2,880 4s. 9d.

By the terms of the claim form the company undertook as follows: "Part VIII. On payment by the Department we hereby "undertake:—(a) to take all recovery steps as directed by the "Department; (b) to assign to the Department all our rights in "the debt or contract together with any security therefor and "any document relating thereto and all our interest in the "goods forming the subject of the claim; (c) to pay over to the "Department forthwith any and all dividends and other pay-"ments which we . . . may receive . . . in respect of the debt "or contract and we acknowledge and declare that all of such "dividends and payments . . . as the Department would be "entitled to retain under the policy if the said dividends were "recovered by the Department, are moneys to which the Depart-"ment alone are beneficially entitled and that until payment to "the Department as aforesaid the said moneys will constitute "trust funds held by us as trustees in trust for the Department."

On February 10, 1953, the Department paid to Martins Bank Ltd., Heywoods Branch, 5, Brunswick Street, Liverpool, £2,592 4s. 4d., being 90 per cent. of the said invoice value of £2,880 4s. 9d., in accordance with the instructions so to do received from the company.

The company was ordered to be wound up on December 6, 1954, and a liquidator was duly appointed.

In a letter dated November 13, 1954 (containing a letter from the company to the bank, directing the bank to hand the full proceeds of the said bill, when received, to the credit of the Department), the Department gave notice to the bank of their claim to be subrogated to the rights of the company with respect to such proceeds and of the Department's claim that such proceeds would represent trust funds held by the company as trustees in trust for the Department. The Department further requested

the bank to provide an assurance that the said proceeds would as and when received by the bank, be remitted in full to the Department. The bank gave this assurance on November 15, 1954.

The liquidator put forward the contention that he was entitled to the whole of such recoveries and that they should be paid by the bank to him for the benefit of the creditors generally; and the solicitor to the Board of Trade was informed of the final decision of the liquidator, that he was not prepared to agree to 90 per cent. of the proceeds of the recoveries received by Martins Bank Ltd. being paid to the Department.

By a letter dated January 21, 1956, Martins Bank Ltd. informed the solicitor to the Board of Trade that the bank had received the full proceeds of the bill and £231 6s. 4d. interest thereon. On February 3, 1956, the bank informed the liquidator that the bank intended to retain the proceeds of the bill pending receipt of the joint authority of the liquidator and the Department or an order of the court as to the disposal thereof.

A summons was taken out by the Board of Trade in the compulsory liquidation of the company asking that (1) the decision of the liquidator rejecting the claim of the applicants, that they were entitled as against the liquidator to 90 per cent. of the sum of £2,880 4s 9d., held by Martins Bank Ltd., Heywoods Branch, Liverpool, and 90 per cent. of the interest accrued or accruing thereon, be reversed, and (2) that the liquidator should execute all such documents and do all such things as were necessary to enable the applicants to obtain payment of such sums from the Bank.

T. G. Roche Q.C. and *Mark Littman* for the applicants.

Lionel Edwards Q.C. and *J. P. Hunter-Brown* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *In re Irving* †; *In re Poulter* ††; *In re Cleadon Trust Ltd.* ‡; *John Edwards & Co.* v. *Motor Union Insurance* §; *In re Westerton.* ¶

WYNN-PARRY J. stated the facts and continued: It is against the background of those facts that I have to consider the rights of the parties. As the policy is a policy of indemnity, it follows, as a matter of law, that the insurer has the benefit of the right of subrogation which, of course, is in its origin an equitable doctrine. If authority be required for that it can be found in *Randal* v. *Cockran.*[1] It is a very short report and I think that it is useful to refer to it: "The King having granted general letters of reprisal

† (1877) 7 Ch.D. 419.

†† (1912) 56 S.J. 291.

‡ [1939] Ch. 286; 55 T.L.R. 154; [1938] 4 All E.R. 518.

§ [1922] 2 K.B. 249; 38 T.L.R. 690.

¶ [1919] 2 Ch. 104.

[1] (1748) 1 Ves.Sen. 98.

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"on the Spaniards for the benefit of his subjects, in consideration "of the losses they sustained by unjust captures; the commis- "sioners would not suffer the insurers to make claim to part of "the prizes, but the owners only, although they were already "satisfied for their loss by the insurers; who thereupon brought "the present bill. Lord Chancellor was of opinion, that the "plaintiffs had the plainest equity that could be. The person "originally sustaining the loss was the owner; but after satisfac- "tion made to him, the insurer. No doubt, but from that time, "as to the goods themselves, if restored in specie, or compensa- "tion made for them, the assured stands as a trustee for the "insurer, in proportion for what he paid."

In the later case of *Castellain* v. *Preston*,[2] to which Mr. Roche referred me, there is a well-known and illuminating judgment by Brett L.J., two passages from which I propose to read. The first is this[3]: "In order to give my opinion upon this case, I feel "obliged to revert to the very foundation of every rule which has "been promulgated and acted on by the courts with regard to "insurance law. The very foundation, in my opinion, of every "rule which has been applied to insurance law is this, namely, "that the contract of insurance contained in a marine or fire "policy is a contract of indemnity, and of indemnity only, and "that this contract means that the assured, in case of a loss "against which the policy has been made, shall be fully "indemnified, but shall never be more than full indemnified. "That is the fundamental principle of insurance, and if ever a "proposition is brought forward which is at variance with it, "that is to say, which either will prevent the assured from "obtaining a full indemnity, or which will give to the assured "more than a full indemnity, that proposition must certainly be "wrong." Later he said[4]: "I have mentioned the doctrine "of notice of abandonment for the purpose of coming to the "doctrine of subrogation. That doctrine does not arise upon any "of the terms of the contract of insurance; it is only another "proposition which has been adopted for the purpose of carrying "out the fundamental rule which I have mentioned, and it is a "doctrine in favour of the underwriters or insurers in order to "prevent the assured from recovering more than a full indemnity; "it has been adopted solely for that reason. It is not, to my "mind, a doctrine applied to insurance law on the ground that "underwriters are sureties. Underwriters are not always sureties. "They have rights which sometimes are similar to the rights of "sureties, but that again is in order to prevent the assured from "recovering from them more than a full indemnity. But it being "admitted that the doctrine of subrogation is to be applied "merely for the purpose of preventing the assured from obtaining "more than a full indemnity, the question is, whether that "doctrine as applied in insurance law can be in any way limited.

[2] (1883) 11 Q.B.D. 380.
[3] Ibid. 386.
[4] Ibid. 387.

"Is it to be limited to this, that the underwriter is subrogated "into the place of the assured so far as to enable the under-"writer to enforce a contract, or to enforce a right of action? "Why is it to be limited to that, if, when it is limited to that, it "will, in certain cases, enable the assured to recover more than "a full indemnity? The moment it can be shown that such a "limitation of the doctrine would have that effect, then, as I "said before, in my opinion, it is contrary to the foundation of "the law as to insurance, and must be wrong. And, with the "greatest deference to my Brother Chitty, it seems to me that "that is the fault of his judgment. He has by his judgment "limited this doctrine of subrogation to placing the insurer in "the position of the assured only for the purpose of enforcing a "right of action, to which the assured may be entitled. In order "to apply the doctrine of subrogation, it seems to me that the "full and absolute meaning of the word must be used, that is to "say, the insurer must be placed in the position of the assured. "Now it seems to me that in order to carry out the fundamental "rule of insurance law, this doctrine of subrogation must be "carried to the extent which I am now about to endeavour to "express, namely, that as between the underwriter and the "assured the underwriter is entitled to the advantage of every "right of the assured, whether such right consists in contract, "fulfilled or unfulfilled, or in remedy for tort capable of being "insisted on or already insisted on, or in any other right, "whether by way of condition or otherwise, legal or equitable, "which can be, or has been exercised or has accrued, and "whether such right could or could not be enforced by the "insurer in the name of the assured by the exercise or acquiring "of which right or condition the loss against which the assured "is insured, can be, or has been, diminished. That seems to me "to put this doctrine of subrogation in the largest possible form, "and if in that form, large as it is, it is short of fulfilling that "which is the fundamental condition, I must have omitted to "state something which ought to have been stated." The other two members of the Court of Appeal, Cotton and Bowen L.JJ., were of the same opinion and treated the scope of the doctrine as being as wide as was laid down by Brett L.J. in the words which I have quoted, and which show beyond the peradventure that his Lordship was designing to enunciate a fundamental rule of universal application.

I come now to *King* v. *Victoria Insurance Company Ltd.*,[5] a case heard in the Privy Council. The headnote reads as follows: "Payment honestly made by insurers in satisfaction of a claim "by the insured entitles the insurers to the remedies available "to the insured; and such remedies cannot be resisted on the "ground that the payment was not within the terms of the "policy:—*Held*, that although the insurers could not by mere

[5] [1896] A.C. 250; 12 T.L.R. 285.

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"force of subrogation sue in their own name, yet that in this "case the right to do so was conferred by assignment from the "insured" aided by the Judicature Act. In the course of his judgment Lord Hobhouse, who gave the judgment of the Board, said [6]: "Their Lordships have no doubt that if, after receiving "payment from the plaintiffs, the bank had got damages from "the government, a court of equity would have treated them as "trustees for the plaintiffs to the extent of the payment, and "that if it had been necessary to use the name of the bank a "court of equity would have compelled the bank to permit it "on the usual terms." Later on he says [7]: "They," that is, their Lordships, "rest their judgment on the broader and simpler "ground that a payment honestly made by insurers in conse-"quence of a policy granted by them and in satisfaction of a "claim by the insured, is a claim made under the policy, which "entitles the insurers to the remedies available to the insured."

On the authority of those cases it follows necessarily to my mind that, as a result of the payment made by the Department to the company on February 10, 1953, the Department, by reason of the nature of the contract and not as a result of any extreme term in it, became subrogated to all the rights of the company. Therefore, if (which did not happen) the sterling sum in question had been received by the company, the company would thereupon have become trustees thereof for the Department.

Some debate turned on *Stearns* v. *Village Main Reef Gold Mining Co. Ltd.*[8] The headnote reads as follows: "Gold of the "defendants (mine owners), which had been insured by the "plaintiffs (underwriters), was commandeered by the South "African Government shortly before the declaration of war. "The defendants having asked for a return of part of the gold, "the South African Government paid them a sum of money in "respect of it, on the understanding that the defendants' mine "would be kept open, and that 50 per cent. of the gold won "would be handed to the South African Government. The "plaintiffs having paid as for a total loss claimed the sum "received by the defendants from the South African Govern-"ment:—*Held*, that the sum received by the defendants from "the South African Government was a payment in diminution "of the loss which the plaintiffs were entitled to recover, but "that the defendants were not trustees for the plaintiffs, nor "liable to pay interest on the amount while it had remained in "their hands." It is important to bear in mind exactly what was the question in that case and what was the form of the relief sought by the plaintiffs. The sequence is, first of all, that the gold was commandeered; then £7,239 12s. 0d. was paid to the defendants by the Republic of South Africa. The plaintiffs put in to their insurers a claim upon the basis of a total loss, namely, for £21,880, without disclosing the receipt of the

[6] Ibid. 255.
[7] Ibid. 256.
[8] (1905) 10 Com.Cas. 89; 21 T.L.R. 236.

£7,239 12s. 0d.; and what the insurers did was to sue for what in effect had been an overpayment.

No question of relying on the doctrine of subrogation arose, and, indeed, subrogation was not relevant in the state of facts as I have detailed them. Therefore, it appears to me that *Stearns* v. *Village Main Reef Gold Mining Co. Ltd.*[8] had really no relevance in considering the problem which faces me on this summons.

I, therefore, have come to the conclusion that, in view of the nature of the contract—a contract of indemnity—the doctrine of subrogation applies, and in the result, having regard to the scope of that doctrine, the Board of Trade, the applicants in this case, are entitled to the relief which they claim on the summons.

Another point was argued and, although what I have said is sufficient to dispose of the summons, I ought, I think, to advert to it. Mr. Roche suggested that from the claim form can be extracted an equitable assignment by the company to the Department. That arises under Part VIII of the claim. [His Lordship read sub-clauses (b) and (c) and continued:] Mr. Edwards for the liquidator, while admitting that the language of those two paragraphs was apt to effect an equitable assignment, contended that neither of these paragraphs in fact so operated, because there was no consideration moving to the company for the undertakings in question. In my judgment, that argument cannot be supported. Part VIII, and in particular the two paragraphs to which I have referred, are to my mind directly referable to and covered by condition 5 of the policy which I have read, and the relevant part of which I will repeat: "... and the Department shall have the right at any time to "require the exporter to transfer to the Department his rights "under any contract in respect of which payment has been made "as aforesaid for the purpose of effecting recoveries in such "manner as the Department may consider necessary or desirable." It follows, in my view, that, by requiring the undertakings under Part VIII of the claim to which I have referred, the Department was doing no more than exercising a right to that end expressly reserved by the policy. Therefore, the point that there is no consideration to support an equitable assignment fails.

Finally, Mr. Roche contended that the first three or four letters in the bundle of correspondence constitute at least an equitable assignment, indeed a legal assignment. On November 10, 1954, the company wrote to the manager of the Heywoods Branch, Liverpool, of Martins Bank Ltd., which was concerned with the transaction: "Dear Sir, With reference to the above-"noted outstanding Bill on Auto Electrica Ltda., Brazil: "Collection [and then the number is given] £2,880 4s. 9d. I "shall be obliged if you will kindly hand proceeds in full, when "received, to the Export Credits Guarantee Department." The

[8] 10 Com.Cas. 89.

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Department on November 13 wrote a letter to the manager of Martins Bank Ltd. in Liverpool, the heading to which indentifies the transaction as being the transaction in question, which stated: "I refer to the above-mentioned bill of exchange on which this "Department implemented its guarantee on February 10, 1953. "Would you kindly note that if and when the proceeds of this "bill are received by you, such proceeds are to be forwarded to "the Department in full, and not in any circumstances paid to "Messrs. Miller, Gibb & Co. Ltd. In this connection, the "Department encloses herewith a letter of authority from Miller, "Gibb & Co. Ltd. confirming the above-mentioned instructions. "Would you kindly confirm in due course that you have taken "note of this subrogation of the exporters' rights and provide "your assurances that the proceeds of the bill in question, as "and when received by you, will be remitted in full to the "Department. Would you also kindly take note of the fact "that in conformity with the arrangements existing between "Miller, Gibb & Co. Ltd. and the Department, the proceeds of "the bill in question will represent trust funds held by Miller "Gibb & Co. Ltd. as trustees in trust for the Department and "cannot be used for any other purpose." Finally, on November 15, Martins Bank wrote to the Department referring to the transaction in question and saying: "We are in receipt of "your letter of the 13th November with reference to the above "collection, and confirm that we have taken note of the "information therein and that the proceeds of this bill as and when "received by us will be remitted in full to your Department." It appears to me that those three letters show that there was an absolute assignment in writing by the company in favour of the Department, not merely by way of charge, notice of which was given to and acknowledged by the bank. That, in my view, constitutes a good legal assignment. If authority be wanted for that proposition it will be found, I think, in the case to which Mr. Roche referred me, *Alexander* v. *Steinhardt, Walker & Co.*[9]

Mr. Edwards again contended as regards the assignment, evidenced by the letters that I have read, that there was no consideration moving to the company for the assignment, but in my judgment that argument fails for the same reason as the argument on the claim form, namely, that the assignment which was effected by the letter of November 10, 1954, is directly referable to condition 5 of the policy, and what was being done by that letter was something which was required by the Department as the insurer, and which it had a right to require by reason of the terms of condition 5.

For these reasons, in my judgment, this application succeeds, and I propose, therefore, to make an order reversing the decision of the liquidator as asked in paragraph (1) of the summons, and

[9] [1903] 2 K.B. 208.

also under paragraph (2), an order that the liquidator shall execute all such documents and do all such things which may be necessary to enable the applicants to obtain from Martins Bank Ltd. 90 per cent. of the sum in question, £2,880 4s. 9d., and the same proportion of the interest when calculated.

Order accordingly.

Solicitors: *Solicitor, Board of Trade; Pritchard, Englefield & Co. for Lamb, Goldsmith & Howard, Liverpool.*

J. L. D.

[CHANCERY DIVISION.]

* HUGHES *v.* WAITE AND OTHERS.

1957
Jan. 30, 31.
Harman J.

[1956 H. 2083.]

Mortgage—Leasing, power of—Statutory—Form of lease—Occupation of mortgaged property by agreement with mortgagors—Agreement made before mortgagors entitled to property—Lump sum paid by tenants to mortgagors described as "rent in advance"—Whether lump sum a "fine"—Whether tenancies good as against mortgagee—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 99 (6), 205 (1) (xxiii).

In October, 1955, the plaintiff negotiated with the three defendants W., who were estate agents, for the sale to them of an empty freehold dwelling-house which was being converted into three flats. Long before completion the defendants W. disposed of the flats. On August 20, 1955, M. paid them £20 and they gave him a receipt worded: "Application for unfurnished accommodation. Received "from M. the sum of £20 as deposit on middle floor in" the house. On August 23, 1955, C. paid them £25, being given a like receipt "in respect of advance rent . . . top flat," the money being described also as a "holding deposit." On August 31, 1955, he paid them £250 18s. 0d., stated in the receipt to represent the balance of three years' inclusive rent in advance for the top flat. In a letter received by C. on December 9, 1955, one of the defendants W. stated: ". . . we confirm . . . 1. The tenancy to "commence after the completion of conversion and decorations of "flat. 2. The tenancy is a weekly one. 3. Should you vacate the "flat on one week's notice any balance of rent shall be refunded." On September 3, 1955, M. paid the defendants W. £100 described as a "further deposit" and, on September 9, 1955, £281 14s. 0d. not described at all and purporting to be received by the defendants W. as stakeholders. On September 24, 1955, Mrs. D. paid them £200, being given a receipt in which that money was described as "holding deposit on middle flat." On October 26, 1955, completion of the sale for £1,700 of the house by the plaintiff to the defendants W. took place. On the same day they executed a land charge in her favour to secure £1,100 of the purchase money. That was the first occasion that the defendants W. had any interest in the property and there was no evidence that they had a contract earlier

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than that. On November 14, 1955, the conveyance and the land charge were registered. In 1955 the defendants W. let C., M. and D. (hereinafter called "the occupants") into possession, C. on October 31, M. on November 5 and D. on November 21. The defendants W. paid the plaintiff nothing whatever on the mortgage. At the date of these proceedings two of those defendants had fled the country and the third was ill. Until inquiries were begun the plaintiff did not know that the property had been let.

On a summons by the plaintiff for an order for possession:—

Held, in deciding that she was entitled to her order, (1) that the occupants were merely occupiers of the three flats on sufferance and so had no answer to the plaintiff's claim for possession, because the bargains were made before the defendants W. had any interest in the property, so that they were not exercising the statutory power exercisable by a mortgagor, as they were not mortgagors; and no estoppel affected the plaintiff, who was not a party to the promises made by the defendants W.

(2) That, even if the occupants had bargains with the defendants W. entitling them to tenancies against those defendants, those tenancies were not tenancies which the defendants W. had power, as mortgagors, to grant after they became mortgagors, as they were not tenancies at a rent as required by section 99 (6) of the Law of Property Act, 1925,[1] since, although the amounts were calculated by reference to so many weeks' or years' rent, no periodical payment of rent was prescribed; and the payments were foregifts and, accordingly, fines within the meaning of sections 99 (6) and 205 (1) (xxiii) of the Act.

City Permanent Building Society v. *Miller* [1952] Ch. 840; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621 followed.

Alliance Building Society v. *Shave* [1952] Ch. 581; [1952] 1 T.L.R. 1174; [1952] 1 All E.R. 1033 referred to on the question of service on the defendants W. who had left the country.

Adjourned summons.

A summons was issued under Order 55, r. 5A, by the plaintiff, Mrs. Mary McKay Hughes, as mortgagee of a house known as 136, Burnt Ash Hill, Lee, S.E., claiming possession thereof. The defendants were the mortgagors, Peter William Waite, Derek Walter Waite and William Henry Waite, and the respective occupants of three flats in the dwelling-house, David Frederick Meyrick, Mrs. Mona Jean Joyce Duignan and Walter William Collins, who claimed to be tenants of the mortgagors. Each occupant had paid to the mortgagors one or more lump sum or sums. A receipt was given to Meyrick describing his payment as a "deposit," to Collins describing his as "advance rent" and also as a "holding deposit," and to Mrs. Duignan describing hers as a "holding deposit," and to Collins describing a further payment by him as the balance of three years' inclusive rent.

[1] Law of Property Act, 1925, s. 99 (6): "Every such lease"—i.e., lease authorized by the section—"shall reserve the best rent that can "reasonably be obtained, regard "being had to the circumstances of "the case, but without any fine being "taken."

S. 205 (1): "In this Act unless "the context otherwise requires, the "following expressions have the "meanings hereby assigned to them "respectively, that is to say:— . . . "(xxiii) . . . 'fine' includes a "premium or foregift and any pay-"ment, consideration, or benefit in "the nature of a fine, premium, or "foregift . . ."

The occupants accordingly claimed to be entitled to tenancies which would be good against the plaintiff as mortgagee.

H. A. H. Christie Q.C. and *P. R. Oliver* (*E. W. H. Christie* with them) for the plaintiff.

Peter, Derek and William Waite were not represented and did not appear.

P. Ingress Bell Q.C. and *Dudley Collard* for the occupants.

Cases cited in argument not referred to in the judgment: *Utting (B. G.) & Co. Ltd.* v. *Hughes* *; *Municipal Permanent Investment Building Society* v. *Smith.*†

HARMAN J. This is an application by a person having a registered charge asking for possession of certain mortgaged property. The summons was taken out under Order 55, r. 5A, and issued against the first three defendants, who are mortgagors under a registered instrument (and to whom I will refer as "the "Waites"), and three further persons, who are admitted to be in possession of the three flats of which the mortgaged property is comprised. Order 55, r. 5A, speaks of "delivery of possession ". . . by any other person in, or alleged to be in possession of "the property."

No service has been effected on the first and second defendants. There has been service on the third defendant, and there is an affidavit of service, which will be filed in due course, but he does not appear. The three persons in possession (who are referred to herein as "the occupants") have entered appearances, and are represented before me. I am proposing to go on without requiring service on the first two defendants, who have been keeping out of the way, and against whom substituted service was applied for on the authority of the decision of Wynn-Parry J. in *Alliance Building Society* v. *Shave.*[1] If I make an order for possession, it will be only against those in possession, and will not affect such rights, if any, as the Waites have under their mortgage.

It used to be recognized that a mortgagee might take possession as a matter of course, and it is only in recent years that the housing shortage and the Rent Restrictions Acts between them have made what seems to be a difficulty on this matter. In the old days mortgagees kept out of possession because they did not want to have to account as mortgagees in possession on the footing of wilful default, but the opposite has come about in these days. The only way in which a mortgagee can realize his security to advantage is by obtaining vacant possession and selling as mortgagee.

This case is another illustration of what appears to be a rather

* [1939] 2 K.B. 231; 55 T.L.R. 556; [1939] 2 All E.R. 126.

† (1888) 22 Q.B.D. 70; 5 T.L.R. 17.

[1] [1952] Ch. 581; [1952] 1 T.L.R. 1174; [1952] 1 All E.R. 1033.

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prevalent rascally practice among persons, at any rate in London, who trade on the credulity of members of the public perhaps desperately in want of a house over their heads. These persons extract large sums of money from members of the public, calling the payment "rent in advance," or something of that sort, and promising them, if they pay that down at once, that they shall have, either immediately or in the future, a so-called tenancy of a flat, or a house, or the part of a house. Such a case was dealt with by me, and by the Court of Appeal, in *City Permanent Building Society* v. *Miller*,[2] in which the facts in many ways were like the present case.

In the present case the plaintiff became the registered owner of the property, No. 136, Burnt Ash Hill, Lee, in 1948. In 1955 she negotiated with the Waites to sell the property to them, and she sold it to them on October 26, 1955. On that same date they executed in her favour a charge in the Land Registry form to secure £1,100, which was part of the purchase money. That was the first occasion, so far as I know, that the Waites had any interest in the property. There is no evidence that they had anything in the nature of a contract earlier than that. The conveyance and the mortgage or charge operated in equity until put on the register on November 14, 1955, which was the first occasion on which a legal interest was created in the Waites. That derives from the Land Registration Act, 1925, s. 19. Long before the Waites had any interest in the property, they had started to deal with it. It was empty, and was being converted into three flats. The Waites, who carried on an estate agency business under the name of Waites Estates, in Sydenham, disposed of the accommodation to the occupants long before they had any interest in it themselves. In point of time the earliest of the gulls was the defendant Meyrick, who, on August 20, put down £20, and got a receipt on a printed form headed "Waites "Estates," followed by "Application for unfurnished accommo- "dation. Received from Mr. D. Meyrick the sum of £20 as "deposit on middle floor, 136, Burnt Ash Hill." That receipt was signed illegibly on behalf of one of the Waites.

The next to be caught was the defendant Collins, who paid £25 on August 23, 1955, and got a like receipt, except that it is said to be paid "in respect of advance rent, 136, Burnt Ash Hill, "top flat." The sum is also described as a "holding deposit."

The defendant Duignan did not come on the scene until a month later, when she put down £200, and obtained a receipt in which the money was described as "holding deposit on middle "flat." Therefore, by September 24, 1955, the Waites had caught their three fish and had got a deposit from each of them. There was no suggestion when possession was to be given. The flats were evidently not in a finished condition at the time. The

[2] [1952] Ch. 840; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621.

documents described "Waites Estates" as acting as stakeholders; they did not purport to be owners at all, and they made a charge called a ten guineas letting fee, not payable until the tenant was accepted and received the key. There were, I notice, these words: "At the end of the advance term, rent to be paid weekly or by mutual arrangement." There is no written evidence of what "the advance term" was supposed to be, but the occupants have sworn affidavits in which they suggest, in what are to me suspiciously similar terms, that each made an oral agreement for a weekly tenancy, or, alternatively, for a term of three years, and thereafter weekly at an inclusive rent calculated at a rate of so much a week payable as to the first three years in advance and thereafter weekly. In support of those assertions they produce the documents which I have in part described.

The defendant Meyrick was induced to part with a further £100 on September 3, 1955, described as a further deposit, and with £281 14s. 0d. on September 9, 1955, not described at all, purporting to be received by the Waites as stakeholders. The defendant Collins parted with £250 18s. 0d. on August 31, 1955. That is said to represent the balance of three years' rent in advance—"top flat, 136, Burnt Ash Hill," and the rent is "inclusive." So that there is a suggestion in the defendant Collins' case that the money was rent. Moreover, he received on September 9 a letter from one of the Waites in which it is said that these receipts make a total of £276 18s. 0d., "representing three years' advance rent on the above flat. We also "confirm the following points as requested by yourself:—1. The "tenancy to commence after the completion of conversion and "decorations of flat. 2. The tenancy is a weekly one. 3. Should "you vacate the flat on one week's notice any balance of rent "shall be refunded. Please note that any other points are clearly "stated on receipt. Assuring you of our best attention at all "times."

The decorations were finished. The Waites had acquired, as I have said, by November 14, 1955, a legal estate: they let the occupants into possession, the defendant Meyrick on November 5, 1955; the defendant Duignan on November 21, 1955; and the defendant Collins on October 31, 1955.

The Waites, having obtained these comparatively large sums, paid nothing whatever on the mortgage which they had created, and the plaintiff was minded, not unnaturally, by May, 1956, to exercise her remedy as mortgagee and take possession. When she came to do so she found these three defendants in occupation, saying that they were tenants, and, moreover, they had paid all the rent that was due from them for three years, and that nothing, therefore, was payable to her at all. It is said that is the effect of the law on what has happened. The Waites are, as I understand it, being sought by the police, but that is cold comfort to any of the other parties to this suit. The question is: which of two defrauded parties ought to suffer?

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Before 1881 a mortgagor could create no tenancy at all valid against his mortgagee, but in and since that year the mortgagor while in possession has had statutory powers of creating certain leases, and under the Law of Property Act, 1925, s. 99, the mortgagor has wide powers. For instance, he can create an occupation lease of 50 years. The leases authorized by section 99 (3) (i) are occupation leases "for any term not exceeding "21 years, or, in the case of a mortgage made after the com-"mencement of this Act, 50 years." Subsection (5) provides: "Every such lease shall be made to take effect in possession not "later than twelve months after its date." Subsection (6) provides: "Every such lease shall reserve the best rent that "can reasonably be obtained, regard being had to the circum-"stances of the case, but without any fine being taken." Then subsection (7) provides that every such lease shall contain a condition of re-entry. Under subsection (17) "lease" must be construed to extend and apply, as far as circumstances admit, to any letting and to any agreement, whether in writing or not, for leasing or letting. So that the mortgagors, the Waites, had a power, when in possession, which could not have been, at any rate, at the earliest before October 25, 1955, to create leases valid against the mortgagee.

It is said that they have done so in favour of the occupants. It is said that the arrangements, which I have briefly described, whereby the Waites extracted these moneys from these unfortunate occupants, had the effect of giving them promises which perhaps were not good contracts, but amounted, so to speak, to offers to create in their favour weekly tenancies extending over three years in consideration of the payment of these lump sums which were quantified by reference to the rack-rent of the property over those three years. It is said that, even if there were no valid agreement to that effect, when the Waites let their victims into possession the Waites became disentitled by estoppel from denying the rights of the persons in possession, and that the mortgagee is bound by that condition of things, and is bound to treat the occupants as having proper leases of the flats which they respectively occupy.

I think that it is true that the court would have striven to help the occupants against the Waites to obtain some kind of satisfaction, they having been let into possession on the faith of these promises. But, of course, that does not apply to the plaintiff. She was no party to these promises and no estoppel affects her. I cannot see how the fact that it is possible that the Waites were precluded from denying that they had made a proper agreement can preclude the plaintiff from denying that any proper agreement was made. These bargains, so far as they were bargains, were made long before the Waites were in possession, and long before, as it appears, they had any interest in the property, legal or equitable, or at all. They were, therefore, not exercising the powers exercisable by a mortgagor because the

Waites were not then mortgagors. The bargains were agreements, if they were agreements at all, to let these people into possession at some time. There was no date or term fixed for the time when possession should begin. No doubt when possession was taken the court would have implied some kind of agreement between the occupants and the Waites that the occupants should have possession, and possibly on the terms that they should remain there for three years on the strength of the sums that they had paid, or that they should remain there from week to week and get back any proportion of the sum remaining in the landlord's hands if the occupation came to an end before the three years had expired; but I cannot see that this gave the occupants any estate or interest in the property as against the plaintiff. They did not pay a weekly or other periodical rent so as to create a periodical tenancy between them and anybody at all. In my judgment, they were merely occupiers on sufferance of the three flats which they now occupy. That being so, they have no answer to the plaintiff's claim for possession.

I may be wrong about that. Supposing, then, that the occupants did have some bargain with the Waites which entitled them as against the Waites to tenancies, were these tenancies which the Waites had power as mortgagors to grant after they became mortgagors? In my judgment, plainly they were not; as I see it they were not tenancies at a rent at all. It is true that the amount of money extracted from each of the unfortunate occupants was calculated by reference to so many weeks' rent, or so many years' rent, of the flat to be occupied, but I think that there is no suggestion of any periodical payment of rent such as is bound to be provided for in a lease created by a mortgagor. It is clear that, if the mortgagor is to have the power of leasing, he must have a power which he must exercise as much for the mortgagee's as for his own benefit. He is to reserve the best rent that can reasonably be obtained, and not to take any fine. So far as I can see, no rent at all was reserved under these so-called agreements. Lump sums were paid down, and they did not pass the first test.

On the question whether a fine was taken, in my opinion it clearly was. These sums could only be described as premiums or foregifts. What is a fine? It is defined in the Law of Property Act, 1925, s. 205 (1) (xxiii), as including a premium or foregift. In my judgment, these payments were clearly foregifts —sums paid entirely in advance. If I agree with my landlord to pay him a rent which is not the rack-rent, and to pay down the difference between the rent agreed and the rack-rent as a lump sum in advance, that is a premium, as I think everybody will agree. But it is argued that if I agree to pay the whole sum in advance, that is not a premium. That does not appear to me to be reasonable at all. The requirement of paying the whole rent in advance is not an exercise of the mortgagor's power.

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Supposing the Waites had the powers of mortgagors to grant leases, they never exercised them. I am to some extent supported in this opinion by the views of, at any rate, two of the Lords Justices in *City Permanent Building Society* v. *Miller*,[3] and I do not wish to retract the view which I apparently there formed, namely, that to take the whole rent in advance is to take a fine and is not within the power of a mortgagor under the Law of Property Act, 1925, s. 99.

I therefore propose to make a decree in favour of the plaintiff for possession within 28 days from the completion of the order.

Order accordingly.

Solicitors: *James & Charles Dodd; Mills, Lockyer & Co.*

K. R. A. H.

[3] [1952] Ch. 840; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621.

[CHANCERY DIVISION.]

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Feb. 12, 13.

Harman J.

* ALLIANCE PERPETUAL BUILDING SOCIETY *v.* BELRUM INVESTMENTS LTD. AND OTHERS.

[1956 B. 1985.]

Contempt of Court — Report of judicial proceedings — False report — Proceedings in chambers before master — Inaccurate comment on and description of proceedings in newspaper before matter adjourned into court—Motion for committal of editor for contempt of court.

In 1955 D. bought a house which he resold to a company controlled by himself and his wife. The company mortgaged the house by legal charge to a building society to secure money lent, D. and his wife joining as sureties. In June, 1955, the building society issued a summons claiming possession of the property and nothing else. D. and his wife were joined in the action only because they were in possession and claimed to be tenants of the mortgagor company. The action proceeded in the normal course in chambers and the master gave an appointment before him for January 18, 1957, to adjourn the action into court for hearing. On January 3, 1957, an article appeared in a newspaper stating that D was to fight a writ which threatened his possession of his luxury home, that the building society claimed that a mortgage advanced to D. on his £20,000 house had not been honoured and that the building society was seeking foreclosure, and that the action had been listed by a judge in chambers for January 18. Then came a purported account of a reporter's telephone interview with D., who was stated to have said that he had plenty of money and that it would take a long time to get him down. The author was a journalist employed by the newspaper. The article was inaccurate and a misleading account of the proceedings. It represented the action as a proceeding for foreclosure against D. arising out of default in paying mortgage money. The action had neither of those

ingredients. A writ for libel was issued against the newspaper. By this motion D. asked that the editor be committed to prison for contempt in publishing the purported account of proceedings in the action which was pending in chambers and had not yet been adjourned into open court. The editor by his affidavit disclaimed any intention of contempt but exhibited a copy of the summons without saying how he came by it; and he persisted in the wholly inaccurate statement that the summons showed that the claim was that the company had not paid the mortgage instalment and that D. and his wife defaulted as sureties:—

Held, that while neither D. nor any witness on his behalf would be deterred by what had happened from going on in the action, D. was nevertheless entitled to complain of the unwarranted intrusion of a stranger into his affairs, and the editor had no right to comment on the matter—not, at any rate, in a garbled form falsifying the issues. The court's displeasure would be marked by fining him £100.

Gaskell & Chambers Ltd. v. *Hudson, Dodsworth & Co.* [1936] 2 K.B. 595 and *In re William Thomas Shipping Co.* [1930] 2 Ch. 368 distinguished.

In re New Gold Coast Exploration Co. [1901] 1 Ch. 860; 17 T.L.R. 312 and *Reg.* v. *Evening Standard Co. Ltd.* [1954] 1 Q.B. 578; [1954] 2 W.L.R. 861; [1954] 1 All E.R. 1026 considered.

MOTION.

Belrum Investments Ltd., George Dawson and Olga Dawson, his wife, were the defendants in an action brought by the Alliance Perpetual Building Society. George Dawson moved for the committal to prison of Arthur Wareham, editor of the "Daily Mail," for alleged contempt of court in publishing what purported to be an account of proceedings in the action while it was pending in chambers and had not yet been heard in open court.

The facts are fully stated in the judgment of Harman J.

John Platts-Mills and *C. G. Allen* for the applicant on the motion. Any account of proceedings in chambers is a contempt: Halsbury, Laws of England, 2nd ed., vol. 26, p. 42 [1]; [1932] W.N., Pt. II, 185, a direction by Lord Hewart C.J. on New Procedure.

[HARMAN J. All New Procedure rules have been revoked.]

The direction refers to the matter only inferentially. [*Scott* v. *Scott*,[2] *per* Earl Loreburn [3] and *per* Lord Atkinson [4] were referred to.]

The following authorities were also referred to, in addition to

[1] Halsbury, Laws of England, 3rd ed., vol. 8 (1954), p. 12, to the contrary, was not apparently cited.—EDITOR.

[2] [1913] A.C. 417; 29 T.L.R. 620. Passages to the contrary from the speeches do not appear to have been cited.—EDITOR.

[3] [1913] A.C. 417, 445, 447.

[4] Ibid. 467.

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cases referred to in the judgment: *In re Cheltenham & Swansea Railway Carriage & Wagon Co.*[5]; *J. & P. Coates* v. *Chadwick*[6]; *In re Crown Bank*[7]; and *In re O'Connor, Chesshire* v. *Strauss.*[8]

Sir Hartley Shawcross Q.C. and *Neville Faulks* for the respondent. It is not a contempt to announce that proceedings are pending whether in chambers or in court. Justice is not best served by secrecy, except in the three recognized cases: wards of court, lunacy, and secret processes. Even in those cases reporting the results or initiation of proceedings is not a contempt. Nor is publication of the pleadings. Nor is inaccuracy by itself a contempt. The question is whether the publication constitutes such an interference with justice as to warrant a committal; it must contain an injurious misrepresentation likely to interfere with the conduct of the parties or their witnesses. It cannot affect that issue whether the proceedings are in chambers or in court. [The following cases only were expressly referred to: *Rex* v. *Astor*[9]; *In re Crown Bank*[7]; *In re New Gold Coast Exploration Co.*[10]; *Gaskell & Chambers Ltd.* v. *Hudson, Dodsworth & Co.*[11]; *Rex* v. *Editor of Evening News*[12]; *In re de Beaujeu.*[13]]

Platts-Mills, in reply, conceded that the bare publication of pleadings was permitted.

Harman J. This is a motion by one George Dawson to commit Arthur George Wareham, editor of the "Daily Mail," for contempt of court by the publication in that paper of what purports to be an account of proceedings in this action, now pending in chambers and never yet heard in open court. The motion is by one of the defendants in the action against a stranger to it, and this appears to be the right procedure for the purpose. The notice should have been, but is not, entitled in the name of the respondent, but this omission is not fatal: see *In re Law.*[1]

In or about 1945 the applicant bought a property known as Garden Court, Esher, and resold it to the first defendants, a company owned and controlled by himself and his wife. Subsequently, by legal charge duly registered, that company mortgaged the property to the plaintiffs to secure a sum of money lent to the company, Dawson and his wife joining in the mortgage as sureties. There are some odd features about these transactions but they do not concern me here.

On June 13, 1956, the plaintiffs, as mortgagees, issued the originating summons in this action, claiming possession of the

[5] (1869) L.R. 8 Eq. 580; 17 W.R. 463.
[6] [1894] 1 Ch. 347; 10 T.L.R. 226.
[7] (1890) 44 Ch.D. 649; 39 W.R. 45.
[8] (1896) 12 T.L.R. 291.
[9] (1913) 30 T.L.R. 10.
[10] [1901] 1 Ch. 860; 17 T.L.R. 312.
[11] [1936] 2 K.B. 595.
[12] The Times, Feb. 3, 1937.
[13] [1949] 1 Ch. 230; 65 T.L.R. 143; [1949] 1 All E.R. 489.
[1] [1914] W.N. 258.

property and no further relief. This is a form of procedure now much in vogue where there are persons other than the mortgagor in occupation. It is usually designed to enable the mortgagees to exercise their power of sale, which can only be done with advantage if vacant possession can be offered. It has nothing to do with the enforcement of the mortgage debt, or with foreclosure. Possession is a remedy to which a mortgagee is entitled as of right against the mortgagor, whether the principal or interest be due or not, unless there is some special clause in the mortgage excluding it. There is no suggestion of that sort here. The remedy in no way depends on default, nor are the applicant and his wife, as sureties, necessary parties to the suit at all, though the fact that they are sureties appears quite irrelevantly in the heading of the summons. The only reason for their presence is that they are in occupation and claim to be tenants of the mortgagors. If they are tenants having rights paramount to the mortgage, no relief can be given against them. If not, they are, qua the mortgagees, mere trespassers, and an order against them would go as of course.

The action proceeded in the ordinary course in chambers, where it seems that the mortgagor company raised various defences as to the validity of the mortgage, and others connected with the state of accounts between them and the plaintiffs, the latter being irrelevant, as no account or payment was sought. The applicant and his wife claimed to be tenants under a title anterior to the mortgage. I know nothing about the merits. The evidence was apparently complete and the master had given an appointment before him in chambers for January 18, 1957, preparatory to adjourning the action into court for hearing.

At this juncture the matter complained of appeared in the form of an article in the "Daily Mail" of January 3, 1957, in these terms: "Mortgage company issue writ to take over £20,000 "home. George Dawson fights for his mansion. Money? "Plenty!" Then there is a picture of "the house that George "bought." The article then says: "By Daily Mail Reporter: "George Dawson, the cockney millionaire, is to fight a writ "which threatens his possession of his luxury home at Garden "Court, Oxshott, Surrey. The case is being brought by the "Alliance Perpetual Building Society of Baker Street, W.1. "They claim that a mortgage advanced to Mr. Dawson on his "£20,000 house has not been honoured. They seek an injunction "to foreclose on the mortgage. The action has been listed for "January 18th. It will be heard by a judge in chambers." There then follows what purports to be an account of an interview with the applicant by the reporter on the telephone, in which the applicant is reported as saying that he has plenty of money and that it will take a long time to get him down.

The author of this story was, it appears, one Martin, a journalist in the employ of the paper, and the respondent accepts responsibility for it. The source of it is in dispute. Mr. Martin

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has stated that he had it from one Addis, who on his part has sworn an affidavit filed on behalf of the applicant, stating that Mr. Martin told him that he got his information from the plaintiffs' solicitor, one Bieber. This sounds improbable, if only because of the gross inaccuracies in the story. Moreover, Mr. Addis declares himself an enemy of the applicant and may have made the disclosure out of spite. This, however, is a question which I need not decide.

The article is full of inaccuracies and can, I think, be fairly described as a most misleading account of the proceedings. It represents the action as being a proceeding for foreclosure against the applicant arising out of his default in repaying the mortgage money. As I have shown, it has neither of these ingredients.

The applicant has issued a writ for libel against the newspaper. As to that, I make no comment. This motion was not launched until a month later. The gravamen of the charge made is that the article is an account of matters proceeding in chambers. In my judgment, if this charge be true, a contempt of court has been committed. Interlocutory matters before the master proceed in private; the public has no right to attend them, nor has anyone, as I conceive, any right to give any account of them while the action is pending and has not been adjourned into court.

It is not easy to find authority for this proposition, but it is assumed in the speech of Lord Loreburn L.C. in *Scott* v. *Scott*,[2] and is, I think, well established. The judge may allow a report of such proceedings to be published if it illustrates some point of principle: see 1932 Weekly Notes Miscellaneous, p. 185.

The first answer made is that there is no account of proceedings in chambers, but merely an inaccurate version of the originating summons. It is said that it is an everyday matter to publish in a newspaper the fact that A has issued a writ against B, and to state generally the nature of the relief claimed; and further, that though in former times publication of a pleading in a pending action was treated as a contempt (see, for instance, *Rex* v. *Astor*[3]), that doctrine has been modified by subsequent decisions, for example, *Gaskell & Chambers Ltd.* v. *Hudson, Dodsworth & Co.*[4] In that case the defendants issued a circular enclosing the plaintiffs' statement of claim, with comments, and that was held no contempt. The Divisional Court held that no hard and fast rule could prevail, and it is not difficult to see that to publish what your opponent said against you cannot be a contempt. Let it be conceded that the publication of the terms of the originating summons in this action would likewise be no contempt if the plaintiffs had published it. But in the present case the publication is by a stranger and is, moreover, not at all confined to the matter of the originating summons. It is a gloss on it and a grossly inaccurate one. The statement that default

[2] [1913] A.C. 417, 445; 29 T.L.R. 520.

[3] (1918) 30 T.L.R. 10.

[4] [1936] 2 K.B. 595, 604.

was alleged by the plaintiffs must be based, if not on guesswork or mere hearsay, on some knowledge of the evidence filed on the plaintiffs' behalf, and can only have been inserted in order to suggest that the applicant's solvency was in some way in doubt. But for this there would have been, I surmise, no news value in the disclosure, and therefore no reason for an article on the front page of a journal with a national circulation.

In my judgment this is very far removed from the facts of the case last cited and is in fact a disclosure of a matter proceeding in the privacy of chambers, and at least technically a contempt.

The respondent in his affidavit in answer disclaims any intention of contempt, but the matter of his affidavit makes the fault worse. First, he exhibits a copy of the originating summons itself. He does not say how he came by this document. It is one which he has no right to have in his possession. Documents in a pending action must not be disclosed to strangers to the suit. He follows this by stating that he knows nothing of the facts of the case on which his paper has commented and, worse still, persists in the statement that it shows that the claim is "that the defendant company has not paid the mortgage instal-"ments and that George and Olga Dawson have defaulted as "sureties."

The originating summons shows nothing of the sort and makes no such claim; nor does the remedy depend on any such thing. If the affidavit in support so alleges, it is, as I have said, irrelevant and altogether unconnected with the claim for possession. Moreover, the statement that the action has been listed is untrue, for it implies that it has appeared in some list of actions to which the public has access, the truth being that only someone who had access to the parties could know of the appointment made by the master. It is not suggested that this information came either through the court itself (which would make the matter worse) or from the applicant or those in his confidence.

None the less, it is argued that if this be a contempt it is only technically so, and I was referred to cases to show that the court ought to be slow to accept motions of this kind except in cases where real harm is done or was likely to ensue. The earliest of these cases was, I think, *In re New Gold Coast Exploration Co.*[5] In that case there was a voluntary winding up in progress and a shareholder issued a circular to his fellow shareholders in respect of which the liquidator moved against him, alleging it to be a contempt. Cozens-Hardy J. would have none of it. He began by saying in his judgment that the application was misconceived, and he goes on to point out that the courts have to some extent taken a view of contempt less stringent than that which ruled in the preceding century. After pointing to a number

[5] [1901] 1 Ch. 860; 17 T.L.R. 312.

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of cases, he came to *Reg.* v. *Payne*,[6] in which Lord Russell of Killowen C.J., sitting in a Divisional Court with Wright J., said: "We have been referred to certain cases in the Chancery "Division of the High Court as authorities in support of the "present application. I will not refer to those decisions further "than to say that, in my opinion, in some instances, the courts "have gone rather too far." Then Cozens-Hardy J. says what those cases are, and he then goes on to say[7]: "The Lord Chief "Justice also cites the following passage from the judgment of "Cotton L.J. in *Hunt* v. *Clarke*,[8] in which, after referring "to the judgment of Jessel M.R. in *In re Clements*,[9] he "said[10]: 'Now that I apply and adopt as the principle which "'ought to regulate these applications—that there should be no "'such application made unless the thing done is of such a "'nature as to require the arbitrary and summary interference "'of the court in order to enable justice to be duly and properly "'administered without any interruption or interference, that is "'what we have to consider, and in my opinion although as I "'say there is here that which is technically a contempt, and "'may be such a contempt as to be of a serious nature, I cannot "'think there is any such interference or any such fear of any "'such interference with the due conduct of this action, or any "'such prejudice to the defendant who is applying here, as to "'justify the court in interfering by this summary and arbitrary "'process.'"

A later case is *Gaskell & Chambers Ltd.* v. *Hudson, Dodsworth & Co.*,[11] to which I have already referred.

It was said that this was not a bona fide complaint but only an attempt either to bolster up the applicant's libel claim or to wreak a spite against the respondents. I am very conscious that this is a jurisdiction to be exercised with caution and that this type of complaint is one which may easily become an abuse of the court's process. I am told moreover that in the Queen's Bench Division Lord Goddard C.J. has made comments which in practice have confined these applications to those made or sanctioned by the Law Officers. No such practice exists in this perhaps more peaceable division, but the law must be the same for both.

It goes without saying that the publication will have no influence on the judge who has to try the case. The issues which he will have to try are not even hinted at in the article. But that is not the end of it.

The question was considered by Maugham J., as he then was, in *In re William Thomas Shipping Co. Ltd.*[12] The headnote

[6] [1896] 1 Q.B. 577, 580; 12 T.L.R. 321.

[7] [1901] 1 Ch. 860, 864; 17 T.L.R. 312, 313.

[8] (1889) 58 L.J.Q.B. 490, 493; 5 T.L.R. 650, 651.

[9] (1877) 46 L.J.Ch. 375.

[10] 58 L.J.Q.B. 490, 493; 5 T.L.R 650, 651.

[11] [1936] 2 K.B. 595.

[12] [1930] 2 Ch. 368.

states: " 'Contempt of court' may include conduct which, while "it cannot directly influence a judge's mind, is calculated to "affect the conduct of parties to proceedings, and the court's "jurisdiction to commit for contempt is not confined to cases in "which its orders may directly be affected."

In that case there had been a receiver appointed in a debenture holders' action. A certain Sir Robert Thomas, who was a managing director of the shipping company concerned, feeling himself aggrieved, issued a circular abusing the liquidator and practically saying that the court was very stupid to have handled the matter in the way it did and that a disastrous blunder had in fact been made. The liquidator moved against him for contempt of court.

Maugham J. carefully considered the authorities and said [13]: "In other words, is it a contempt of court, notwithstanding the "recent decisions to which I am going to refer, to abuse the "parties concerned in a pending cause or matter by injurious "misrepresentations which may tend to influence the conduct "of the party aggrieved in the proceedings or which may tend "to cause other parties who have a proper cause of action not to "approach the court? There are a large number of cases where "conduct of that sort has been treated as a contempt of court."

His Lordship then cites *Kitcat* v. *Sharp* [14] and *Ilkley Local Board* v. *Oswald Lister* [15] and goes on to say [16]: "It is quite "clear that Chitty J., did not think that the circulars published "by the defendant on the occasion of an election for the Ilkley "Local Board were likely to prejudice them at the trial of the "action in the Chancery Division. That could not be the ground "on which he interfered."

He then cites *Reg.* v. *Payne*,[17] which I have already mentioned, and Cotton L.J.'s observations in *Hunt* v. *Clarke*,[18] which I have read. He then says [19]: "Dealing, as I am here, "with a case very different from that which came before the "court in *Reg.* v. *Payne*,[17] I must express my opinion that the "jurisdiction of the court is not confined to cases where the order "of the court or the future orders of the court are likely to be "directly affected in some way. If it were so confined, I doubt "whether there would be any limit to what a litigant, or some "other person, might say pending the hearing of an action in "the Chancery Division, unless, indeed, it could be shown that "possible witnesses in the case were being interfered with. I "think that to publish injurious misrepresentations directed "against a party to the action, especially when they are holding "up that party to hatred or contempt, is liable to affect the

[13] Ibid. 374.
[14] (1882) 31 W.R. 227.
[15] (1895) 11 T.L.R. 176.
[16] [1930] 2 Ch. 365, 374.
[17] [1896] 1 Q.B. 577; 12 T.L.R. 321.
[18] 58 L.J.Q.B. 490, 493; 5 T.L.R. 650, 651.
[19] [1930] 2 Ch. 368, 376.

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"course of justice, because it may, in the case of a plaintiff, "cause him to discontinue the action from fear of public dislike, "or it may cause the defendant to come to a compromise which "he otherwise would not come to, for a like reason."

That again was a very different case from the present. The comment was on a decision come to in open court and no question of wrongful disclosure of private matters was or could be raised.

An even more recent decision is that of the Divisional Court in *Reg.* v. *Evening Standard Co. Ltd.*[20] Lord Goddard C.J. said: "It is just as well that the nature of the jurisdiction "which this court exercises on these occasions with regard to "reports of trials in newspapers should be understood. It is "called contempt of court, and that is a convenient expression "because it is akin to a contempt. But the essence of the "jurisdiction is that reports, if they contain comments on cases "before they are tried, or alleged histories of the prisoner who "is on trial—such as in the case of the *Daily Mirror* (*Rex* v. "*Bolam, Ex parte Haigh*[21]) in which this court had to inter-"vene about five years ago—and all misreports are matters "which tend to interfere with the due course of justice." He then cites a passage from Lord Hardwicke L.C. in *The St. James's Evening Post*[22] and goes on to say[23]: "That is the "foundation of the summary jurisdiction which this court has "exercised now for more than 200 years in the case of comment "before the case is heard, or of the publication of improper "information about a case which is to be heard or is not fully "heard, or of the misrepresentation of the proceedings in a "court. We have frequently said that this jurisdiction should "be invoked and should be exercised only in cases of real and "serious moment."

In my judgment I ought not to hold that the applicant or any witness on his behalf would be deterred by what has happened from going on with his action or giving his evidence. In fact, the evidence is complete and is all on affidavit. Nevertheless, I think that he was justified in bringing this matter before the court. The respondent had no right to comment on the matter, at any rate in a garbled form, falsifying the issues. It is, in my judgment, no justification to say that the applicant's rights, if he has any, can be vindicated in the libel suit. He is entitled to complain of the unwarranted intrusion of a stranger into his affairs.

I am content to accept the defendant's disclaimer and apology. He is a person high in his profession and with no previous default of this sort. Moreover, his responsibility is vicarious. If his

[20] [1954] 1 Q.B. 578, 583; [1954] 2 W.L.R. 861; [1954] 1 All E.R. 1026, 1028.

[21] (1949) 93 S.J. 220.

[22] (1742) 2 Atk. 469.

[23] [1954] 1 Q.B. 578, 584; [1954] 2 W.L.R. 861; [1954] 1 All E.R. 1026, 1029.

underling took advice, he was very ill advised, and I cannot overlook the result. I regard it as important that this kind of intrusion on matters pending in chambers should be strongly discouraged and I feel bound to mark the court's displeasure by fining the respondent £100.

Order accordingly.

Solicitors: *J. M. Isaacs & Co.; Swepstone, Walsh & Son.*

K. R. A. H.

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[CHANCERY DIVISION.]

* *In re* SHAW, DECD.
PUBLIC TRUSTEE *v.* DAY AND OTHERS.

[1955 S. 2090.]

1957 *Jan.* 16, 17, 18, 22, 24; *Feb.* 20.

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Charity—Education—Alphabet—Trust for inquiries into practicability and effect of substituting proposed new alphabet for present alphabet of 26 letters — Trust for transliterating literary work into proposed new alphabet and publishing it page by page with lettering of present alphabet opposite thereto—Whether charitable.

Trust — Possibility of execution by court — Trust for benefit only of objects.

Trust—Uncertainty.

A testator by his will directed his trustee to stand possessed of his residuary trust funds and the annual income thereof during the period of 21 years after his death (1) to institute and finance inquiries to ascertain (*a*) the number of extant persons speaking English and writing it by the established alphabet of 26 letters ("Dr. Johnson's alphabet"); (*b*) how much time per individual scribe would be saved by substituting for that alphabet one containing at least 40 letters ("the proposed British alphabet"), enabling English to be written without indicating single sounds by groups of letters or by diacritical marks instead of by one symbol for each sound; (*c*) how many of those persons were engaged in speaking and writing English at any and every moment in the world; (*d*) on those factors to ascertain the time and labour wasted by the lack of at least 14 unequivocal syllables; (*e*) to add to the estimates of time lost or saved estimates of loss of income in British and American currency; (2) to employ a phonetic expert to transliterate the testator's play "Androcles and the Lion" into the proposed English alphabet, assuming the pronunciation to resemble that recorded by H.M. King George V; (3) to employ an artist-calligrapher to fair-copy the transliteration for reproduction; (4) to publish the transliteration with the original "Dr. Johnson's" lettering opposite thereto and present copies to libraries in the British Isles, the Commonwealth and America:—

Held, that the trusts so declared failed; as (1) the objects, if regarded as tending to the increase of knowledge, were not thereby charitable unless combined with provisions for teaching and education, which elements were lacking.

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In re Macduff [1896] 2 Ch. 451; 12 T.L.R. 452 applied.

(2) The objects were not beneficial to the community in a way regarded as charitable by law; as trusts for advertisements, propaganda and research on a controversial matter could not be so regarded, but were rather analogous to trusts for political purposes.

Trustees of Sir G. B. Hunter (1922) "*C*" *Trust* v. *Inland Revenue Commissioners* (1929) 45 T.L.R. 344; 14 T.C. 427 and *Bowman* v. *Secular Society* [1917] A.C. 406; 33 T.L.R. 376 applied.

(3) The trusts, not being charitable, failed also as they were for the benefit not of an individual but of an object, and as such were not open to the control of the court.

In re Diplock [1941] Ch. 253; 57 T.L.R. 263 applied.

(4) It was not open to the court to validate them by treating them as powers.

Inland Revenue Commissioners v. *Broadway Cottages Trust* [1955] Ch. 20; [1954] 3 W.L.R. 438; [1954] 3 All E.R. 120 applied.

ADJOURNED SUMMONS.

By his will dated June 12, 1950, George Bernard Shaw, (hereinafter called "the testator,") directed his trustee to hold his residuary trust funds and the income thereof on trusts for purposes connected with the alteration of the alphabet. On November 2, 1950, the testator died: and by this summons, dated May 17, 1955, the Public Trustee, as executor and trustee of the will, asked, inter alia, whether the alphabet trusts were valid and effectual or were invalid and failed on the ground of uncertainty, perpetuity, impracticability, public policy or any other ground, and whether he ought to take any steps towards carrying out the trusts or ascertaining whether they were impracticable.

The defendants to the summons were Frederick William Day and his wife, Margaret Day; the trustees of the British Museum; the Governors and Guardians of the National Gallery of Ireland; the Royal Academy of Dramatic Art; and the Attorney-General.

Robert Lazarus for the Public Trustee.

Mark Cockle for Frederick and Margaret Day.

Charles Russell Q.C. and *P. W. E. Taylor* for the Trustees of the British Museum and for the Royal Academy of Dramatic Art.

Kenneth Elphinstone for the Governors and Guardians of the National Gallery of Ireland.

E. Milner Holland Q.C. and *Denys Buckley* for the Attorney-General.

The facts are stated in the headnote and in the written judgment of Harman J.

Cases cited in argument not referred to in the judgment: *Inland Revenue Commissioners* v. *Baddeley*[1]; *In re Hummeltenberg.*[2]

Cur. adv. vult.

[1] [1955] A.C. 572; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525.

[2] [1923] 1 Ch. 237; 39 T.L.R. 203.

1957. Feb. 20. HARMAN J. read the following judgment: All his long life Bernard Shaw was an indefatigable reformer. He was already well known when the present century dawned, as novelist, critic, pamphleteer, playwright, and during the ensuing half-century he continued to act as a kind of itching powder to the British public, to the English-speaking peoples, and, indeed to an even wider audience, castigating their follies, their foibles and their fallacies, and bombarding them with a combination of paradox and wit that earned him in the course of years the status of an oracle: the Shavian oracle; and the rare distinction of adding a word to the language. Many of his projects he lived to see gain acceptance and carried into effect and become normal. It was natural that he should be interested in English orthography and pronunciation. These are obvious targets for the reformer. It is as difficult for the native to defend the one as it is for the foreigner to compass the other. The evidence shows that Shaw had for many years been interested in the subject. Perhaps his best known excursion in this field is "Pygmalion," in which the protagonist is a professor of phonetics: this was produced as a play in 1914 and has held the stage ever since and invaded the world of the film. It is, indeed, a curious reflection that this same work, tagged with versicles which I suppose Shaw would have detested, and tricked out with music which he would have eschewed (see the preface to the "Admirable Bashville"), is now charming huge audiences on the other side of the Atlantic and has given birth to the present proceedings. I am told that the receipts from this source have enabled the executor to get on terms with the existing death duties payable on the estate, thus bringing the interpretation of the will into the realm of practical politics.

The testator, whatever his other qualifications, was the master of a pellucid style, and the reader embarks on his will confident of finding no difficulty in understanding the objects which the testator had in mind. This document, moreover, was evidently originally the work of a skilled equity draftsman. As such I doubt not it was easily to be understood if not of the vulgar at any rate by the initiate. Unfortunately the will bears ample internal evidence of being in part the testator's own work. The two styles, as ever, make an unfortunate mixture. It is always a marriage of incompatibles: the delicate testamentary machinery devised by the conveyancer can but suffer when subjected to the cacoethes scribendi of the author, even though the latter's language, if it stood alone, might be a literary masterpiece.

This will is a long and complicated document made on June 12, 1950, when the testator was already 94 years old, though it is fair to say that it is rather youthful exuberance than the circumspection of old age that mars its symmetry. By clause 2 the plaintiff is appointed sole executor and trustee. Clause 5 is in these terms: "I bequeath my copyrights perform-
"ing rights filming rights television rights and all cognate rights

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"now in existence or hereafter to be created with the manu-"scripts typescripts and other documents in which I have such "rights to my trustee upon trust to apply the proceeds resulting "from the exploitation of such rights or the sale or other lucrative "use of such documents as income of my estate."

Clause 7 begins as follows: "I declare that my trustee shall "manage and deal with my author's rights with all the powers "in that behalf of an absolute owner (subject as hereinafter "provided) for so long as may prove necessary or expedient "during a period ending at the expiration of 20 years from the "day of the death of the last survivor of all the lineal descen-"dants of His late Majesty King George the Fifth who shall be "living at the time of my death (hereinafter called 'the special "'period')." A proviso is added forbidding the trustee to sell or assign the literary rights or to alienate them for more than a limited period. There follow clauses giving specific bequests and various directions including clause 16 in these words: "I "empower my trustee to procure all necessary assistance and "expert advice legal artistic literary or other for the discharge "of his relevant functions and to pay its cost out of my estate."

Next come legacies and annuities to servants, relations and others, the trustee being empowered to provide the annuities out of the income of "my residuary trust funds hereinafter defined," and it is declared that "every annuity unless previously appro-"priated shall until the expiration of 21 years from my death or "the previous cesser whether partial or complete of the trust "of the balance of the income of my residuary trust funds herein-"after contained be payable only out of the income of my "residuary trust funds in each year from my death available "for the payment thereof and if the income of my residuary "trust funds shall be insufficient to pay the said annuities in "full the annuitant shall not be entitled to be paid any capital "sum in satisfaction of his or her annuity as a legacy, but the "said annuity shall abate pro rata for such period and to such an "extent as shall be necessary having regard to the insufficiency "of such income as aforesaid but if at the end of any year "from my death there should be income available (after paying "the full amounts of the said annuities for the time being payable "for that year) to pay the amounts or part of the amounts by "which the annuities then still payable had previously abated "my trustee shall out of such income pay the said amounts or "such parts of the said amounts and rateably in proportion to "such last mentioned annuities as such income shall be sufficient "to satisfy. Upon the expiration of 21 years from my death "or the cesser whether partial or complete of the said trust of "the balance of the said income the annuities then subsisting if "not then provided for under sub-clause (4) hereof and any "amounts by which such annuities had previously abated if not "made good shall be a charge on the capital of my residuary

"trust funds." The trustee is also given a discretion to increase annuities in certain events.

Clause 35 and its sequents I must read in full. Clause 35 is in these terms: "I devise and bequeath all my real and personal "estate not otherwise specifically disposed of by this my will or "any codicil hereto and all property over which I have general "power of appointment unto my trustee upon trust that my "trustee shall (subject to the power of postponing the sale and "conversion thereof hereinafter contained) sell my real estate "and sell call in or otherwise convert into money as much as "may be needed of my personal estate (other than any copy-"rights which as provided by clause 7 of this my will are not "to be sold) to increase the ready moneys of which I may be "possessed at my death to an amount sufficient to pay my "funeral and testamentary expenses and debts estate duty legacy "duty and all the duties payable on my death in respect of my "estate or the bequests hereby made free of duty (other than "testamentary expenses) and the legacies bequeathed by this "my will or any codicil hereto or to make such other payments "or investments or charge of investments as in his opinion shall "be advisable in the interest of my estate and shall invest the "residue of such moneys in manner hereinafter authorized and "shall stand possessed of the said residuary trust moneys and "the investments for the time being representing the same and "all other investments for the time being forming part of my "residuary estate (herein called my residuary trust funds) and the "annual income thereof upon the trusts hereby declared of and "concerning the same: (1) To institute and finance a series of "inquiries to ascertain or estimate as far as possible the following "statistics (a) the number of extant persons who speak the "English language and write it by the established and official "alphabet of 26 letters (hereinafter called Dr. Johnson's "alphabet); (b) how much time could be saved per individual "scribe by the substitution for the said alphabet of an alphabet "containing at least 40 letters (hereinafter called the Proposed "British alphabet) enabling the said language to be written "without indicating single sounds by groups of letters or by "diacritical marks, instead of by one symbol for each sound; "(c) how many of these persons are engaged in writing or "printing English at any and every moment in the world; (d) on "these factors to estimate the time and labour wasted by our "lack of at least 14 unequivocal single symbols; (e) to add where "possible to the estimates of time lost or saved by the difference "between Dr. Johnson's alphabet and the Proposed British "alphabet estimates of the loss of income in British and "American currency. The inquiry must be confined strictly to "the statistical and mathematical problems to be solved without "regard to the views of professional and amateur phoneticians, "etymologists, spelling reformers, patentees of universal "languages, inventors of shorthand codes for verbatim reporting

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"or rival alphabets, teachers of the established orthography, "disputants about pronunciation, or any of the irreconcilables "whose wranglings have overlooked and confused the single "issue of labour saving and made change impossible during the "last hundred years. The inquiry must not imply any approval "or disapproval of the Proposed British alphabet by the inquirers "or by my trustee. (2) To employ a phonetic expert to trans-"literate my play entitled 'Androcles and the Lion' into the "Proposed British alphabet assuming the pronunciation to "resemble that recorded of His Majesty our late King George V. "and sometimes described as Northern English. (3) To employ "an artist-calligrapher to fair-copy the transliteration for repro-"duction by lithography photography or any other method that "may serve in the absence of printers' types. (4) To advertise "and publish the transliteration with the original Dr. Johnson's "lettering opposite the transliteration page by page and a "glossary of the two alphabets at the end and to present copies to "public libraries in the British Isles, the British Commonwealth, "the American States North and South and to national libraries "everywhere in that order."

Clause 36 is: "I desire my trustee to bear in mind that the "Proposed British alphabet does not pretend to be exhaustive as "it contains only 16 vowels whereas by infinitesimal move-"ments of the tongue countless different vowels can be produced "all of them in use among speakers of English who utter the "same vowel no oftener than they make the same fingerprints. "Nevertheless they can understand one another's speech and "writing sufficiently to converse and correspond."

Clause 37 says: "It is possible that the Ministry of Educa-"tion may institute the inquiry and adopt the Proposed British "alphabet to be taught in the schools it controls in which event "subsection 1 of clause 35 foregoing and its relevant sequels will "be contra-indicated as superfluous and clause 40 come into "operation accordingly but the adoption must be exact and no "account taken of the numerous alternative spelling reforms "now advocated or hereafter proposed."

Clause 38 is: "I hereby devise and bequeath the balance of "the income of my residuary trust funds not required during "the period of 21 years after my death to pay the annuities "hereby or by any codicil hereto bequeathed or for any other "purpose upon which income of my residuary trust funds may "under the trusts hereinbefore contained be applicable upon "trust during the special period but subject to cesser as herein-"after provided to apply the same as follows: A. To remunerate "the services and defray the expenses incidental to these pro-"ceedings and generally to the launching advertising and "propaganda of the said British alphabet. B. To acquire by "employment purchase or otherwise the copyrights and patents "(if any) created by or involved in the designing and manufac-"ture of the said alphabet or the publication of the works printed

"in it without exploiting the said rights or for commercial profit. "C. To wind up the enterprise when the aforesaid steps have "been taken or if and when its official adoption or general vogue "shall make further recourse to my estate and action on the part "of my trustee in respect of this charitable trust superfluous."

Clause 39 says: "Pending the operation of the foregoing "clause I direct that my trustee shall for the said period of 21 "years from my death accumulate the said balance of the income "of my residuary trust funds in the way of compound interest by "investing the same and the resulting income thereof from time "to time in any investment in which my residuary trust funds "are authorised to be invested."

Clause 40 is: "Subject to the trusts hereinbefore declared of "my residuary trust funds and the income thereof or if and so "far as such trusts shall fail through judicial decision or any "other cause beyond my trustee's control my trustee shall stand "possessed of my residuary trust funds and the income thereof "but subject to a charge on the capital as well as the income "thereof for payment of such of the annuities hereby bequeathed "as shall be subsisting upon trust as to one third thereof for the "trustees of the British Museum in acknowledgment of the "incalculable value to me of my daily resort to the reading room "of that institution at the beginning of my career as to one "third of the same upon trust for the National Gallery of Ireland "and as to the remaining one third of the same upon trust for "the Royal Academy of Dramatic Art at 61 Gower Street in the "County of London and should any of these three institutions "be permanently closed at the date when the trust to accumulate "the said balance of income of my residuary trust funds shall "cease the others or other shall succeed to its share and if more "than one equally."

Finally, clause 47 reads thus: "Having been born a British "subject in Ireland in 1856, subsequently registered as a citizen "of Eire, and finally privileged to remain a British subject by "the Home Secretary's letter dated June 27, 1949, I declare "that my domicile of choice is English and desire that my will be "construed and take effect according to English law."

Apart from a minor question about certain annuities which I have already decided, the difficulties begin with clause 35 which is, in form, a normal residuary clause directing conversion of the estate, other than copyrights, and the payment of funeral and testamentary expenses and debts out of the proceeds and the ready money. These resources have proved inadequate, and it has been necessary to defray the death duties largely out of royalties accruing since the death, which, it will be remembered, are directed by clause 5 to be treated as income. The definition of "my residuary trust funds" appears at first sight to exclude the copyrights and the proceeds of their exploitation, but no one suggested that the testator died intestate in this respect, and I am content to assume that these, directed as they are to be

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applied "as income of my estate," form part of the residuary income. The trustee is by clause 7 directed to manage and deal with them as absolute owner for so long as may be necessary during the defined "special period."

The directions in clause 35 connected with what the testator calls the "Proposed British alphabet" prescribe no limit of time, but clause 38 shows that not more than the income of the first 21 years after the death is to be devoted to these purposes. So much of this income as is not devoted to these purposes or the subsidiary purposes mentioned in clause 38 (which are, in my view, mere machinery incidental to the purposes stated in clause 35) is to be accumulated, and is to continue to be used during the special period unless the trusts "shall fail through "judicial decision or any other cause beyond my trustee's control," or unless the enterprise shall have been wound up on its successful achievement.

It appears that the residuary estate is likely to consist of nothing but copyrights and royalties arising out of them. These are to devolve at the end of the 21-year period on the ultimate residuary legatees, the British Museum, the Royal Academy of Dramatic Art and the Irish National Gallery in equal shares. The first two of these now claim that what I may call the alphabet trusts are entirely void, and that the claimants are entitled therefore to come into their inheritance at once and to stop the accumulation of income. The grounds of this claim are two: first, that the trusts, being for an object and not for a person, are void trusts; secondly, that they are void for uncertainty.

The Attorney-General appears as parens patriae to uphold the trusts as being charitable trusts, and counsel for the Attorney-General at my request also supported the proposition of the executor that, even if not charitable, these trusts, not being tainted with the vice of perpetuity (as it is called), are a valid exercise by a man of his power of disposing of his own money as he thinks fit. The claimants retort that these trusts are not charitable trusts, and it seems to me that I should address myself first to that question. It is notorious that the word "charitable," when used by a lawyer, covers many objects which a layman would not consider to be included under that word, but excludes benevolent or philanthropic activities which the layman would consider charitable. In construing a will the lawyer's sense must prevail in the absence of some special context. The four heads of charity are set out by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel.*[1] His words, as has often been pointed out, are not original, being drawn from the argument of Sir Samuel Romilly in his reply in *Morice* v. *Bishop of Durham.*[2] They are almost too familiar to need repetition. Shortly stated the four heads are (i) religion, (ii) poverty, (iii) education, and (iv) "other purposes beneficial

[1] [1891] A.C. 531, 583; 7 T.L.R. 657.

[2] (1805) 10 Ves. 522, 531, 532.

"to the community." Sir Samuel Romilly describes the last head as being "the most difficult," and the phrase he uses is "the advancement of objects of general public utility." Here, again, it is trite law that not every object coming within one or other of these categories is charitable—a college for pickpockets is no charity—but that every object which is to rank as charitable must either fit into one or more of the first three categories, or, if not, may still be held charitable because of general public utility.

The first object of the alphabet trusts is to find out by inquiry how much time could be saved by persons who speak the English language and write it, by the use of the proposed British alphabet and so to show the extent of the time and labour wasted by the use of our present alphabet, and, if possible, further to state this waste of time in terms of loss of money. The second is to transliterate one of the testator's plays, "Androcles and "the Lion," into the proposed British alphabet assuming a given pronunciation of English, and to advertise and publish the transliteration in a page-by-page version in the proposed alphabet on one side and the existing alphabet on the other, and, by the dissemination of copies and, in addition, by advertisement and propaganda, to persuade the government or the public or the English-speaking world to adopt it. This was described by the Attorney-General as a useful piece of research beneficial to the public, because it would facilitate the education of the young and the teaching of the language and show a way to save time and therefore money. It was suggested that the objects could thus be brought within the third category and that a parallel could be found in the decision of Danckwerts J. in *Crystal Palace Trustees* v. *Minister of Town and Country Planning*,[3] where trusts "for the promotion of industry commerce and art" were held charitable. So they were, but only in the context provided by the instrument (an Act of Parliament) in which they appeared. In my opinion, if the object be merely the increase of knowledge, that is not in itself a charitable object unless it be combined with teaching or education: see the speech of Rigby L.J. in *In re Macduff*.[4] The facts of that case bear no resemblance to the present, but Rigby L.J. says: "There is one other case to "which I will refer—*Whicker* v. *Hume*[5]—and in doing so I "will refer also to the unreported case of *President of the United "States of America* v. *Drummond*,[6] which is mentioned in "*Whicker* v. *Hume*.[7] I say nothing about the wide extent of "the gift in *Whicker* v. *Hume*,[8] because there is no doubt now "that the extensive nature of the gift as regards the range of

[3] [1951] Ch. 132; 66 T.L.R. (Pt. 2) 753; [1950] 2 All E.R. 857n.
[4] [1896] 2 Ch. 451, 472; 12 T.L.R. 452.
[5] (1858) 7 H.L.C. 124.
[6] 7 H.L.C. 141, 155.
[7] Ibid.
[8] Ibid.

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"the objects is no objection to it; but the gift was for advance-
"ment of education and learning, and the objection was taken
"by counsel who were impeaching the validity of the gift that
"education is no doubt a charitable purpose within the Statute
"of Elizabeth, but learning is not—that is to say, that the pro-
"motion of abstract learning would not be a charitable purpose.
"That was dealt with by Lord Chelmsford and Lord Cranworth,
"and both of them point out that, reading the word 'learning'
"as you find it in that will in connexion with education, it must
"be taken as equivalent to teaching, and, therefore, as a certain
"branch of education; and I rather gather from their judgments,
"and from the pains which they take to draw out and to elucidate
"the meaning of the word 'learning' in that will, that if they
"could not have put that interpretation upon it they would have
"doubted, at any rate, as to whether the advancement of learning
"as an abstract matter would be a charity at all. The Lord
"Chancellor, Lord Chelmsford, goes with great pains into the
"matter, and deals with the word 'learning'; and he says that
"the word in that will was used in the sense of teaching and
"instruction, 'and, in that sense, it appears to me,' he says,
"'that the case which was cited by the respondents, and which
"'is printed in the respondent's case, of the *President of the*
"'*United States of America* v. *Drummond*,[9] may be applicable,
"'where Lord Langdale decided, that a gift to the United States
"'of America, to found, at Washington, under the name of the
"'"Smithsonian Institution, an establishment for the increase
"'"of knowledge among men," was a valid charity.' The
"Lords evidently doubted whether a gift for the increase of
"knowledge would be a good charitable gift, unless it was under-
"stood to mean a gift for teaching and education. Yet the
"increase of knowledge would unquestionably in these days be
"taken to be a purpose of general utility, and the doubt of the
"noble Lords appears to me to be strongly in favour of the view
"taken by Lord Langdale that 'purposes of general utility' will
"not make a good charitable gift."

The research and propaganda enjoined by the testator seem to me merely to tend to the increase of public knowledge in a certain respect, namely, the saving of time and money by the use of the proposed alphabet. There is no element of teaching or education combined with this, nor does the propaganda element in the trusts tend to more than to persuade the public that the adoption of the new script would be "a good thing," and that, in my view, is not education. Therefore I reject this element.

There remains the fourth category. As I have already said, this does not embrace all objects of public utility, as appears clearly in the case of *In re Strakosch*[10] and perhaps even better in *Williams' Trustees* v. *Inland Revenue Commissioners*.[11] The

[9] 7 H.L.C. 141, 155.

[10] [1949] Ch. 529; 65 T.L.R. 383; [1949] 2 All E.R. 6.

[11] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513.

headnote reads: "Every object of public general utility is not "necessarily a charity, for in order to be charitable a trust must "be within the spirit and intendment of the statute 43 Elizabeth, "chapter 4. Accordingly, no trust can be charitable unless it is "beneficial to the community in a way in which the law regards "as charitable. A trust was established with the objects of "promoting Welsh interests in London by social intercourse; "discussing all questions affecting Welsh interests; fostering the "study of the Welsh language by lectures on Welsh history, "literature, music and art; maintaining a library of literature "in the Welsh language or relating to Wales. The trustees were "empowered (inter alia) to maintain an institute and meeting "place for the benefit of Welsh people in London with a view "to creating a centre to promote 'the moral, social, spiritual "'and educational welfare of Welsh people.' *Held*, that the "trust was not exempt from income tax under section 37, sub-"section (1), of the Income Tax Act, 1918, since the ground on "which a charitable character was sought to be attributed to it "was not that it was beneficial in a way which the law regards "as charitable." In his speech Lord Simonds says [12]: "My "Lords, the claim of the appellants that the property is vested "in them for charitable purposes is based on these contentions, "(a) that 'the dominant purpose of the trust is the fostering of "'Welsh culture which is a purpose beneficial to the community "'composed of the people of the United Kingdom,' (b) that "'the purpose aforesaid is beneficial to the community composed "'of the people of the Principality of Wales and the county of "'Monmouth which is an integral part of the United Kingdom "'and in itself constitutes a political body settled in a particular "'territorial area' and (c) 'because the maintenance of the "'institute (the expressed method of effectuating the purpose "'aforesaid) is itself a purpose beneficial to a section of the "'British community which is determined by reference to "'impersonal qualifications (namely persons with Welsh con-"'nexions who are resident in or near or visiting London); and "'is not a selection of private individuals chosen on account of "'personal qualifications.' I have taken this statement of the "appellants' contentions from the formal reasons in their written "case, because in them so clearly appears the fallacious argument "upon which in this and other cases, which it has been my "fortune to hear, an attempt has been made to establish the "charitable character of a trust. My Lords, there are, I think, "two propositions which must ever be borne in mind in any case "in which the question is whether a trust is charitable. The "first is that it is still the general law that a trust is not "charitable and entitled to the privileges which charity confers, "unless it is within the spirit and intendment of the preamble "to the statute of Elizabeth (43 Elizabeth, chapter 4), which is

[12] [1947] A.C. 447, 454; 63 T.L.R. 352, 354; [1947] 1 All E.R. 513.

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"expressly preserved by section 13 (3) of the Mortmain and "Charitable Uses Act, 1888. The second is that the classifica-"tion of charity in its legal sense into four principal divisions by "Lord Macnaghten in *Income Tax Special Purposes Commis-"sioners* v. *Pemsel*[13] must always be read subject to the qualifi-"cation appearing in the judgment of Lindley L.J. in *In re "Macduff*[14] . . ." Lord Simonds then cites from that case as I have done. Then he goes on: "But it is just because the "purpose of the trust deed in this case is said to be beneficial "to the community or a section of the community and for no "other reason that its charitable character is asserted. It is "not alleged that the trust is (a) for the benefit of the community "and (b) beneficial in a way which the law regards as charitable. "Therefore, as it seems to me, in its mere statement the claim "is imperfect and must fail."

It is hard to ascertain what are the limits of purposes held to be beneficial to the community "in a way which the law regards "as charitable." Lord Simonds, in the case last cited, grapples with this difficulty, and he admits that it is very difficult to reconcile all the cases. His Lordship opines that "Each case "must be judged on its own facts and the dividing line is not "easily drawn . . ."[15] It seems to me, however, that in the present case I am stopped on the threshold by the word "beneficial." Who is to say whether this project is beneficial? That, on the face of it, is a most controversial question, and I do not think that the fact that the testator and a number of other people are of opinion that the step would be a benefit proves the case, for undoubtedly there are a great many more people, at present at any rate, who think the exact contrary. That is why the testator directs the steps which he recommends to be taken. They are intended to overcome the opposition and sloth of the great majority who prefer to stick to what they know and to use that to which they are accustomed. I do not see how mere advertisement and propaganda can be postulated as being beneficial. Mr. Isaac Pitman is the author of a singularly able piece of pleading on the subject in his affidavit, but, even if I were persuaded by him of the merits of the scheme, I cannot think that my opinion on that subject is relevant or can be the deciding factor.

I feel unable to pronounce that the research to be done is a task of general utility. In order to be persuaded of that, I should have to hold it to be generally accepted that benefit would be conferred on the public by the end proposed. But that is the very conviction which the propaganda based on the research is designed to instil. The testator is convinced, and sets out to convince the world, but the fact that he considers the proposed

[13] [1891] A.C. 531, 583; 7 T.L.R. 657.

[14] [1896] 2 Ch. 451, 472; 12 T.L.R. 452.

[15] [1947] A.C. 447, 458; 63 T.L.R. 352, 355; [1947] 1 All E.R. 513, 520.

reform to be beneficial does not make it so any more than the fact that he describes the trust as charitable constrains the court to hold that it is.

A case on a parallel subject, spelling reform, came before Rowlatt J. on an income tax point. That is *Trustees of the Sir G. B. Hunter* (1922) "*C*" *Trust* v. *Inland Revenue Commissioners*.[16] The headnote reads: "The appellants claimed that "the income of a trust of which they were trustees was exempt "from income tax under section 37 (1) (b), Income Tax Act, 1918, "on the ground that the trust was established for charitable "purposes only, and that the trust income was applied to such "purposes only. The trust deed provided that the net income "and, after a period of years, the capital, of the trust should "be paid or applied to the benefit of the Simplified Spelling "Society or in certain circumstances, as to which the trustees "had wide discretionary powers, to the benefit of or to promote "the formation of any other society or association having similar "objects. The objects of the society were to recommend and to "further the general use of simpler spellings of English words "than those now in use. It engaged in propaganda to influence "public opinion in favour of its objects and to gain for them the "approval of education authorities. The appellants claimed that "the purposes for which the society was established were "charitable either as being educational or as being beneficial to "the community. Held, that the trust was not established for "charitable purposes." In the case stated I find that it was contended for the society that its proposal had two practical advantages: "(i) By the adoption of the system, spelling would "be more quickly learned by a child, and the time so saved "could be utilized in training the child's mind in other directions. "The system would thus benefit education indirectly. (ii) The "system was of general advantage, because by making the "sound of words correspond with their written representation, "it would lead to better speech, and by facilitating the learning "of English by non-English speaking people, whether British "subjects or foreigners, would help the adoption of English as "an instrument of international communication." The trustees "contended (1) That the society was established for educational "purposes only: (2) That alternatively the society was estab-"lished for purposes beneficial to the community only." The Crown claimed "(1) That the trust was not established for educa-"tional purposes only or for purposes beneficial to the com-"munity but for the advancement of an idea or theory." With that view the Special Commissioners agreed, and there was an appeal which came before Rowlatt J. who said[17]: "I think that "the commissioners were clearly right here. It must be dis-"tinctly understood that what the court has to decide in cases "of this kind is not whether it appears that the society is

[16] (1929) 14 T.C. 427; 45 T.L.R. 344. [17] 14 T.C. 427, 432.

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"pursuing a beneficial object or not, in the opinion of the court; "I think that the court has nothing to do with that at all. But "what the court has to decide is whether the object of the "society is one that is charitable within the meaning of the rule "governing courts of equity and the Income Tax Acts. The "objects of this society or any other society which would benefit "under this trust is simply to make spelling more simple. "Everyone would agree up to a point that it is probably advan-"tageous. Probably as you go on you will get differences of "opinion; but, right or wrong, the question is whether that is a "charitable object. You have people trying to promote the "simplification of spelling, or the simplification of grammar, or "the uniformity of pronouncing, or the simplification of dress, "or the simplification or reform of any of the conveniences of "life. But in my judgment they are nowhere near either of the "express categories mentioned by Lord Macnaghten in the well-"known judgment, *Income Tax Special Purposes Commis-"sioners* v. *Pemsel*[18] or within the classes of cases which come "within the general classes in the Act. I think that this case "is hardly arguable." Such words of such a judge must have great weight with me.

It seems to me that the objects of the alphabet trusts are analogous to trusts for political purposes, which advocate a change in the law. Such objects have never been considered charitable. In his celebrated speech in *Bowman* v. *Secular Society*[19] Lord Parker has this passage: "Now if your Lordships "will refer for a moment to the society's memorandum of "association you will find that none of its objects, except, "possibly, the first, are charitable. The abolition of religious "tests, the disestablishment of the Church, the secularization of "education, the alteration of the law touching religion or "marriage, or the observation of the Sabbath, are purely "political objects. Equity has always refused to recognize such "objects as charitable. It is true that a gift to an association "formed for their attainment may, if the association be unincor-"porated, be upheld as an absolute gift to its members, or, if "the association be incorporated, as an absolute gift to the "corporate body; but a trust for the attainment of political "objects has always been held invalid, not because it is illegal, "for every one is at liberty to advocate or promote by any lawful "means a change in the law, but because the court has no "means of judging whether a proposed change in the law will "or will not be for the public benefit, and therefore cannot say "that a gift to secure the change is a charitable gift."

I therefore do not reach the further inquiry whether the benefit is one within the spirit or intendment (as it is called) of the Statute of Elizabeth, but, if I had to decide that point, I should hold that it was not.

[18] [1891] A.C. 531.

[19] [1917] A.C. 406, 442; 33 T.L.R. 376, 378.

It was argued for the ultimate legatees that, apart from any other consideration, the vice of uncertainty is fatal. Now, it has been often said that the vagueness with which a charitable bequest is stated will never be the cause of its failure. A modern instance is *In re Gott.*[20] I will read from the headnote: "A "charitable trust cannot fail for uncertainty whether the charit- "able intention be general or only specific. There is no practical "reason why certainty of the exact ambit of a charitable purpose "should be required, as the court can settle a scheme for its "administration." Uthwatt J. said[21]: "The argument is that "where there is shown an intention to devote property to a "particular charitable purpose only, but it is impossible to "ascertain that purpose with certainty, the trust intended is not "known, and there is, therefore, no trust to be enforced. The "well-known statement that 'a charitable trust does not fail "'for uncertainty' is said to be a slogan which does not apply "save where there is an intent in favour of charity generally. "No doubt, when a purpose is stated, no charitable trust is "created unless the purpose is certainly charitable, but, given "that certainty, uncertainty as to the particular charitable "purpose intended is, in my opinion, immaterial. No authority "was cited to me which supports the proposition that certainty "in the definition of an intended specific charitable purpose is "necessary and the proposition appears to be wrong in principle "and never to have been accepted in practice. If a gift to "charity generally does not fail for uncertainty—and that is a "proposition which is not open to dispute—it appears to me to "be a natural consequence, though it may not be a necessary "consequence, that a specific charitable purpose may be vaguely "set out. There is no practical reason why certainty of the "exact ambit of a particular charitable purpose should be "required, for the court has, as regards all charitable trusts, "jurisdiction to settle a scheme for their administration—I am "not referring to cy près schemes—and it is settled practice "that these schemes may deal, not only with methods of ad- "ministration, but also with, and define, the substance of the "trust. The court, as Lord Eldon pointed out, in *Morice* v. "*Bishop of Durham*,[22] has taken strong liberties on the subject "of charities."

Once decide that the object is charitable and the law will provide the means of carrying it into effect by a scheme, and it seems to me that the fact that the testator has not selected any particular form of alphabet for his experiment would not be fatal if the experiment itself constituted a charitable object.

The question of certainty becomes far more difficult if there be no charitable intent. The objection here is that the Public Trustee would not know how to set about his task because he

[20] [1944] Ch. 193; 60 T.L.R. 214; [1944] 1 All E.R. 293.

[21] [1944] Ch. 193, 196; 60 T.L.R. 214, 215; [1944] 1 All E.R. 293, 294.

[22] 10 Ves. 522, 538.

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would not know the corpus on which to direct his appointed statistical and phonetic experts to work. No particular alphabet has been indicated by the testator, though there are indications of the kind of alphabet required. It is to have not less than 40 letters of which at least 14 are to be symbols for vowel sounds. The evidence before me showed that a great deal of work has been and is being done on these lines, and that among those skilled in the knowledge of phonetics a fit person could be selected who would be competent to advise the Public Trustee either to adopt one of the already existing scripts, or, if necessary, to procure the invention of a new one. I should not have considered the testator's omission or failure to choose an alphabet fatal. Once that is decided, I see no uncertainty. The statistical calculations could on the evidence be done, and the remaining directions are quite categorical.

Can, then, this project be upheld apart from charity? I feel bound to say at once that, as the authorities stand, I do not think I am at liberty to hold that it can. In *Houston* v. *Burns* [23] Lord Haldane begins his speech in these terms: "My Lords, by "the law of Scotland, as by that of England, a testator can "defeat the claim of those entitled by law in the absence of a "valid will to succeed to the beneficial interest in his estate "only if he has made a complete disposition of that beneficial "interest. He cannot leave it to another person to make such "a disposition for him unless he has passed the beneficial interest "to that person to dispose of as his own. He may, indeed, pro-"vide that a special class of persons, or of institutions invested "by law with the capacity of persons to hold property, are to "take in such shares as a third person may determine, but that "is only because he has disposed of the beneficial interest in "favour of that class as his beneficiaries. There is, however, "an apparent exception to the principle. The testator may "indicate his intention that his estate is to go for charitable "purposes. If these purposes are of the kinds which the law "recognizes in somewhat different ways in the two countries as "charitable, the court will disregard a merely subordinate "deficiency in particular expression of intention to dispose of "the entire beneficial interest to a class, and will even them-"selves, by making a scheme of some kind, give effect to the "general intention that the estate should be disposed of for "charitable purposes."

Lord Parker in *Bowman* v. *Secular Society* [24] categorically states "A trust to be valid must be for the benefit of individuals ". . . or must be in that class of gifts for the benefit of the public "which the courts in this country recognize as charitable . . ." In other words, one cannot have a trust, other than a charitable trust, for the benefit, not of individuals, but of objects. The reason has been often stated, that the court cannot control the

[23] [1918] A.C. 337, 342; 24 T.L.R. 219.

[24] [1917] A.C. 406, 441; [1917] 33 T.L.R. 376, 378.

trust. The principle has been recently restated by Roxburgh J. in *In re Astor Settlement Trusts*[25] where the authorities are elaborately reviewed. An object cannot complain to the court, which therefore cannot control the trust, and, therefore, will not allow it to continue. I must confess that I feel some reluctance to come to this conclusion. I agree at once that, if the persons to take in remainder are unascertainable, the court is deprived of any means of controlling such a trust, but if, as here, the persons taking the ultimate residue are ascertained, I do not feel the force of this objection. They are entitled to the estate except in so far as it has been devoted to the indicated purposes, and in so far as it is not devoted to those purposes, the money being spent is the money of the residuary legatees of the ultimate remaindermen, and they can come to the court and sue the executor for a devastavit, or the trustee for a breach of trust, and thus, though not themselves interested in the purposes, enable the court indirectly to control them. This line of reasoning is not, I think, open to me. See, for instance, the statement by Lord Greene M.R. in *In re Diplock*.[26] "Those principles," he says, dealing with uncertainty, "I apprehend are really "nothing more than the application of a fundamental principle "of the law relating to trusts. In order that a trust may be "properly constituted, there must be a beneficiary. The "beneficiary must be ascertained or must be ascertainable. In "the case of what I may call impersonal trusts, such as a gift to "charitable purposes, or to benevolent purposes, there is no class "of beneficiary which can be defined in the same sense as a class "of beneficiaries such as a class of relatives. In the latter case, "although no particular person in the class may be able to say "that at any given moment he is entitled to anything out of the "trust, the class as a whole can enforce the trust. Now in the "case of charitable trusts in which no defined class is specified, "nevertheless owing to the particular principles which have come "to be applied to charitable gifts, the courts have not treated "the trust as failing for that reason. There is a very good ground "for that, namely that the Crown, as parens patriae taking all "charities under its protection, is in a position to enforce the "trust; and therefore, although there may be no specified charit-"able beneficiary who can come to the court and insist on having "the trust performed, nevertheless the Attorney-General can "appear and is entitled to insist on the trust being carried out, "if necessary, by a scheme cy près. But that exception to the "general rule, that there must be beneficiaries ascertained or "ascertainable—if I may call it an exception—does not extend "beyond what falls within the legal class of charity. It does not "extend to other public spirited purposes." The same view

[25] [1952] Ch. 534; [1952] 1 T.L.R. 1005; [1952] 1 All E.R. 1067.

[26] [1941] Ch. 253, 259; 57 T.L.R. 263, 264.

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is taken in the judgment of Jenkins L.J. in *Commissioners of Inland Revenue* v. *Broadway Cottages Trust.*[27]

I should have wished to regard this bequest as a gift to the ultimate residuary legatees subject to a condition by which they cannot complain of income during the first 21 years after the testator's death being devoted to the alphabet project. This apparently might be the way in which the matter would be viewed in the United States, for I find in Morris and Leach's work on the Rule against Perpetuities (1956), at p. 308, the following passage quoted from the American Law Institute's Restatement of Trusts: "Where the owner of property transfers "it upon an intended trust for a specific non-charitable purpose, "and there is no definite or definitely ascertainable beneficiary "designated, no trust is created; but the transferee has power "to apply the property to the designated purpose, unless he is "authorized so to apply the property beyond the period of the "rule against perpetuities, or the purpose is capricious." As the authors point out, this is to treat a trust of this sort as a power, for clearly there is no one who can directly enforce the trust, and if the trustees choose to pay the whole moneys to the residuary legatees, no one can complain. All that can be done is to control the trustees indirectly in the exercise of their power. In my judgment, I am not at liberty to validate this trust by treating it as a power. (See per Jenkins L.J. in *Sunnyfields* case above[28]: "We do not think that a valid power is to be "spelt out of an invalid trust." This also was the view of the learned author of Gray on Perpetuities (4th ed.), the leading work on the subject (See Appendix H), and I feel bound to accept it.)

The result is that the alphabet trusts are, in my judgment, invalid, and must fail. It seems that their begotter suspected as much, hence his jibe about failure by judicial decision. I answer that it is not the fault of the law, but of the testator, who failed almost for the first time in his life to grasp the legal problem or to make up his mind what he wanted.

Declarations accordingly.

Solicitors: *J. N. Mason & Co.; Russell Jones & Walker; Charles Russell & Co.; Bentleys, Stokes & Lowless; the Treasury Solicitor.*

K. R. A. H.

[27] [1955] Ch. 20; [1954] 3 W.L.R. 438; [1954] 3 All E.R. 120.

[28] [1955] Ch. 20, 36; [1954] 3 All E.R. 120.

[COURT OF CRIMINAL APPEAL.]

* REGINA v. THOMAS.

C. C. C.
1957
Jan. 24.
Pilcher J.

C. C. A.
1957
Apr. 1.
Lord Goddard C.J., Hilbery and Stable JJ.

Vagrancy—Prostitution—Living on the earnings of prostitution—Room let to prostitute at inflated rent—Room let for purposes of prostitution—Vagrancy Act, 1898 (61 & 62 *Vict. c.* 39), *s.* 1 (1).

At the trial of a defendant on a charge of knowingly living wholly or in part on the earnings of prostitution contrary to section 1 (1) of the Vagrancy Act, 1898, there was evidence for the prosecution that the defendant, after a certain amount of bargaining, made an arrangement with a woman, whom he knew to be a prostitute, that between the hours of 9 p.m. and 2 a.m. she should have the use of a room in a house which he rented, the prostitute paying him £3 a night for the use of the room, and that he knew that her purpose in securing the use of the room was to bring her clients there, as she in fact did. At the conclusion of the case for the prosecution counsel for the defence submitted that there was no case to answer:—

Held, rejecting the submission, that if there was evidence that a defendant had let a room or a flat at a grossly inflated rent to a prostitute for the express purpose of allowing her to ply her immoral trade there, it was for the jury to determine on the facts of each particular case whether the defendant was in fact knowingly living wholly or in part on the earnings of prostitution. A person who acted in such a fashion was acting, as it were, as a coadjutor of the prostitute and was in quite a different position from a shopkeeper, doctor, or person performing services to a prostitute in the ordinary way.

Regina v. *Silver* [1956] 1 W.L.R. 281; [1956] 1 All E.R. 716; 40 Cr.App.R. 32 overruled.

TRIAL ON INDICTMENT.

The defendant, Andrew Babatunde Thomas, was charged with, inter alia, knowingly living wholly or in part on the earnings of prostitution contrary to section 1 (1) of the Vagrancy Act, 1898.

The following statement of facts emerging from the evidence for the prosecution is taken from the judgment of Pilcher J. A prostitute now aged 21, with some 57 previous convictions for prostitution, made an arrangement with the defendant that she should have the use of a room which he rented in a house at Bayswater, between certain hours, roughly, 9 p.m. in the evening and about 2 a.m. in the morning. A certain amount of bargaining took place, and eventually the prostitute agreed to pay the defendant £3 a night for the facilities which she enjoyed. The defendant knew that she was a prostitute, and knew that her purpose in securing the use of the room was to bring her clients there, and it was almost certain that he knew that she did a very satisfactory trade in the room; on her own evidence she was earning about £80 to £90 a week from her professional activities.

At the conclusion of the case for the prosecution counsel for the defendant indicated that he would call no evidence, and in the absence of the jury, relying on the direction in *Reg.* v.

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Silver,† submitted that it was not open to the jury to find that the defendant had committed any offence against the Vagrancy Act, 1898, and that, therefore, there was no case to answer.

This report is confined to the issue raised by that submission.

Victor Durand for the prosecution.
H. S. Grannum for the defendant.

PILCHER J. referred to the facts as stated above and continued: At the conclusion of the case for the prosecution Mr. Grannum indicated that he did not propose to call any evidence on behalf of the defence, but he submitted that, in the circumstances, having regard to this particular count under the Vagrancy Act, I ought to direct the jury that they must acquit the accused. In support of this proposition he cited *Reg.* v. *Silver*,[1] a decision of Judge Maude in this court in February of 1956. That was a case in which the defendants were landlords and estate agents, who were concerned with letting flats at high rents, each flat to one prostitute, knowing that she was a prostitute, and that she intended to use the flat for the purpose of prostitution. They were accordingly charged under section 1 of the Vagrancy Act, 1898. The judge directed the jury to return a verdict of not guilty on this particular count.

In his direction the judge said[2]: "The question now arises, "for the second time so far as is known, as to what these words "mean, that is to say, 'knowingly lives wholly or in part on the "'earnings of prostitution.' It might seem, as I say, to those "who did not give careful consideration to it that anybody who "received money earned by a prostitute would be committing an "offence. For instance, the chemist who sells medicines and "other things to a prostitute knowing that she is a prostitute "would in part be living on the earnings of prostitution, in one "sense, the broadest sense; the doctor who attends her, the "lawyer who appears for her, if those persons know that she "is in fact a prostitute, might appear to be committing an "offence. That, of course, cannot be the intention of the Act. "If in fact that were so, the state of the prostitute in this world "would be simply appalling; she would be able to get no "services—or only with the utmost difficulty—and the same "would apply to the food she wanted to buy. It is unthinkable. "Therefore, one has to make up one's mind what the Act of "1898 really means. It has been said in argument before me, "by both sides, that the doctor, for instance, who treats the "prostitute knowing that she is a prostitute is not really living "of her earnings, although of course the money that is handed "over is her earnings; what he is doing is, in fact, living on his "own earnings; the doctor has earned his money. The shopkeeper,

† [1956] 1 W.L.R. 281; [1956] 1 All E.R. 716; 40 Cr.App.R. 32.

[1] [1956] 1 W.L.R. 281; [1956] 1 All E.R. 716; 40 Cr.App.R. 32.

[2] [1956] 1 W.L.R. 281, 284.

"the grocer and the baker and so on, they earn their money. "On the one hand, the doctor gives his services, and on the other, "in the case of the shopkeepers, they give their goods in exchange "for money: they, in fact, are earning their living. They are "not, therefore, knowingly living in part on the earnings of prosti-"tution at all. But it is said now—and it is the only instance "to which I should be directing my attention—that where a "landlord lets his premises for the purposes of prostitution and "gets what I propose to call a prostitute rent, a wholly different "situation arises; that is to say, in that the ordinary moral rent is "less than the prostitution rent, then in fact he is so far as the "prostitute rent addition is concerned living on the earnings "of prostitution. Now I do not think he is. I think that what "the landlord is doing is, he is living on his own earnings, "just like the shopkeeper. A shopkeeper who grossly over-"charged a prostitute because she was a prostitute would, "nevertheless, be living on his own earnings—utterly, completely "and disgustingly immoral, but they are his own earnings." The jury returned a verdict of not guilty and the defendants were discharged.

With the greatest respect to the judge, I do not agree with that last passage which I have read. It seems to me that if there is evidence that a defendant has let a room, or a flat, at a grossly inflated rent to a prostitute for the express purpose of allowing her to ply her immoral trade, then it is for the jury to determine on the facts of each particular case, whether the accused is in fact knowingly living wholly or in part on the earnings of prostitution. I take the view that anyone who acts in that fashion, is acting as it were as a coadjutor of the prostitute, and is in quite a different position to the shopkeeper, doctor or anyone else who performs services or sells goods in the ordinary way to a prostitute, and with regard to the argument addressed to me in the absence of the jury, when the jury return, I propose to direct them on the lines which I have indicated, and not in the fashion in which Judge Maude directed the jury in *Reg.* v. *Silver.*[3]

Direction accordingly.

The jury returned a verdict of Guilty and the defendant, having been sentenced to imprisonment, applied to the Court of Criminal Appeal for leave to appeal against his conviction.

The defendant did not appear and was not represented.

STABLE J., delivering the judgment of the court. This is an application for leave to appeal against conviction for, amongst other things, living on the immoral earnings of a prostitute. The judge, refusing to follow observations of Judge Maude in *Reg.* v. *Silver,*[4] directed the jury that if the defendant was receiving a payment of £3 a night for allowing the prostitute to have the use

[3] [1956] 1 W.L.R. 281. [4] [1956] 1 W.L.R. 281.

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of his bedroom for the purposes of carrying on her trade of prostitution in his room, he was living wholly or in part on the immoral earnings of that prostitute. In our judgment, the direction of the judge was right, and the observations in *Reg.* v. *Silver*,[4] so far as they conflict with the observations of the judge in the present case, were wrong. It was a perfectly plain case and there is no question but that the defendant was living wholly or in part on immoral earnings. The application for leave to appeal is dismissed.

Application dismissed.

Solicitors: *Solicitor, Metropolitan Police; Nehra, Emerson, Naylor & Co.*

J. F. L.

[4] [1956] 1 W.L.R. 281.

[COURT OF CRIMINAL APPEAL.]

C. C. A.
1957
May 13.
Lord Goddard C.J., Hilbery and Devlin JJ.

* PRACTICE DIRECTION (NON-CAPITAL MURDER).

Criminal Law—Court of Criminal Appeal—Application for leave to appeal to—Murder—Non-capital—Applications for leave not to be listed as final appeals — Application for leave to appeal against sentence not receivable — Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3 (*c*)—*Homicide Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 9.

LORD GODDARD C.J. An application for leave to appeal against sentence of life imprisonment imposed under section 9 of the Homicide Act, 1957,[1] for non-capital murder cannot be received because section 3 (*c*) of the Criminal Appeal Act, 1907,[2] provides that a person may appeal against a sentence "unless the sentence "is one fixed by law." The sentence for non-capital murder is now fixed by law by the Homicide Act, 1957.

I also desire to say that in the past all applications for leave to appeal in capital cases were treated as final appeals and put in the list as such. The prosecution was represented so that, if the appeal were dismissed, the capital sentence would not be postponed. Now, in all cases of non-capital murder, applications for leave to appeal against conviction will be treated in the ordinary way. They will be listed simply as applications, and the prosecution need not be represented unless leave to appeal is given.

E. M. W.

[1] Homicide Act, 1957, s. 9 (1): "Where a court . . . is precluded by "this Part of this Act from passing "sentence of death, the sentence shall "be one of imprisonment for life."

[2] Criminal Appeal Act, 1907, s. 3: "A person convicted on indictment "may appeal under this Act to the "Court of Criminal Appeal— . . . "(*c*) with the leave of the Court of "Criminal Appeal against the sen-"tence passed on his conviction, "unless the sentence is one fixed by "law."

[COURT OF APPEAL.]

* RICHARDSON *v.* LONDON COUNTY COUNCIL AND OTHERS.

C. A.

1957
Apr. 12, 15, 16.

Denning, Parker and Sellers L.JJ.

Mental Deficiency — Detention order — Reasonable care — Consent of parent or guardian—Petition signed by mother—Father resident in India—Legality—Person found neglected—Order of detention by judicial authority—Jurisdiction to make order—Proposed actions by detainee on release, against local authorities and Board of Control — Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *ss.* 15 (1), 71; *Mental Treatment Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 23), *s.* 16 (1).

In January, 1925, the applicant, R., who was then 20 years of age, was at the request of his mother, with whom he was living, and who asserted that he was beyond her control, placed in the St. Mary Abbott's Hospital by the London County Council, as a place of safety, the council purporting to act under section 15 (1) of the Mental Deficiency Act, 1913.[1] Shortly afterwards, on a petition signed by the mother (the father was in India) and supported by two doctors, an order was made by a judicial authority under which R. was transferred to Normansfield, a paying home, the mother being responsible for the cost of his maintenance. Later, the father having died and the mother being unable to maintain him, R. was temporarily placed by the Middlesex County Council in an institution at Brentford, until in October, 1925, an order was made by the Board of Control committing him to the Rampton Institution as a person of dangerous propensities. He remained there until 1954, when he was released. He then sought leave under section 16 (2) of the Mental Treatment Act, 1930,[2] to bring actions against the two county councils and the Board of Control claiming

[1] Mental Deficiency Act, 1913, s. 15 (1): "If any officer of the local "authority authorised in that behalf "or any constable finds neglected, "abandoned, or without visible means "of support or cruelly treated any per-"son whom he has reasonable cause to "believe to be a defective, he may "take such person to a place of safety, "and such person may be there "detained until a petition under this "Act can be presented."

"Interpretation." S. 71 (1): ". . . The expression 'parent or "'guardian' in relation to a defec-"tive shall include any person who "undertakes or performs towards the "defective the duty of a parent or "guardian: . . ."

[2] Mental Treatment Act, 1930, s. 16 (1): ". . . '(1) Where a per-"'son has presented a petition for a "'reception order, or signed or "'carried out, or done any act with "'a view to signing or carrying out, "'an order purporting to be a recep-"'tion order or any report, applica-"'tion, recommendation, or certifi-"'cate purporting to be a report, "'application, recommendation, or "'certificate under this Act, or any "'Act amending this Act, or has "'done anything in pursuance of this "'Act, or any Act amending this "'Act, he shall not be liable to any "'civil or criminal proceedings "'whether on the ground of want of "'jurisdiction or on any other ground "'unless he has acted in bad faith "'or without reasonable care.'"

"'(2) No proceedings, civil or "'criminal, shall be brought against "'any person in any court in respect "'of any such matter as is men-"'tioned in the last preceding sub-"'section, without the leave of the "'High Court, and leave shall not "'be given unless the court is "'satisfied that there is substantial "'ground for the contention that the "'person, against whom it is sought "'to bring the proceedings, has acted "'in bad faith or without reasonable "'care. . . .'"

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damages. It was contended that the mother was not the parent whose signature to the petition was required by the statutes; that the applicant was not a person found neglected, and that the order made by the judicial authority was made without jurisdiction. Havers J. refused leave to proceed against the county councils, but granted leave to proceed against the Board of Control. The applicant now appealed and the Board of Control brought a counter appeal. The sole question at issue was whether there was a substantial ground for the contention that the defendants had acted in bad faith or without reasonable care:—

Held, (1) that where the father of a defective was not living in this country and therefore was not at the relevant time the person who undertook or performed the duty of parent or guardian, it was not unreasonable to hold that the consent of the mother to a petition was sufficient to comply with the requirement of section 6 (2) of the Act of 1913.

(2) That the words "found neglected" in the Act of 1913 must be construed in the light of the law as it stood in 1925, when those words were given a wider interpretation than they were in *Reg.* v. *Board of Control, Ex parte Rutty* [1956] 2 Q.B. 109; [1956] 2 W.L.R. 822; [1956] 1 All E.R. 769. It was then reasonable to hold that a feeble-minded person was neglected if he were not given the care which he ought to have, or was not under the control which he ought to be under for his own good and that of others.

Rex v. *Judge Radcliffe* [1915] 3 K.B. 418; 31 T.L.R. 610 considered.

(3) That, as no substantial ground had been shown for contending that the proposed respondents had acted in bad faith or without reasonable care, the applicant's appeal failed and that of the Board of Control must be allowed.

APPEALS from Havers J.

The applicant, Ralph Edward Richardson, a man, 53 years of age, who since 1925 had been detained as a person of defective mentality under the Mental Defective Acts, in institutions of one kind or another, but had now been released, sought to bring actions for damages against the London County Council, the Middlesex County Council and the Board of Control. He therefore, as required by section 16 (2) of the Mental Treatment Act, 1930, applied to the High Court for leave to do so. Havers J., on March 1, 1957, refused leave to proceed against the London County Council and the Middlesex County Council, but granted leave to proceed against the Board of Control. The applicant, who alleged that his detention was unlawful, having been ordered without jurisdiction, appealed. The Board of Control cross-appealed.

The facts are more fully set out in the judgment of Denning L.J.

John Thompson Q.C. and *John Platts-Mills* for the applicant.

F. H. Lawton for the London County Council.

John G. Wilmers for Middlesex County Council.

Sir Harry Hylton-Foster Q.C., S.-G., and *Rodger Winn* for the Board of Control.

In addition to cases referred to in the judgments, *Harnett* v. *Fisher* [3] was cited in argument.

DENNING L.J. The applicant is now 53 years of age and he has been in an institution of one kind or another ever since 1925, as being a feeble-minded person under the Mental Defective Acts. After 30 years he was released, and now he seeks to bring an action in the courts against the public authorities, on the ground that his detention was unlawful. It has been provided by Parliament that an action of such a kind is not to be allowed to proceed unless the person bringing it first gets the leave of the High Court. The Mental Treatment Act, 1930, s. 16 (2), states that leave shall not be given "unless the court is satisfied that "there is substantial ground for the contention that the person, "against whom it is sought to bring the proceedings, has acted in "bad faith or without reasonable care." The judge below was not satisfied that there was any substantial ground for such a contention against the London County Council or the Middlesex County Council, but he held there was such a ground against the Board of Control. We have to consider here Mr. Richardson's appeal seeking leave to proceed against the London County Council and the Middlesex County Council, and the cross-appeal of the Board of Control, saying that leave ought not to be granted to proceed against them.

The applicant was born in India on February 17, 1904. His father was an officer in the Indian Police, and his mother was out there with her husband. He came to England when he was four years old. He was in a preparatory school here and in public schools, and when he was 18 he passed the Oxford Senior Local Examination with honours in French; but not long afterwards he seems to have had a breakdown. He became very difficult and from May 23, 1923, until January, 1925, he was placed by his parents in an approved home which was run by a Dr. Harry Corner. Then, shortly before he was 21, on January 9, 1925, he was sent to work, as a trial, on a poultry farm at Heathfield in Sussex. He did not stay there long. On January 28—that is, under three weeks—his mother took him away. It is recorded that he had been threatening violence to the farmer with whom he worked and the farmer said he was quite unmanageable. His mother brought him to London. She had no place to take him, because she herself was only in lodgings; so she took him temporarily to relatives in a flat. We do not know how welcome he was with those relatives, but within two days it became urgent to find other accommodation for him. The boy's uncle apparently came up from Ringwood and went with the mother and the boy to the London County Council. They were accompanied also by Dr. Corner, who had had him in the approved home for the previous 18 months. Dr. Corner told

[3] [1927] A.C. 573, 581; 43 T.L.R. 567.

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the London County Council that the boy was entirely beyond the control of his parents, and that two doctors were prepared to certify him as a mental defective.

Mrs. Richardson, the mother, was anxious that the lad should be put under immediate restraint pending the completion of private arrangements for his reception into a proper institution. He was examined by the medical officer of the London County Council. The outcome of that talk and examination was that the London County Council, through their officers, took him to what is called "a place of safety," the St. Mary Abbott's Hospital. In so doing, they purported to act under the authority of Act of Parliament, section 15 (1) of the Mental Deficiency Act, 1913, which states: "If any officer of the local authority authorised in "that behalf or any constable finds neglected, abandoned, or "without visible means of support or cruelly treated any person "whom he has reasonable cause to believe to be a defective, he "may take such person to a place of safety, and such person may "be there detained until a petition under this Act can be "presented." So, acting under that section, he was taken to St. Mary Abbott's Hospital. Within a few days a petition was presented, as the Act required, to a judicial authority asking that steps should be taken in respect of this boy; and the petition was made by the mother. She presented it, asking that an order might be made for sending him to Normansfield in Middlesex. That is a certified home, which had been approved by the authorities for the reception of mental defectives, where she, the mother, would have to pay for him. Her petition was supported by a certificate by Sir Maurice Craig, a specialist in these matters, and by Dr. Corner, both of whom gave full details of their reasons for believing him to be a mental defective.

That petition being made and so supported, the case came before the judicial authority, a specially appointed magistrate, and he, after hearing the matter, made an order in apparently proper form, finding that the applicant "is a feeble-minded "person, is a defective within the meaning of the Mental "Deficiency Act, and is subject to be dealt with under the Act by "reason of the following circumstances: by reason of being "neglected and not under proper care and control." That order was made on February 11, 1925, and by virtue of it the applicant was taken from the St. Mary Abbott's Hospital, the place of safety, to Normansfield, a paying home, where he remained, his mother presumably being responsible for the cost of his maintenance in that home. Shortly after he went to Normansfield he became 21, and thereupon under a statutory provision in that behalf his case was reconsidered. It was reconsidered on March 24, 1925, by three visitors; and it appears that there were also present Sir Maurice Craig, Mr. Langdon-Down (the doctor from Normansfield), Dr. Corner (the doctor who had had him at the approved home beforehand), the mother's solicitors, and a solicitor representing the applicant, the alleged defective.

From such records as there are, it appears that all of them were of opinion that he was mentally defective, save one visitor, who recorded an opinion the other way. In the result, seeing that there was not a unanimous opinion of the visitors in favour of his discharge, he continued to be detained at Normansfield. A little later his father died. His mother was left without means and could not pay for him at Normansfield any longer. Accordingly, steps were taken to get him transferred to an institution where the local authority would pay for him. Before that happened he escaped from Normansfield and was found two days later as he was coming out of Ripon Cathedral. He was taken back, not to Normansfield, but to an institution at Brentford, when arrangements could be made for the local authority to pay for him. He was kept in that institution for a few months. During that time he applied for a poor person's certificate, under the old Poor Persons Rules, to bring an action before the court, and a solicitor wrote a few letters on his behalf, but did not carry it further. Ultimately, on October 2, 1925, the Board of Control made an order that he was of dangerous propensities and he was removed to the Rampton Institution. He remained there, or in other institutions, until the year 1954, when he was released.

Such being his history, the applicant seeks to bring an action, complaining that from the beginning his detention was unlawful. To do this, he has to satisfy the court that there are substantial grounds for the contention that there was bad faith or want of reasonable care. I will go through the principal contentions. The first complaint is of the conduct of the London County Council on January 30, 1925. On that day his mother, with his uncle and a doctor, took him along to the London County Council. The officers of the London County Council said that they found him neglected and had reasonable cause to believe him to be a defective, and so took him to a place of safety. On behalf of the applicant it is contended that there was no possible justification for the suggestion that he was "found neglected," and that there must have been a want of reasonable care, at least, on the part of the London County Council: and that there might even have been bad faith, in that they may have realized that it was doubtful whether they had any power in law to detain him, but nevertheless, in order to support the mother's wishes, they took a chance on it and found him "neglected" when he was not so in fact.

I cannot help thinking that that contention only sees the light of day because of the decision of the Divisional Court last year in *Reg.* v. *Board of Control, Ex parte Rutty*,[1] where that court said that the words "found neglected" in section 2 (1) (*b*) of the Act of 1913 strongly suggested that the defective must be found through neglect in some degree of distress; and that the word "neglected" must be construed as meaning physically suffering

[1] [1956] 2 Q.B. 109; [1956] 2 W.L.R. 822; [1956] 1 All E.R. 769.

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from a lack of essentials through want of reasonable care. Applying that case, it is said that this youth was not in the least "neglected" or "found neglected." He was being paid for by his mother; he was taken along in the care of his mother; he could not be said to be "found neglected" simply because he was beyond her control. I do not think we ought to look at this case in the light of the decision in *Rutty's* case.[1] We ought to look at it as the law stood in 1925. At that time the courts were not disposed to give such a narrow construction to the word "neglected" as they have since done in *Rutty's* case.[1]

In 1915, in *Rex* v. *Judge Radcliffe*,[2] the Divisional Court (consisting of Lord Reading C.J., sitting with Darling and Lush JJ.) had considered the very point. Mr. Bankes had there contended "that the words 'found neglected' point to some person, "some officer of the local authority, finding the defective home-"less or uncared for." The court said that although that was no doubt one kind of case contemplated by the section, "we think "that it would be a too narrow view to take of the section if we "were to say that a parent himself may not petition on one of "these grounds." In view of that case, I think that any person interpreting in 1925 the words "found neglected" would have given a wider interpretation to them than was given in 1956.

Looking at the words apart from authority, it seems to me reasonable to hold—or at least a reasonable person might hold—that a feeble-minded person is "neglected" if he is not given the care which he ought to have, or is not under the control which he ought to be under, both for his own good and for the good of others. It is obvious, of course, that if his parents and relatives are indifferent to their responsibility to him, not caring whether he runs wild or not, then he is neglected. He is neglected by his parents and relatives. Suppose, however, that his parents and relatives are not indifferent. They are anxious to do all they can for him but simply cannot manage it, so that he gets past their outstretched hands and runs wild all the same. He is outside their control. He is not neglected *by them*. But many people would say that he is neglected by the community at large. If his parents and relatives cannot give him the care and control which he ought to have, then the responsibility falls on the rest of the community and, unless and until they do something about it, he is neglected, not by his parents, but by the community at large.

It is for that very reason that Parliament has seen to it that there are officers to represent the community—a constable or an officer of a local authority—who can act on behalf of the community at large and undertake the responsibility that falls upon them. If they find a feeble-minded person "neglected" in the sense that I have mentioned, then it might well be thought that,

[1] [1956] 2 Q.B. 109.

[2] [1915] 3 K.B. 418; 31 T.L.R. 610.

on the true construction of this statute, one of those officers can take him to a place of safety. That seems to me to be the interpretation which the court had in mind in 1915 in *Judge Radcliffe's* case,[3] and which might reasonably be had in mind by the public authorities in 1925, when they acted as they did in this case. The present contention that this youth was not "neglected" can only be based on the decision in 1956 in *Rutty's* case.[4] It was not apparent to anyone's mind in the year 1925. For present purposes, *Rutty's* case must be put on one side. When that is done, I cannot see any substantial ground for saying that the London County Council were at fault in any way in acting on the basis that this youth was, in the circumstances, "found neglected." They had reliable medical evidence that he was a mental defective. He had been in an approved home for 18 months, on a farm for just under three weeks, and his mother had had to bring him back to London. She was in lodgings and had put the youth out with a cousin. How long would this cousin keep him? Who could take care of him? He was beyond the control of his parents and could not be looked after by them. So long as nothing was done to bring him under control, he was neglected by the community at large. In the circumstances, I should have thought there was reasonable ground for holding him to be "found neglected."

The second complaint arises from the conduct of the judicial authority who, on February 11, 1925, made an order for the detention of this youth. The judicial authority acted on the footing that he was "found neglected," thus giving those words the same interpretation as the London County Council, and confirming the reasonableness of their conduct. But this particular complaint arises from section 6 (3), which provides that if an order is to be made, it is not to be made without the consent in writing of "the parent"; and it is said in this case that, as the mother was the petitioner, the "parent" concerned was the father, and his consent ought to have been obtained. This is the ground on which the judge gave leave for an action to be brought against the Board of Control. The contention is based on some observations in the *Judge Radcliffe* case,[5] which appear to say that in such a case, if the mother is the petitioner, the father must give his consent. But in that case father and mother were living together, and the observations must be restricted to such a case.

When the parents are not living together, but the father is absent for some reason—in one of the cases, *Woodward* v. *Oldfield*,[6] the father was in penal servitude, and one can imagine many other cases, a father away at sea, or a prisoner of war—I cannot think that the consent of the father would be a necessary condition. He would not come within the definition of "parent"

[3] [1915] 3 K.B. 418.
[4] [1956] 2 Q.B. 109.
[5] [1915] 3 K.B. 418.
[6] [1928] 1 K.B. 204; 43 T.L.R. 488.

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in this Act, because he would not at the relevant time be a person who undertakes or performs the duty of a parent or guardian. In this case the father was in India. In 1925 there were no air-mail letters that could get to and fro in a short time. It might take weeks or months to get into touch with the father. In my opinion, when the father is unavoidably away so that his consent cannot be obtained within any reasonable period of time, in such a case the consent of the mother is sufficient, even though she is the one who makes the petition.

In these circumstances, I should have thought it could not be said that the judicial authority had acted without jurisdiction; but, in any case, I do not see that the Board of Control can be blamed. It may be that in some circumstances they ought to take steps to rectify a mistake by the judicial authority. But here there was no mistake, or at any rate no want of care by them. The chairman of the board looked into this matter himself and gave a decision on it. He wrote: "As the father is in "India, I think we may assume the mother is properly acting." That shows that the point was carefully considered. In these circumstances, I can see no ground for the contention that there was any want of reasonable care or any bad faith in the Board of Control in not insisting upon the father's consent.

So much for the order of the judicial authority, from which the whole of the remaining detention flows. But I have yet to consider the position of the Middlesex County Council. They only took part in the detention of this man after he left the private home in Normansfield and went into their institution at Brentford. There is some obscurity as to how he actually came to be there. He was given leave of absence, under the regulations in that behalf, from Normansfield and taken to this institution in Middlesex. It has been suggested that the Middlesex County Council, soon after they had the man in their institution, were very uneasy about the legal position and took steps to validate it. There are letters produced showing that he was told that the Middlesex County Council were about to present a petition to a judicial authority for an order to send him to a certified institution. They later dropped the idea, and it is suggested that the reason was because in the meantime the applicant, under the Poor Persons procedure, went to a solicitor, who wrote letters to the Middlesex County Council, obviously leading up to an action. Soon afterwards, on August 5, the Middlesex County Council wrote to the solicitor that they were going to continue to hold the applicant under the existing "continuation order," and then wrote a letter on August 14 saying that they were not going to proceed with the petition.

It is said that that shows something in the nature of bad faith: that the Middlesex County Council saw that there was something wrong with the detention and, instead of taking steps to clear it up, they in effect took their chance and kept him in the institution. I cannot see that there is any substantial ground for

this contention. At the most, there is a suspicion, and I should have thought a very flimsy suspicion at that. In addition we have been given a possible explanation. I say "possible explanation" because, after this length of time, the full facts cannot be discovered; but it seems very likely that all that happened was this: the question arose whether the local authority had any authority to pay for the applicant in this institution at Brentford. It was thought at one time that they would have to go through the procedure again of taking him to a place of safety and have another petition to the judicial authority. Hence the letters. But the Board of Control seem to have pointed out that that was unnecessary, because there is power under the regulations to transfer him from a certified home to an institution, and that thereupon arrangements can be made for payment by the local authority. It was for that reason that the county council did not go on with the proposed petition. When that explanation is preferred, any suspicion flies out of the window. I see no ground for allowing the applicant to bring an action against the Middlesex County Council.

Next we come to October 2, 1925, when the Board of Control made an order that the applicant was to be removed to the Rampton Institution, on the ground that he was of dangerous propensities. It is said that the Board of Control did not exercise reasonable care in this regard: but I can see no ground for that contention. The reports made show that he had threatened violence on a number of occasions. In order to show the applicant's deplorable state, I will read what the people at Normansfield said: "An assistant pigman under whom he has "worked at Normansfield informs me that he does not work "well and that he is unstable. He says that he masturbates "openly and does not conceal the fact that he discussed with "him the question of raping a sow. He also says that he con-"siders that he is a danger to other people and that he would "be quite likely to do them an injury with a knife or other "weapon if he had a grudge, real or fancied, against them." Another man said that "he imagined everyone is his enemy; "he cannot work with other people; that he cannot control people "nor can he be controlled." In addition, he threatened to shoot Dr. Corner. Moreover, when there was a suggestion that he should be moved from Brentford to another home, several other homes refused because of his condition. In the circumstances, I can see no ground for suggesting that the Board of Control were wanting in reasonable care in the steps that they took to have him removed to the Rampton Institution.

In conclusion, I may say that this seems to be one of the very cases which Parliament had in mind when they said that such an action as this should not be brought without the leave of the court. It is an unfortunate feature of mental illness that those afflicted by it do not realize the need for their being under the care and control of others. They resent it, much as a small

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child or a dumb animal resents being given medicine for its own good, and they are apt to turn round and claw and scratch the hand that gives it. See how this unfortunate man has turned round, not only on the public authorities, but on his own mother. She is now 81. He accuses her in these proceedings of wickedly presenting the petition for his detention. He says the petition by his mother "was presented in bad faith and without exercising "reasonable care, and negligently by her." Surely, if any impartial person looks at the known facts, they would see that the poor woman was at her wits' end to know what to do with her son. She went to the London County Council as a last resort, and only presented a petition on their suggestion.

Although he has made these allegations against her, I am glad to see that he has not sought to make her a defendant to this action for damages, though if his case is true, she is the origin and cause of all his troubles. If he were a man of sound mind, I should have thought his attack on his mother was reprehensible, but as he was a sick creature, feeble-minded, incapable of telling right from wrong, he should be excused. In any case, I do not think that he should be at liberty, after all these years, to bring an action against the public authorities who were concerned in his case. Parliament has wisely provided that he is not to be allowed to bring an action of this kind unless there is substantial ground for believing them to have been guilty of want of good faith or want of reasonable care. This court, in *Shackleton* v. *Swift*,[7] made it clear that this protection is not to be construed narrowly. That case shows that, although these public authorities may have misconstrued the Act and although they may have done things which there was no jurisdiction to do, nevertheless, so long as they acted in good faith and in a reasonable manner, they are to be protected from having actions brought against them. That was so under the Act of 1913. The new Act of 1930 gives even greater protection. It puts the burden of proof the other way round. It puts the burden of proof on the man who seeks to bring such an action. It goes further. It says that not only must there be reasonable grounds, but there must be *substantial* grounds for the contention. I do not think it possible to define what are "substantial grounds." Suffice it to say that there must be solid grounds for thinking that there was want of reasonable care or bad faith.

Looking at the whole of this case, it seems to me that no substantial ground is shown here for bringing these actions. I would therefore dismiss the appeal in the case of the London County Council and the Middlesex County Council, and I would allow the appeal of the Board of Control, and make the appropriate order.

PARKER L.J. I entirely agree with all that my Lord has said, and I would only add a few words on the principles upon which

[7] [1913] 2 K.B. 304.

the court should act in exercising its discretion under section 16 of the Mental Treatment Act. In the first place, it is quite clear that it is not enough for an applicant to show that the order under which he has been detained was made without jurisdiction, or, indeed, was bad on its face. Those would be good grounds in proceedings for habeas corpus or for certiorari; but here, as the section itself shows, the considerations are entirely different, because under subsection (1) of section 16 it is provided that a person concerned with the reception of a mental deficient "shall "not be liable to any civil or criminal proceedings whether on "the ground of want of jurisdiction or on any other ground "unless he has acted in bad faith or without reasonable care." Subsection (2) provides that leave of the court "shall not be "given unless the court is satisfied that there is substantial "ground for the contention that the person, against whom it is "sought to bring the proceedings, has acted in bad faith or "without reasonable care."

The word "substantial" is not easy to define. Indeed, it is probably incapable of precise definition; but I take it that it means something more than "reasonable ground," which were the words used in section 330 of the Lunacy Act, 1890, before it was amended by section 16 of the Act of 1930. It is, I think, at the opposite end of the scale (if I may use that expression) to a flimsy ground. It is something short of certainty, but something considerably more than bare suspicion. "Bad faith" speaks for itself, and so does "without reasonable care," in the ordinary case; but what is the position when a person concerned has in good faith misconstrued the words of the statute? For myself, I take it to be the law that in such a case, provided the statute could, in the mind of that person, who is not a lawyer, reasonably be thought to bear that construction, it cannot be said that he has acted without reasonable care.

That was said quite clearly by Vaughan Williams L.J. in *Shackleton* v. *Swift*,[8] to which my Lord has referred: "Under "those circumstances, in my judgment, without going at further "length through the Act of Parliament, I decide this question "upon the ground that this Act of Parliament gives special "protection to those officers and others acting under the powers "of this Act in cases where, although they may have miscon-"strued the Act and although they may have done things which "there was no jurisdiction to do, they have acted in good faith "and in a reasonable manner." Of course, if the words of the statute are so clear and precise that they are incapable, even in the mind of a layman, of bearing the construction in question, then that would be evidence of lack of reasonable care, if not of bad faith.

Applying those principles to the present case, I agree with the judge that the applicant has not brought himself within the

[8] [1913] 2 K.B. 304, 316.

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section in regard to the proposed action against the London County Council. Clearly they had reasonable cause to believe that the applicant was a defective. It is true that they use a rather broad description of their views in saying that there are "prima facie grounds for a suspicion that," but if one looks at Mr. Leeming's minute, a contemporary document, it is perfectly clear that Dr. Corner, in whose care the applicant had been, accompanied the mother and that the London County Council were told that two doctors were prepared to certify. In my view they clearly had grounds for that belief. But then it is said—and this is the crux of the case against the London County Council—that this applicant was not "found neglected" within the meaning of the statute, so as to enable him to be sent to a "place of safety."

It is perfectly clear that the circumstances must be considered. As my Lord has said, the mother and uncle were asking, as a matter of urgency, that the applicant should be put under immediate restraint. He had been to a mental home, he had been let out on licence to a farm without success, and he had been brought back from the farm and housed with the mother of a cousin. That was the situation on January 30 when the mother and uncle brought him before the London County Council. His mother said that she was unable to exercise proper control over him, and certainly was not in a position to give him the care, supervision and control which his mental state demanded. It seems to me that in those circumstances a perfectly possible construction of the Act, and prima facie a reasonable construction of the Act, would be that a person is "found neglected" who needs the care, supervision and control referred to in section 1 (*c*) of the Act. Indeed, that was the view taken by the judicial authority. I suspect that that was the view taken by the applicant's own advisers (and he had advisers from time to time) throughout the period of his restraint, because if that was thought to be the wrong construction, as was decided in *Rutty's* case,[9] habeas corpus proceedings would no doubt have been taken. It seems to me perfectly clear that, but for *Rutty's* case[9] and the law as expounded there, these proceedings would never have been heard of, and for the very good reason that until *Rutty's* case[9] it was thought generally that the words "found neglected" in section 2, and again in section 15, should be given a wide construction.

As regards the proposed action against the Middlesex County Council, without going through the matter in detail, it seems to me that the case as presented to the court is really one of bare suspicion. It is suggested that the council realized or suspected that the original order was bad, that they were minded to initiate a petition themselves to regularize the position, and that it was only when a solicitor on behalf of the applicant intervened that

[9] [1956] 2 Q.B. 109.

they changed their mind and hoped that nothing more would be heard of the matter. Apart from the fact that the Middlesex County Council, as I understand it, never saw the order at all, and therefore could have no grounds whatever for suspecting any irregularity, the letters (as I see it) which have now been disclosed show on their face a perfectly innocent explanation.

As regards the Board of Control, the real case, as I understand it, made against them by Mr. Thompson, who has put forward every possible argument on behalf of the applicant, is this, that they should have seen from the order itself that it was bad. In other words, he says the order was bad on its face, that the board, exercising reasonable care, would have noted that, and it would then become their duty to discharge the applicant. Whether or not it is their duty in any such case to take proceedings to discharge an applicant it is unnecessary to determine, because, as I see it, there was nothing irregular on the face of the order. The same point arises in regard to the word "neglected," which I have already dealt with.

The only other point is the point with which my Lord has fully dealt, namely, the fact that, on the face of the order, only the consent of one parent was obtained. Again it seems to me that the Board of Control could reasonably interpret the provision in section 6, in the circumstances of this case, as requiring only the consent of the mother, which was indeed the view taken by the judicial authority.

Mr. Thompson made a number of smaller points against the Board of Control. He said, as I understand it, that they would have seen the dissenting opinion of Dr. Leeson on the reconsideration on the applicant attaining 21 years of age, and he says that they should have made further inquiries, or again should have discharged the applicant. Even if they did see that opinion, I doubt whether they were bound to take any steps whatever, nor do I see what they could have done. The statute provides that the applicant shall only be released on attaining 21 if the visitors agree to that course. They did not all agree to that course, and accordingly he had to stay, as he did, under the statute, in the institution.

Finally, it is said they failed to take reasonable care in making the order of transfer to Rampton. I think Mr. Thompson realizes that that is perhaps his weakest point, because, as it seems to me, for the reasons given by my Lord, there was ample evidence on which the Board of Control should act. Accordingly, I would dismiss the applicant's appeal and allow the appeal of the Board of Control.

SELLERS L.J. I so entirely agree with the judgment delivered by my Lord (probably the last, we regret, that he will deliver in

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these courts) that I hope it will not be showing any lack of appreciation to the skill, discretion and tenacity of Mr. Thompson's argument if I add no further words of my own.

Appeal dismissed.
Cross-appeal allowed.

Solicitors: *Robert K. George; J. G. Barr; Kenneth Goodacre; Solicitor to Ministry of Health.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

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May 8, 9.
Lord Goddard C.J., Hilbery and Donovan JJ.

* DERBYSHIRE MINERS' WELFARE COMMITTEE *v.* SKEGNESS URBAN DISTRICT COUNCIL.

Rates and Rating — "Social welfare" — Recreation — Miners' welfare holiday camp—Trustees occupying premises used for "purpose of a "holiday centre . . . for the benefit of" coal miners, their dependants and invitees—Provision of cost-price holidays—Organization not established or conducted for profit—Not prima facie charitable — Whether "social welfare" — Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).
Charity—Recreation—Holidays.

The appellants occupied a holiday camp and premises on trust to "permit the . . . premises to be used for the purpose of a "holiday centre and a recreation or pleasure ground for the benefit "of workers in or about coal mines employed by collieries in the "Derbyshire District (including the dependants and invitees of the "said workers)." The premises consisted, inter alia, of chalets; a kitchen and dining hall; a theatre and children's theatre; bars, lounges, tea bars and a billiards room; a bowling green, skating rink and gardens; a dormitory for young children; and other ancillary buildings. The only persons attending the holiday camp were workers in or about coal mines in the district of Derbyshire (excluding South Derbyshire), their wives and children, to whom holidays were provided at cost price, the appellants seeking to make neither a profit nor a loss on their operations. The funds for the establishment of the camp had been provided out of statutory compulsory contributions levied on the coal industry under Acts of Parliament and grants for capital expenditure were made by the Social Welfare Organization set up under the Miners' Welfare Act, 1952. The appellants claimed to be entitled to the benefit of the rating relief provided by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, on the ground that they were an organization not established or conducted for profit and whose main objects were charitable or "otherwise con-"cerned with the advancement of . . . social welfare" within the meaning of section 8 (1) (*a*):—

Held, that although they were not prima facie charitable the main objects of the appellants were concerned with the advancement of social welfare within the meaning of section 8 (1) (*a*); the benefits provided were clearly for the advancement of social

welfare and the camp was not provided as a matter of business; if benevolence was required, there were elements of benevolence, for the beneficiaries had not themselves provided the funds necessary for the establishment of the camp, where they enjoyed a holiday at no more than cost price; nor could it be said that the coal miners of Derbyshire, their dependants and invitees, were not a sufficiently large and important section of the community to bring the objects of the appellants within the section; the appellants, accordingly, were entitled to the relief claimed.

National Deposit Friendly Society Trustees v. *Skegness Urban District Council* [1957] 2 W.L.R. 322; [1957] 1 All E.R. 407 applied.

Observations of Lord Simonds in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297, 307; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31 considered.

CASE STATED by Lincoln (Parts of Lindsey) Quarter Sessions.

The appellants, known as the Derbyshire Miners' Welfare Committee, were shown in the rate book for the year ended March 31, 1956, as the occupiers of a hereditament in Skegness described as "holiday camp and premises" with a rateable value of £1,476, and the amount of the rate was shown as £1,758 18s. In the rate book for the following year the rateable value of the premises was shown as £3,800 and the amount of the rate as £3,040. The appellants, by notice given under section 4 of the Poor Relief Act, 1743, appealed against that rate on the grounds that the provisions of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1] applied to the hereditament; that the rate was not made in conformity with that section in that the amount charged or to be charged exceeded the amount permitted by the section; and that the amount of rates charged or to be charged ought to have been limited to £1,758 18s.

The following were among the facts found by quarter sessions. The appellants were in fact the trustees of the Derbyshire Miners' Welfare Convalescent Home and Holiday Centre (hereafter referred to as the trust), being generally known by the name, The Derbyshire Miners' Welfare Committee, and at all times occupied the hereditament in question, and a further hereditament used as a convalescent home (as to which no question arose) for the purpose of a convalescent home and holiday centre for the use of workers in and about coal mines in Derbyshire (exclusive of

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to . . . "(a) any hereditament occupied for "the purposes of an organisation ". . . which is not established or "conducted for profit and whose main "objects are charitable or are otherwise concerned with the advancement of religion, education or social "welfare; . . . (2) For the purposes "of the making and levying of rates ". . . for the year beginning with "the date of the coming into force of "the first new valuation list . . . "the amount of rates chargeable "in respect of a hereditament to "which this section applies shall ". . . be limited as follows . . . "(a) for the first year of the new "list, the amount so chargeable shall "not exceed the total amount of rates "(including any special rates) which "were charged in respect of the "hereditament for the last year "before the new list came into "force; . . ."

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South Derbyshire). The hereditament consisted of a number of chalets in which visitors to the holiday centre could sleep; a kitchen and dining hall; a theatre and a children's theatre; bars, lounges, tea bars and a billiards room; a bowling green, roller skating rink and gardens; a special block for paraplegics; a dormitory for young children; shops selling holiday requisites, administrative offices and other ancillary buildings. (The expenses of the paraplegic block were borne by another fund and for that reason quarter sessions were of opinion that the presence of that block did not affect the question before them.)

By section 13 of the Miners' Welfare Act, 1952, the social welfare organization set up under that Act obtained from the National Coal Board such sums as were necessary to meet the estimated cost of any social welfare activities within the meaning of that Act, such as holiday camps of the nature of that in question, intended to be carried out by the social welfare organization. In so far as it was a matter of fact, quarter sessions found that the camp was provided by the social welfare organization but that that organization had only made grants for capital expenditure, and in so doing it was their practice to make it a condition that the appellants would be responsible for maintenance and operational expenses, the camp being run by trustees who sought to make neither a profit nor a loss on their operations. The convalescent home and holiday centre kept separate accounts and neither the trust nor the convalescent home nor the holiday centre was established or at any time conducted for profit.

The only persons attending the holiday centre were workers in or about coal mines in the district of Derbyshire (excluding South Derbyshire), their wives and children; if all the vacancies were not filled by those persons, they were filled by applicants from other coalfields, but generally there were no vacancies left to be filled by applicants from other coalfields. A charge varying from £5 15s. for an adult to £1 10s. for a small child was made for a week's holiday accommodation and full board, which charge included the return rail or omnibus fare from the visitor's home to Skegness. Drinks and other refreshments were sold to persons staying at the holiday centre, alcoholic drinks being acquired by such persons as members of a club and in the winter by local residents who became members of the club. A substantial profit was made out of the supply of drink but the charge for accommodation was so fixed that taking all the operations together the trustees made neither a profit nor a loss.

The trust was the subject of an order made by the Charity Commissioners on February 20, 1953, approving and establishing a scheme for the regulation of two charities, the Derbyshire Miners' Welfare Convalescent Home, and the Derbyshire Miners' Holiday Centre, which latter charity was stated to be regulated in conformity with the trusts declared by a deed dated December 6, 1940. Paragraph 5 of the scheme provided as follows: "*Object.* The charity and the endowments thereof shall be

"administered and managed for the object following . . . The "provision and maintenance of a convalescent home for workers "in and about coal mines in the district of Derbyshire (exclusive "of South Derbyshire) and subject thereto the provision and "maintenance of a holiday centre for the benefit of persons "qualified as aforesaid and in need of a change of air."

By paragraph 18: "The land and buildings for the time being "belonging to the charity and heretofore used as a convalescent "home shall be appropriated and used as a convalescent home "for workers in or about coal mines in the district of Derby-"shire (exclusive of South Derbyshire) and their wives and "families. Any land and buildings . . . not required to be "retained or occupied for the last above-mentioned purpose may "be appropriated and used for the purpose of a holiday centre "for the benefit of persons qualified as aforesaid and in need of a "change of air: Provided that so often and so long as accommo-"dation in the . . . convalescent home or holiday centre is not "required for occupation by persons qualified as aforesaid the "trustees may admit to the . . . convalescent home or holiday "centre . . . persons other than persons qualified as aforesaid "upon payment of such charges adequate in the opinion of the "trustees to cover the cost of maintaining persons so admitted "in the . . . convalescent home or holiday centre as the trustees "may fix from time to time."

It appeared from the documents before the court that the premises occupied for the purposes of the holiday centre were held by the appellants under a lease dated December 6, 1940, granted by the trustees of the Derbyshire District Miners' Welfare Committee to trustees on behalf of the Derbyshire District Miners' Holiday Centre at a rent of £200 a year. The lease, after reciting, inter alia, that section 20 of the Mining Industry Act, 1920, established a fund, known as the Miners' Welfare Fund, that the duty of allocating money from that fund was then vested in the Miners' Welfare Committee appointed under section 20 (3) of that Act (as varied), and that the Miners' Welfare Committee had allocated £35,000 for the purposes of providing a holiday centre for the use and benefit of workers in or about coal mines, more particularly for such of those workers as were resident for the time and from time to time in the Derbyshire district, contained the following declaration of trust: "The trustees shall "permit the demised premises to be used for the purpose of a "holiday centre and a recreation or pleasure ground for the "benefit of workers in or about coal mines employed by collieries "in the Derbyshire District (including the dependants and "invitees of the said workers)." The lease was referred to in the order of the Charity Commissioners annexed to the case stated but was not before quarter sessions.

It was contended for the appellants (1) that the purposes of the trust were charitable, and (2), alternatively, that the purposes were otherwise connected with the advancement of social welfare

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because (a) the provision of holidays at cost for persons in need of a change of air was a purpose connected with the advancement of social welfare; (b) social welfare within the meaning of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, did not connote a benefit to the community at large but that it was the intention and effect of the section to confer the benefits of the section on organizations which were not charitable because their purposes did not benefit a sufficiently large section of the community, and (c) social welfare within the meaning of section 8 should be taken to include "social welfare activities" as defined in section 16 (1) of the Miners' Welfare Act, 1952.

It was contended for the rating authority (1) that the purposes of the trust were not charitable, and (2) that they were not otherwise concerned with the advancement of social welfare because social welfare connoted a benefit to the community, and a benefit to employees of one employer to the exclusion of all other members of the community was not the advancement of social welfare within the meaning of the section; it was also contended that the definition of "social welfare activities" in section 16 (1) of the Miners' Welfare Act, 1952, was contained in a different statute and in a connexion which was not in any way in pari materia with section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Quarter sessions were of the opinion (a) that the purposes of the trust were not charitable, and (b) that the purposes of the trust were not otherwise concerned with the advancement of social welfare because social welfare connoted a benefit to the community and not a benefit to an individual or to a particular class of workpeople employed by one employer; that to confer a benefit on some of the servants of the National Coal Board by the provision of a summer holiday at cost was not sufficiently wide to constitute the advancement of social welfare within the meaning of section 8; and (c) the definition of "social welfare activities" in the Miners' Welfare Act, 1952, was not applicable to the interpretation of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and they dismissed the appeal.

The appellants appealed.

At the hearing before the court the argument was confined to the issue as to whether or not the main object of the trust was concerned with the advancement of social welfare within the meaning of section 8 (1) (*a*).

Geoffrey Cross Q.C. and *J. M. Milne* for the appellants.

Sir Arthur Comyns Carr Q.C., *C. E. Scholefield* and *J. Deakin James* for the rating authority.

The following cases were cited in argument: *Inland Revenue*

Commissioners v. *Trustees of Roberts Marine Mansions* [2]; *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [3]; *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council* [4]; *Gilmour* v. *Coats* [5]; *Monck* v. *Hilton* [6]; *Inland Revenue Commissioners* v. *Baddeley* [7]; and *British Launderers' Research Association Ltd.* v. *Hendon Borough Rating Authority.* [8]

LORD GODDARD C.J. I will ask Donovan J. to give the first judgment.

DONOVAN J. This is an appeal by way of case stated from the decision of the Quarter Sessions Appeal Committee for the County of Lincoln (Parts of Lindsey), dismissing an appeal by the appellants against a rate levied upon them for the year ending March 31, 1957. The hereditament occupied by the appellants is a holiday camp and auxiliary premises at Skegness. The rate for the year ending March 31, 1956, was £1,758 18s. The rate for the year ending March 31, 1957, was £3,040, so that there has been a substantial increase in the second year. Part of the hereditaments occupied by the appellants at Skegness consists of a convalescent home, but with this the case is not concerned and no issue arises upon it.

The ground of appeal before the appeals committee was that the appellants were entitled to the benefit of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which confers certain reliefs from rating as regards the premises to which it applies. Section 8 provides, so far as is relevant, that: "(1) This section applies to the following hereditaments, "that is to say—(*a*) any hereditament occupied for the purposes "of an organisation (whether corporate or unincorporate) which "is not established or conducted for profit and whose main "objects are charitable or are otherwise concerned with the "advancement of religion, education or social welfare; . . ."

It being admitted that the appellants are not established or conducted for profit, they claimed that their main object was charitable within the meaning of the section; alternatively, that they were otherwise concerned with the advancement of social welfare. Quarter sessions decided that the appellants were not entitled to the relief provided by the section. They took the view that the main objects of the appellants were not charitable and were not otherwise concerned with the advancement of social welfare. The ground of that decision appears to have been

[2] (1926) 43 T.L.R. 52; (1927) 43 T.L.R. 270, C.A.; 11 T.C. 425.

[3] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[4] [1957] 2 W.L.R. 322; [1957] 1 All E.R. 407.

[5] [1949] A.C. 427; 65 T.L.R. 234; [1949] 1 All E.R. 848.

[6] (1877) 2 Ex.D. 268.

[7] [1955] A.C. 572; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525.

[8] [1949] 1 K.B. 462; 65 T.L.R. 103; sub nom. *British Launderers' Research Association Ltd.* v. *Central Middlesex Assessment Committee and Hendon Rating Authority* [1949] 1 All E.R. 21.

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that the benefits conferred by the appellants were to such a limited class of individuals that there was not sufficient public benefit conferred by the holiday camp to warrant their claim. Quarter sessions also took the view that a holiday camp the purpose of which was to provide holidays at cost was not per se a charitable object.

In 1953 the Charity Commissioners established a scheme for the regulation of the appellants' assets and funds employed in the furtherance of the convalescent home and the holiday camp. The relevant provisions of that scheme are contained in two paragraphs: the first, paragraph 5, provides: "The charity and "the endowments thereof shall be administered and managed for "the object following that is to say—The provision and main-"tenance of a convalescent home for workers in and about coal "mines in the district of Derbyshire (exclusive of South Derby-"shire) and subject thereto the provision and maintenance of a "holiday centre for the benefit of persons qualified as aforesaid "and in need of a change of air." The second, paragraph 18, provides: "The land and buildings for the time being belonging "to the charity and heretofore used as a convalescent home shall "be appropriated and used as a convalescent home for workers in "or about coal mines in the district of Derbyshire (exclusive of "South Derbyshire) and their wives and families. Any land and "buildings belonging to the charity at the date hereof not "required to be retained or occupied for the last above-mentioned "purpose may be appropriated and used for the purpose of a "holiday centre for the benefit of persons qualified as aforesaid "and in need of a change of air: . . ."

The words "in need of a change of air" will, therefore, be noted as appearing in both of those paragraphs, and the reason for their inclusion is almost certainly that a holiday camp where people can get holidays at cost would not, of itself, be a charity, not being in any way for the relief of poverty or for the advancement of education, religion or some other purpose beneficial to the community. Those were the four heads of charities enumerated by Lord Macnaghten in *Income Tax Special Commissioners* v. *Pemsel*,[1] and, as has been held frequently, in order to come within that fourth category, the object of the organization or trust must not merely be for the public benefit, but also must be analogous to those objects which are enumerated as charitable under the Statute of Elizabeth. Those objects, in my view, would not include something which is merely a seaside holiday camp run at cost. In *Inland Revenue Commissioners* v. *Trustees of Roberts Marine Mansions*,[2] the Court of Appeal held that the words "requiring rest and a change of air" as descriptive of the beneficiaries in that case, who were members of the drapery and allied trades, imported an element of the relief of sickness or poor health, and so qualified that particular trust as charitable, and

[1] [1891] A.C. 531, 583; 7 T.L.R. 657.

[2] (1927) 43 T.L.R. 270; 11 T.C. 425.

it would seem that whoever drafted the Charity Commissioners' scheme in the present case treated that decision as a precedent.

Nevertheless, the governing document in this case is the lease of December 6, 1940, wherein the trust is expressed. That was not produced at the hearing before the quarter sessions. The object of the trust is there described in clause 6 in these terms: "The trustees shall permit the demised premises to be used for "the purpose of a holiday centre and a recreation or pleasure "ground for the benefit of workers in or about coal mines "employed by collieries in the Derbyshire District (including the "dependants and invitees of the said workers)." There is there no mention of beneficiaries who are in need of a change of air, and, therefore, the trust itself, so far as the document before the court is concerned, is simply to give certain persons a seaside holiday at cost; and, prima facie, that is not a charitable object.

Mr. Cross, on behalf of the appellants, says that there are intermediate deeds which may alter the position and may justify those additional words which now appear in the scheme. That may be so, and Mr. Cross wishes to preserve the point that, when all the relevant documents are looked at, this is a charity; but for present purposes, and in view of the state of the evidence before us, he is content not to rely upon that point, but simply to rely on the second ground of appeal, i.e., that even if it cannot be said that the main object of the organization is charitable, nevertheless the appellants are an organization whose main objects are otherwise concerned with the advancement of social welfare.

The words "social welfare" are almost impossible to define. It would be difficult to conceive an expression which could be wider in its scope. Some assistance is to be derived as to what is meant by "social welfare" in connexion with the mining industry at least, from section 12 of the Miners' Welfare Act, 1952, and the definition of "social welfare" contained in section 16 of that Act. It reads in this way: "'social welfare "'activities' means activities concerned with the maintenance "or improvement of the health, social well-being, recreation or "conditions of living of—(*a*) persons employed in or about coal "mines or otherwise employed under the Board." That definition, of course, is not conclusive of the present case, but, as I say, I think that it is helpful. For my part, to provide holidays in a seaside camp at cost, arrangements being made to provide varied and healthy recreation in the camp so that people do not walk aimlessly up and down the parade and have nothing like the same temptation to spend a great deal of time in drinking, and where, in addition, mothers can leave their children properly looked after during the day and thus get some much needed relaxation themselves, all this, to my mind, is clearly the advancement of social welfare; and I did not understand Sir Arthur Comyns Carr, on behalf of the rating authority, to contend the contrary.

But Sir Arthur resists the claim on these grounds. He says,

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first, that "social welfare" in its context in section 8 (1) (*a*) connotes something benevolent in the origin of the funds used for the purpose, or, as Lynskey J. said in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*,[3] recently decided in this court, some eleemosynary element; otherwise he says that every club throughout the country will qualify for relief under this section. The relief which the section gives in fact is the limitation of rates in a way which I need not pause to describe, and such a wide extension of this relief, says Sir Arthur, cannot have been intended by Parliament. There should, he says, be something in the nature of voluntary contributions and there is none, because the fund for the establishment of this camp came from compulsory contributions levied under certain Acts of Parliament dealing with the mining industry. He agreed, I think, that his argument could be summarized thus: if the main object of the organization is business and not the advancement of social welfare, then it is not within the section, albeit that social welfare might incidentally follow from the operations of business. For myself I do not know that I should quarrel with that assertion.

The question here, however, is whether it applies in the present case. The words "or are otherwise concerned" and the following words in the section are words which clearly enlarge the scope of the relief which would otherwise be given, that is, they enlarge the scope of the section beyond "charities" in the legal sense of that term. Sir Arthur wishes the section to be construed as though it read thus: "or are otherwise benevolently "concerned with the advancement of social welfare." Again, for myself, I do not know that I should disagree if "benevo- "lently" is used in contrast to "as a matter of business," because that I think is inherent in the decision of this court in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*.[4]

But in the present case I do not think that this camp is provided as a matter of business. I think that there is certainly some benevolence about it seeing that the beneficiaries did not themselves provide the funds which were necessary to establish the camp, that they enjoy a holiday at no more than cost, and that the trustees who run the camp for them pay a rent for the premises which apparently is far below the rack rent.

I do not think, therefore, that this case fails in limine, as Sir Arthur suggests, on the ground that there is nothing benevolent about the origin and working of the holiday camp, assuming that element to be essential to the claim. I think that there are elements of benevolence about it even though there may be no voluntary contributions to the cost.

The second ground of objection put forward by the rating authority, and the one which was upheld by quarter sessions, is

[3] [1957] 2 W.L.R. 322, 327; [1957] 1 All E.R. 407.

[4] [1957] 2 W.L.R. 322.

that the beneficiaries here are too limited a class; that, just as an organization in order to be a charity in the legal sense of the term must benefit the public at large, or at any rate a substantial section of it, so also an organization to be engaged in the advancement of social welfare within the meaning of the section must benefit the public at large, or at any rate a substantial section of it. Sir Arthur says that this is implicit in the word "social," which connotes society, or some substantial part of it, as opposed to a few individuals.

Accepting that this is so (and for my part I am prepared to do so) one notices here that the trust is for the coal miners of Derbyshire, their dependants and invitees. The Charity Commissioners' scheme seems to me to have enlarged its scope by making everybody a potential beneficiary under the scheme, coal miner or not, with, however, a priority for certain of the Derbyshire miners. But in the present state of the evidence, as I say, it would be better to proceed upon the basis that clause 6 of the lease which I have already read expresses the true extent of the trust.

Upon that it is said by the rating authority that the nexus between the beneficiaries is simply that of a common employer; that this is not enough, and the decision of the House of Lords in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[5] is relied upon as authority for that proposition. That was a case where the trust was expressly for the benefit of the employees of one private employer, albeit a corporation, and the House of Lords left open the question whether the members of a particular calling, as distinct from employees of one employer, would likewise be too narrow a class. The language used by Lord Simonds[6] in his speech clearly leaves open the case of workers in a nationalized undertaking like the present.

There is no point in discussing the numerous decisions upon this topic as to whether a particular section of the public is large enough to constitute a charity, many of which it is difficult to reconcile. For my part, I think that the coal miners of Derbyshire, their dependants and their invitees, if they are the only beneficiaries of this scheme, do constitute a sufficiently large and important section of the community for the present purpose.

Accordingly, I think that the appellants are an organization whose main objects are concerned with the advancement of social welfare within the meaning of section 8 (1) (*a*), and I would allow the appeal.

HILBERY J. I agree. I do not wish to add anything.

LORD GODDARD C.J. I so entirely agree with the judgment

[5] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[6] [1951] A.C. 297, 307.

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which has just been delivered that I do not think that I can usefully add anything.

Appeal allowed.
Leave to appeal.

Solicitors: *Donald H. Haslam, National Coal Board, for Lawrence C. Jenkins, National Coal Board, East Midlands Division; Wrentmore & Son for Clerk to Skegness Urban District Council.*

J. F. L.

[CHANCERY DIVISION.]

1957
Feb. 25.

Wynn-Parry J.

* *In re* R. W. SHARMAN LTD.

[00120 of 1957.]

Company — Winding up — Costs — Judgment creditor's petition — Opposition by majority of creditors — Dismissal of petition — Whether "fair practice" to dismiss with costs or with no order as to costs.

A petitioning creditor asked, as a judgment creditor, for an order for the compulsory winding up of the debtor company. The petitioning creditor's judgment was for £167 5s. 11d. and £8 10s. 0d. costs, and the petition was opposed by a majority of the creditors for a total of £33,302 19s. 3d. and also by the company itself. The petitioning creditor, while recognizing that the petition must in the circumstances be dismissed, asked that it be not ordered to pay the costs:—

Held, dismissing the petition, that with regard to a judgment creditor deprived, as in the present case, of the right ex debito justitiae to a winding-up order only by the opposition of a majority of the creditors, the fair practice would be to make no order as to costs.

In re British Electric Street Tramways [1903] 1 Ch. 725 distinguished.

Petition to wind up a company by a judgment creditor, the Regent Oil Co. Ltd.

In October, 1946, R. W. Sharman Ltd. (hereinafter called "the company"), was incorporated under the Companies Act, 1929, as a company limited by shares, having a nominal capital of £10,000 divided into 10,000 ordinary shares of £1 each, of which £4,267 was, or was credited as, fully paid up. In January, 1957, the petitioning creditor, Regent Oil Co. Ltd., began against the company an action claiming £167 5s. 11d. for goods sold and delivered. On January 7, 1957, notice convening a meeting of creditors of the company was sent to the more substantial creditors and on January 11, 1957, the meeting was held. Notice of it had not been sent to the petitioning creditor. On January 15, 1957, in exercise of a power contained in a

debenture created by the company in favour of Barclays Bank Ltd. on November 11, 1946, a receiver was appointed.

On February 4, 1957, the petitioning creditor obtained against the company, in default of appearance, judgment in its action for £167 5s. 11d. and for £8 10s. 0d. costs. The company did not pay these amounts or any part of them, and the petitioning creditor now accordingly asked that it be compulsorily wound up, alleging that it was insolvent and unable to pay its debts. It was stated in terms in the petition: "The company has not "paid or satisfied any part of the judgment debt and the full "amount thereof remains justly due and owing to the petitioner." As, however, a majority of the creditors, for an aggregate of £33,202 19s. 3d., opposed the petition, as also did the company, the petitioning creditor recognized that the petition would have to be dismissed, but asked that no order be made as to costs.

R. B. S. Instone for the petitioning creditor.

E. F. R. Whitehead for the company and the opposing creditors.

The cases cited in argument are referred to in the judgment.

WYNN-PARRY J. This is a petition for the winding up of a company by Regent Oil Company Ltd., a judgment creditor for £167 5s. 11d. and £8 10s. 0d. costs. The matter coming before the court, it is shown that creditors amounting in value to £33,202 19s. 3d. oppose the making of an order. There appears to have been an informal meeting of some larger creditors to which the petitioning creditor, being a comparatively small creditor, was not invited. The petition discloses that "on "January 15, 1957, a receiver of the company was appointed in "exercise of a power contained in a debenture created by the "company in favour of Barclays Bank Ltd. on November 11, "1946." I assume that that paragraph was introduced into the petition in order to support the allegation in the next paragraph that "the company is insolvent and unable to pay its debts."

Counsel for the petitioning creditor recognizes that in view of the weight of the opposition to the petition he could not properly press for an order and it is obvious that the petition will have to be dismissed; but he asks that no order should be made as to costs. It appears that the present practice in such a case as this is to order the petitioning creditor to pay the costs. Investigation has failed to establish, with any clarity, the origin of this practice or the length of time during which it has obtained although counsel suggests that it may well have grown up since the decision of Simonds J. in *In re Home Remedies Ltd.*[1] It is to be noticed that in the case of contributories the rule is

[1] [1943] Ch. 1; 59 T.L.R. 31; [1942] 2 All E.R. 552.

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R. W. Sharman Ltd., *In re.*

Wynn-Parry J.

different, as appears from *In re Great Northern Copper Mining Co. Ltd.*[2] The headnote to the report reads: "If, on a petition "for winding up a company, the court is of opinion that circum-"stances are such that the opinion of the shareholders ought to "be obtained, and such opinion, when obtained, is to the effect "that there should be no winding up, the court, if satisfied that "such is the bona fide opinion of the shareholders, will consider "itself bound thereby. Therefore, such a petition having been "ordered to stand over for the wish of the shareholders to be "ascertained, and the shareholders expressing a bona fide desire "to continue their concern, the court dismissed the petition; "but, being of opinion that the petitioner had a bona fide case "at the time of presenting the petition, dismissed it without "costs." Lord Romilly M.R., in a short judgment, referred to the fact that the petition had been stood over to ascertain the wishes of the shareholders and took the view he ought to give effect to the wishes of the majority. He ends his judgment saying[3]: "The petition is dismissed; it appears, however, on "the evidence that at the time the petition was presented there "was a proper case for a petition, and it will therefore be "dismissed without costs."

In a later case, *In re British Electric Street Tramways*,[4] Buckley J. laid it down that when a petitioner for a winding-up order elects at the hearing to withdraw his petition he will be ordered to pay the costs of those who have given notice within the specified time of their intention to appear—one set of costs to those supporting and another set to those opposing. The basis of this decision was, as appears clearly from the judgment, that where a petitioner at the hearing refuses or elects not to open the petition and asks for it to be dismissed the court has no opportunity of looking at the matter on the merits and, therefore, has no material on which to exercise its discretion in making an order as to costs. To quote his words[5]: "If the petition is "withdrawn, the court cannot say whether any and which of "these parties would have got their costs if the petition had "been heard."

This case, as is pointed out in argument, is somewhat different because it appears on the face of the petition and cannot be disputed that the petitioning company is a judgment creditor and, therefore, entitled, as between it and the company, ex debito justitiae to an order. The only reason which supervenes to prevent that order being made is the intervention of a body of creditors to whose wishes, under the law as it now stands, the court is bound to have regard.

Is it, the question arises, a fair and reasonable practice that

[2] (1866) 14 W.R. 705; subsequent proceedings reported sub nom. *In re Great Northern Copper Mining Co. of South Australia Ltd., Ex parte the Company* (1869) 20 L.T. 347.

[3] Ibid. 706.

[4] [1903] 1 Ch. 725.

[5] [1903] 1 Ch. 725, 727.

in these circumstances the position of such a petitioner entitled ex debito justitiae against a company to an order should be so much changed for the worse upon the intervention of a body of a majority of creditors opposing the petition? No doubt, if the company itself alone opposes and desires to get rid of the petition it must pay the costs, and that appears from *In re Flagstaff Silver Mining Co. of Utah.*[6]

The court usually hesitates very much to interfere with an existing practice, but I feel that I am at liberty here at any rate to consider the existing practice because history does not report, as I have said, how it came into existence or how long it has continued, and there is no authority which stands in the way of any such review. It appears to me that, at any rate in the case of a judgment creditor, the practice ought to be varied. It is perfectly true, as is pointed out in the judgment of Buckley J. in *In re British Electric Street Tramways,*[7] that the petitioner who issues a petition invites creditors to attend, and it may be that the present practice is perfectly fair in the case of a creditor who is not a judgment creditor, as to whose position I say no more, but where a judgment creditor presents a petition and is only deprived of what otherwise would be his right by the circumstance that an overwhelming majority of the creditors or a majority of the creditors oppose the petition, I find it difficult to see how, as a matter of principle, the practice is justified in not merely depriving the petitioner of his costs but ordering him to pay costs himself. I agree with counsel for the petitioning creditor that it is too late to review the practice with a view to seeing whether or not the petitioner should have his costs, but I have come to the conclusion that, at any rate as regards a judgment creditor in the position of the petitioning creditor in this case, the fair practice would be that in dismissing the petition the court should make no order as to costs.

Petition dismissed.

Solicitors: *Clifford Symons; Reginald Johnson & Co., Hayes, Middlesex.*

K. R. A. H.

[6] (1875) L.R. 20 Eq. 268.

[7] [1903] 1 Ch. 725.

[CHANCERY DIVISION.]

1957
May 8, 16.

Wynn-Parry J.

* ST. PANCRAS BOROUGH COUNCIL *v.* UNIVERSITY OF LONDON.

[1957 S. No. 674.]

Rates and Rating — Charities — "New list" — Notices terminating allowances — Sent before expiration of first year of new list — Whether premature—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8 (2) (3).

Notices under section 8 (3) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, terminating allowances from rates payable under the new list of rates conferred on certain classes of ratepayers by section 8 (2) (*b*) cannot be sent until the expiration of the first year of the new list, since subsection (3), which begins with the words "where paragraph (*b*) of the last "preceding subsection has effect . . ." can only come into effect at the expiration of the first year of the new list.

ADJOURNED SUMMONS.

On March 21, 1956, notices dated March 20, 1956, were served by the plaintiffs, St. Pancras Borough Council, on the defendants, the University of London, informing them of the withdrawal as from March 31, 1959, of the limitation on the defendants' liability for rates conferred by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1] in relation to certain

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to the following hereditaments . . . —(*a*) any "hereditament occupied for the purposes of an organisation . . . "which is not established or conducted for profit and whose main "objects are . . . concerned with "the advancement of . . . education ". . . (2) For the purposes of the "making and levying of rates in a "rating area, for the year beginning "with the date of the coming into "force of the first new valuation list "for that area (in this section "referred to as 'the first year of the "'new list'), and for any subsequent "year, the amount of rates chargeable in respect of a hereditament to "which this section applies shall, "subject to the following provisions "of this section, be limited as "follows . . .—(*a*) for the first year "of the new list, the amount so "chargeable shall not exceed the "total amount of rates . . . which "were charged in respect of the hereditament for the last year before "the new list came into force; "(*b*) if, by virtue of the preceding "paragraph, the amount of rates "chargeable in respect of the hereditament is less than it would have "been apart from that paragraph, "the proportion by which it is thereby required to be reduced shall "apply to any subsequent year "during which the hereditament "continues to be one to which this "section applies, and accordingly "the amount of rates chargeable in "respect of the hereditament for any "such year shall be reduced by that "proportion. . . (3) Where paragraph "(*b*) of the last preceding subsection "has effect in the case of a hereditament, the rating authority may at "any time give notice to the occupiers of the hereditament that, as "from the end of the year specified "in the notice, being a year ending "not less than 36 months after the "date on which the notice is given, "the limitation imposed by virtue of "that paragraph shall either cease to "apply to the hereditament or shall "be modified as mentioned in the "notice. . . ."

properties of the defendants there referred to. These properties (which were hereditaments within the meaning of section 8 (1) of the Act) included University College (the main assessment), and a number of other properties in Gordon Square, Gower Street, Cartwright Gardens, Flaxman Terrace and Taviton Street.

The valuation officer as required by section 1 (3) of the Act transmitted the new valuation list referred to in section 1 (1) to the rating authority; and the first year of the new valuation list for the rating area of the plaintiffs began on April 1, 1956.

The town clerk of the plaintiffs stated in an affidavit that doubts had arisen as to whether on the true construction of section 8 (3) the notices of March 20, 1955, were valid and effective to remove from the defendants as from March 31, 1959, the privileges conferred on them as ratepayers under section 8 (2) (*b*) of the Act. If the notices were ineffective on the grounds that they could not be validly served until a year subsequent to "the first year of the new list," it would be necessary for the plaintiffs to serve new notices, in which case the said privileges could not be terminated until March 31, 1961, at the earliest.

The plaintiffs took out the present summons asking the court to determine whether on the true construction of section 8 (3) of the Act the notices were valid and effective.

Charles Fletcher-Cooke for the plaintiffs.

W. B. Harris for the defendants.

No cases were cited in argument, but Ryde on Rating, 10th ed., p. 183, was referred to.

Cur. adv. vult.

May 16. Wynn-Parry J. having stated the facts read the following judgment: The question which arises is whether the notices are valid notices, or whether they were served prematurely and are therefore invalid. The answer depends wholly on the construction of subsections (2) and (3) of section 8 of the Act, and in particular on the opening words of subsection (3). Subsection (2) appears to me clear in its language, and its effect is that for the first year of the new list the total amount of rates chargeable in respect of a hereditament to which section 8 applies is not to exceed that which was chargeable in respect of that hereditament for the last year before the new list came into force. After the expiration of the first year of the new list and provided the condition at the opening of paragraph (*b*) applies, there will be a proportionate reduction, subject to the provisions of subsection (3), whatever they mean, and to the effect of action properly taken thereunder. Then comes subsection (3), the opening words of which are critical: "Where paragraph (*b*) of the "last preceding subsection has effect in the case of a heredita-"ment, the rating authority may at any time give notice. . . ."

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St. Pancras Borough Council v. University of London.

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As I construe subsection (2), it is possible in respect of any particular hereditament to which the Act applies to say, at least as late as during the currency of the first year of the new list, whether or not at the expiration of that year paragraph (*b*) will apply; but clearly the provisions of paragraph (*b*) cannot come into operation until the expiration of the first year. In subsection (3) the draftsman has used the present tense, "has "effect," and prima facie the result must be that subsection (3) does not operate until after the expiration of the first year of the new list. The doubts which he has raised are caused first by the use of the adverb "where," and secondly, by the use of the wide phrase "at any time." As regards the use of the word "where," it appears to me that this word in its context does no more than introduce a condition, namely, that the particular case must fulfil the conditions of pragraph (*b*) of subsection (2) before the notice contemplated by subsection (3) can be given, and it in no way affects the natural meaning of the words "has effect," which, in my view, refer to a point of time, namely, the moment of time, at the earliest, at which paragraph (*b*) of subsection (2) comes into operation, namely, at the end of the first year of the new list. As regards the words "at any time," they follow the statement of the condition on the fufilment of which the notice may be given, and, in my view, they cannot operate to allow a notice to be given at a time anterior to the condition being fulfilled. They must be read as if they were followed by the word "thereafter." This does not really involve adding to the subsection. It only means that the period during which the notice contemplated by the subsection can be given must necessarily start not earlier than the moment of time when the condition, on the fulfilment of which the notice can be given, has been fulfilled.

I am therefore of opinion that upon the true construction of sub-sections (2) and (3) of section 8 of the Act no notice under subsection (3) can be given until after the expiration of the first year of the new list, and therefore the notices in question were prematurely given, and are invalid. There will be a declaration accordingly.

Declaration accordingly.

Solicitors: *R. C. E. Austin; Slaughter & May.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

* RICHARDS v. HIGHWAY IRONFOUNDERS (WEST BROMWICH) LTD.

1957
Feb. 25, 26, 27, 28; *Mar.* 1, 4, 5, 7.

Pearson J.

[R. No. 114.]

Factory — Dust — Elimination — "All practicable measures" — Substantial quantity of dust—No masks provided—Dust not known to be injurious until 1950*—Silicosis contracted by workman—Whether all practicable measures taken by employers—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 47 (1).

From 1929 until 1952 the plaintiff was employed by the defendant company as an iron moulder, working with other men in one workroom. The last process in the moulding, known as "knocking "out," was carried out on the floor of the workroom and resulted in the emission of substantial quantities of visible dust. About one half of each working shift was occupied by the process of knocking out, conducted by one or other of the men in the workroom, so that the plaintiff was exposed to dust not only from his own operations, but also from that of his fellow workmen. In 1946 the plaintiff became seriously affected with silicosis, and subsequently became dangerously and incurably ill as a result of his work, and lost the prospect of living the normal span of his life. He left the defendants' employment in 1952.

The defendants had not provided their workmen with masks. It was not until 1950 that it became known that dust of the kind in question contained invisible particles tending to cause silicosis. During the relevant period there were a number of types of mask on the market to protect workers against the inhalation of dust, and several of these would have afforded sufficient protection against the visible dust, but only the one known as "the Mark IV" would have been effective against the dangerous, invisible particles. In comparison with other types the Mark IV was heavier and less comfortable and more restrictive of breathing. In the relevant period, when the existence of the invisible particles was unknown, the defendants, if they had decided to supply masks, would have been unlikely to supply Mark IV masks, and the employees would have been unlikely to choose or be willing to wear Mark IV masks. On a claim by the plaintiff for breach of section 47 (1) of the Factories Act, 1937:—

Held, (1) that there was no relevant breach of the section, because the provision of masks was not in the relevant period a practicable measure to protect the persons employed against the inhalation of the dust containing the invisible particles; and

(2) that the defendants' omission to provide masks in the relevant period had not caused the plaintiff's silicosis.

ACTION.

The plaintiff, Walter Richards, while employed by the defendants in their iron foundry, contracted silicosis. He claimed damages for breach of section 47 (1) of the Factories Act, 1937,[1]

[1] Factories Act, 1937, s. 47 (1): "In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall

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alleging that the defendants had failed to take all practicable measures to protect him against the inhalation of dust.

The plaintiff was a moulder in the defendants' employ from 1929 to 1952. In 1946 he became seriously affected with silicosis. The defendants' business involved the process of "knocking-out" the moulds of molten metal after they had cooled off, which included the knocking off of adherent grains of sand from the castings. This process caused substantial quantities of visible dust to be given off. It was not until 1950 that it was appreciated that the dust contained invisible particles tending to cause silicosis.

In March, 1955, Devlin J. held that the provision of a particular mask—the Mark IV—was a practicable measure which the defendants ought to have taken, and found for the plaintiff. On appeal the Court of Appeal [2] directed a new trial on the one question whether the defendants failed to comply with the statutory obligation under section 47 (1) of the Factories Act, 1937, by failing to supply masks, and, if so, to what extent the damage which the plaintiff suffered was properly attributable thereto, including under that head the question whether, in the event, the absence of masks merely aggravated rather than caused the injury. The Court of Appeal said the vital question was whether at the relevant dates the Mark IV mask was regarded by competent persons, including technicians qualified to speak on these matters, as the best all-purpose mask, so that in the natural course of events an obligation to take all practicable measures would inevitably involve, or properly and naturally involve, a supply of Mark IV masks.

Marven Everett Q.C. and *Geoffrey Green* for the plaintiff.
F. W. Beney Q.C. and *Patrick O'Connor* for the defendants.

Cur. adv. vult.

March 7. Pearson J. referred to the previous proceedings and continued: Now I must say something about the construction of section 47. If either of the two conditions is fulfilled, the occupier has to take practicable measures. It is not practicable for the occupier to take measures in relation to something of which he neither is nor ought to be aware. Therefore, the phrase "likely to be injurious or offensive to the persons "employed" has been interpreted, in what may be called a subjective sense, as meaning likely to be injurious or offensive according to the estimation of a reasonably well-informed factory

"be taken to protect the persons employed against inhalation of the "dust or fume or other impurity and "to prevent its accumulating in any "workroom, and in particular, where "the nature of the process makes it "practicable, exhaust appliances shall "be provided and maintained, as near "as possible to the point of origin of "the dust or fume or other impurity, "so as to prevent it entering the air "of any workroom."

[2] [1955] 1 W.L.R. 1049; [1955] 3 All E.R. 205.

occupier, or which the actual occupier knew or ought to have known to be likely to be injurious or offensive. In *Ebbs* v. *James Whitson & Co. Ltd.*[1] Singleton L.J., and perhaps also Denning L.J., impliedly accepted McNair J.'s interpretation on this matter. There is also *Carmichael* v. *Cockburn & Co. Ltd.*[2]

Mr. Beney contends that the same principle applies, when the facts make it applicable, to the second condition, namely, when there is given off a substantial quantity of dust. He says that it is not practicable for the occupier to take measures in relation to dust, of the existence of which he neither is nor ought to be aware, and that one should interpret the words "substantial quantity of dust" as meaning a substantial quantity of dust of which the occupier is or ought to be aware. Mr. Beney supported this argument by citing *Nichols* v. *Hall*,[3] where the word "practicable" was used in the relevant provision; *Sherras* v. *De Rutzen*[4] and *Harding* v. *Price*,[5] where again the word "practicable" was used in the relevant provision. Mr. Beney also cited a passage from the judgment of Jenkins L.J. in *Gregson* v. *Hick Hargreaves & Co. Ltd.*[6] Jenkins L.J., referring to the decision in the court of first instance, said[7]: "The judge, taking the view that all "practicable measures had been taken against the dust which "the defendants could see, or of the existence of which they "knew, came to the conclusion that they could not be held liable "for damage done by the silica dust, which was treated by him "as a distinct and invisible cloud of minute particles. With "respect to him, I think it is wrong for the present purpose to "treat the silica dust as separate from the rest. No one, I "apprehend, would suggest that under section 47 employers such "as the defendants are required to guard against elements the "existence of which is unknown and the presence of which "cannot be detected. The defendants' duty under the second "branch of the section is to protect against dust so far as prac-"ticable. That, as it seems to me, means to protect against the "ordinary, visible, dust arising in the course of the foundry "operations. Once it became known that there was some other "noxious element produced by the process, it would be their "duty under the first branch of the section to guard against it; "but, prima facie, as matters stood at all events in 1938, their "duty was simply to prevent so far as practicable the inhalation "of dust, that is to say, the dust manifestly produced by their "moulding operations. In my judgment, however, if they had "taken all practicable measures to prevent the inhalation of that "dust, the result in all probability would have been to protect

[1] [1952] 2 Q.B. 877, 883, 885; [1952] 1 T.L.R. 1428; [1952] 2 All E.R. 192.
[2] 1956 S.L.T. 241.
[3] (1873) L.R. 8 C.P. 322.
[4] [1895] 1 Q.B. 918; 11 T.L.R. 369.
[5] [1948] 1 K.B. 695; 64 T.L.R. 111; [1948] 1 All E.R. 283.
[6] [1955] 1 W.L.R. 1252; [1955] 3 All E.R. 507.
[7] [1955] 1 W.L.R. 1252, 1265.

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"the plaintiff against the injurious element in that dust in the "shape of free silica, even though the presence of that injurious "element may not have been known."

The present case may require a different view of the facts, but that passage states the principle and brings out clearly the artificial nature of the issue in the present case as it now arises. The plaintiff did not know and the defendants did not know and nobody knew in the relevant period that this special element of free silica risk was involved in the factory operations. The factory operations gave rise to invisible particles, which the defendants could not see and did not know of, and in relation to which they could not be expected to take any measures for the protection of the plaintiff. But there was a substantial quantity of ordinary visible dust. The plaintiff says that the defendants ought to have taken measures to protect him against that dust, and if they had done so they would have provided the Mark IV mask, and that would incidentally and accidentally have had the effect of protecting the plaintiff against the unknown invisible particles. That is what the issue now comes to, and it is an odd and rather artificial issue, but it has to be faced.

It follows from what I have said that I accept Mr. Beney's argument as mentioned above as to the construction of the section. There are two points that arise: first, in deciding whether there was a substantial quantity of dust arising, particularly from the knocking-out operations, one has to consider only the visible dust, because the invisible dust which was at the relevant time unknown has to be disregarded; secondly, in considering whether the Mark IV was a practicable measure at the relevant time and likely to be preferred to other masks such as the Martindale or the Pulsafe, one has to remember that both employers and employees would have in mind only the visible dust and not the invisible dust, and they would be unaware of the silicosis risk involved. [His Lordship referred to the evidence and found that in connexion with the processes carried on in the defendants' moulding shop, especially the knocking-out process, there was given off a substantial quantity of ordinary visible dust. He continued:]

Now I come to the main questions in this trial which relate to the Mark IV mask. There is the question of practicability: whether in the 1940's provision of the Mark IV masks and exhortations of the men to wear them would have been practicable measures to protect the men against inhalation of dust. There is also the question of probability, affecting causation: in the 1940's, if the defendants had decided to supply suitable masks to protect the iron moulders against inhalation of the visible dust which was known to exist, would they probably have provided, and would the plaintiff, if given the choice, probably have chosen, a Mark IV mask rather than a mask of one of the other types which were then on sale and in use?

I should at this stage refer to the passage in the judgment of

Evershed M.R., in which he set out one of the matters to be investigated in this new trial[8]: "Has then the plaintiff shown "that at the relevant dates . . . the Mark IV mask was regarded "by competent persons, including technicians qualified to speak "upon these matters, as what I will call the best all-purpose "mask; so that in the natural course of events an obligation to "take all practicable measures would inevitably involve, or "properly and naturally involve, a supply of Mark IV masks? "That seems to me to be the vital question."

[His Lordship referred to the evidence in relation to the Mark IV mask and to three other masks, namely, the Martindale, the Pulsafe and the Microfilter, which were lighter in weight and more comfortable than the Mark IV, and continued:] The evidence in the present case and Glyn-Jones J.'s judgment in *Crookall* v. *Vickers-Armstrong Ltd.*,[9] suggest a line of approach. Workmen always or nearly always begin by objecting to any new protective device which is offered to them, at any rate when it is some awkward thing, such as a mask or goggles or gloves. That is not an unreasonable attitude on their part. They are manual workers and have their physical efficiency (which includes agility, dexterity and alertness) to consider, and they rely on that physical efficiency for doing their work and avoiding accidents to themselves and others. Any such protective device will diminish their physical efficiency and, therefore, is, prima facie, undesirable, and its introduction is naturally and properly resisted in the first place. Also, a mask which impedes breathing and makes the face hot tends to be detrimental to health to some extent, and that is a further reason for refusing it in the first instance. In order to induce the men to wear the protective device for their own good, the employer has to educate and exhort and encourage them; he has to convince them that the lesser risk or discomfort of wearing or using the device is to be accepted in preference to the greater risk of remaining unprotected against the genuine and serious danger of having an accident or contracting a disease. The employer's chances of inducing the man to wear the device must depend largely upon the available information which he can give and the arguments which he can advance.

At this present time, in the 1950's, the occupier of an iron foundry can tell his men very persuasively that they must wear a Mark IV or a Microfilter, because they are the two masks approved by the regulations and because they are the only masks which keep out the dangerous fine particles, and if the men do not wear one of those masks they are liable to contract silicosis. Those are powerful arguments. Moreover, reference can now be made to the Iron and Steel Foundries Regulations, 1953. [His Lordship read regulation 8 and continued:] The advance of information, the discoveries which have been made, and

[8] [1955] 1 W.L.R. 1049, 1056.

[9] [1955] 1 W.L.R. 659; [1955] 2 All E.R. 12.

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that regulation make the present position in 1957 quite different from the conditions which prevailed in the 1940's, and it would be no excuse now for the employer to say: "If we had provided the masks the men would not have worn "them." The employer has an obligation now under the regulations to provide them, and the workmen to wear them. However, we are concerned with the position in the 1940's and at that time the occupier of an iron foundry could only tell his men that it would be a good thing to wear a Mark IV mask, designed by experts and highly efficient, because it would protect them against inhalation of a substantial quantity of dust. If they then said that the mask was very uncomfortable and it was not practicable to wear it at work and they preferred to endure a substantial quantity of dust as they had been enduring it for many years—or if they said they would prefer to wear a more comfortable mask such as the Martindale or the Pulsafe—the employer could not then give an effective reason to the contrary. He could only say that the dust might perhaps have some noxious element not yet discovered and, therefore, it might perhaps be safer to wear the more efficient mask.

[His Lordship referred to the evidence on the probability of the men wearing the Mark IV mask, if it was provided, and continued:] The question is not altogether easy to decide. One has to consider practicability, and what would have been likely to happen as a matter affecting causation. It seems to me—and I think this is the right finding on the first point—that the Mark IV was on the state of information or knowledge prevailing in the 1940's probably not a practicable measure for dealing with dust which was only substantial in quantity and which was not known to contain fine particles and was not known to be dangerous. In that state of knowledge, the men would reasonably refuse to wear it, and so there would be no protection. If it was not worn in practice, in ordinary workshop conditions and in daily use, then it would not be a practicable measure for protecting the men against inhalation of dust, because if they did not wear it, the inhalation of dust would continue. Secondly —and I think this is clear—the Mark IV is in effect a special purpose and not an all-purpose respirator. If all you want to do is to keep out the ordinary visible dust, you can wear something much less uncomfortable, something much lighter and less restrictive to breathing. Therefore, the Mark IV would not be the natural or reasonable mask to use for dealing with ordinary visible dust in the 1940's. At that period, in the 1940's, the reasonable and natural mask to be used for this purpose would be the Martindale, or alternatively the Pulsafe. If the defendants had in the 1940's decided to supply suitable masks to protect the iron moulders against inhalation of the visible dust which was known to exist, they would not have been likely to supply the Mark IV, and the plaintiff, if given a choice between different masks, would not have been likely to choose the Mark IV, and the likely

choice by both sides would have been the Martindale for that purpose at that time. I do want to emphasize that one has to perform the operation of projecting one's mind back to the 1940's, and consider the question on a basis which is now artificial, because one has to consider the state of knowledge at that time. All they would think they were dealing with was the substantial, but not enormous, quantity of visible dust. There was the Martindale which, according to the information available at the time, was quite adequate for the purpose, and it still is adequate for the purpose of dealing with the larger particles.

For that reason it seems to me impossible to suppose that the defendants, when they had to choose, or the men, when the choice was left to them, would have chosen the heavier, hotter mask and the one more restrictive of breathing, in preference to the smaller, lighter, simpler, cheaper and more comfortable Martindale.

Therefore I hold, first, that there was no relevant breach of the section, because the provision of masks was not in the relevant period a practicable measure to protect the persons employed against the inhalation of the dust containing the invisible particles, and, secondly, that the defendants' omission to provide masks in the relevant period did not cause the plaintiff's silicosis.

With regard to causation and the issue generally, I should mention Mr. Everett's argument on behalf of the plaintiff on this aspect. He said that he had proved that there was a substantial quantity of dust, and, therefore, a duty to take all practicable measures, and he had proved the failure of the defendants to take the practicable measure of supplying the Mark IV mask. Then, he said, the onus shifts to the defendants to absolve themselves from liability. But I do not believe that there is any shifting of the burden of proof. In *Bonnington Castings Ltd.* v. *Wardlaw* [10] Lord Reid said: "It would seem obvious in principle "that a pursuer or plaintiff must prove not only negligence or "breach of duty but also that such fault caused or materially "contributed to his injury, and there is ample authority for that "proposition both in Scotland and in England. I can find neither "reason nor authority for the rule being different where there is "breach of a statutory duty. The fact that Parliament imposes "a duty for the protection of employees has been held to entitle "an employee to sue if he is injured as a result of a breach of "that duty, but it would be going a great deal farther to hold "that it can be inferred from the enactment of a duty that "Parliament intended that any employee suffering injury can "sue his employer merely because there was a breach of duty "and it is shown to be possible that his injury may have been "caused by it. In my judgment, the employee must in all "cases prove his case by the ordinary standard of proof in civil

[10] [1956] A.C. 613, 620; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

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"actions: he must make it appear at least that on a balance of "probabilities the breach of duty caused or materially contributed "to his injury." There is a similar passage in Lord Tucker's speech in the same case.[11]

The plaintiff has to prove a breach causing the damage. He has to say there was a duty to take all practicable measures; therefore, the defendants had a duty to provide suitable masks; if they had performed their duty, they would probably have done so by providing a Mark IV mask, and the plaintiff, if given a choice, would probably have chosen the Mark IV mask; the Mark IV mask, if worn, would have retarded the progress of the disease; therefore, there was a breach causing damage. That is what may be called the plaintiff's chain of proof, and in my view the middle links of the chain are missing.

For that reason the misfortune in this case falls on the plaintiff, and he is not entitled to recover anything in this action.

Judgment for the defendants.

Solicitors: *Beckingsales for Wm. Bache & Sons, West Bromwich; Clifford-Turner & Co.*

J. D. P.

[11] [1956] A.C. 613, 624.

[CHANCERY DIVISION.]

1957
May 16.

Wynn-Parry J.

* *In re* EDEN, DECD.
ELLIS *v.* CRAMPTON AND OTHERS.

[1956 E. 958.]

Trust—Uncertainty, void for—Unascertainable class—Gift to persons employed or previously employed at certain date—Difficulty of ascertaining range of objects—Will—Residuary gift—Whether gift valid.

By his will dated August 22, 1908, a testator directed his trustees to divide "the remainder of the residue" of his estate in such shares or sums as the trustees should in their absolute discretion decide among the persons who should at the date of the death of the testator's wife be employed by or who should have previously been in the employment of the testator's company, or in the service of the testator or his wife. The trustees, in determining the proportions to be paid to such employees or to their wives or children, were to have regard to the length and nature of their service. The testator died on October 2, 1909. His wife died on October 22, 1936, and after her death inquiries were made of her executors by the plaintiff, the trustee of the testator's will, as to the persons who would qualify to benefit under the will and a provisional list drawn up. On January 14, 1949, a statement of the disposition was published in a local newspaper and further

claims were received. In January, 1954, relevant notices were inserted in the London Gazette and seven local newspapers in order to complete a list of persons qualified to benefit under the disposition, but no claims were made. On a summons to determine whether the dispositions constituted a valid trust or was void for uncertainty:—

Held, (1) that in determining whether the disposition contained in the will was valid or void for uncertainty the court must consider the evidence with a view to seeing whether it demonstrated beyond peradventure that it was impossible to ascertain the whole range of objects at the relevant date.

In re Hooper's 1949 Settlement (1955) 34 A.T.C. 3 applied.

(2) That the inquiries by the trustee not having been exhaustive, it could not be said on the evidence that it was impossible to ascertain the whole range of objects, and the disposition, therefore, was not void for uncertainty.

ADJOURNED SUMMONS.

By his will dated August 22, 1908, the testator, Samuel William Eden, after making certain specific and pecuniary bequests, and giving all his real estate on trust for sale, the trusts concerning his residuary personal estate and the residue of his personal estate to his wife for life, directed "And as to "the rest of my residuary trust estate I direct and authorize my "trustees therewith to establish almshouses in the Parish of "Woodborough in the County of Nottingham for poor persons "in manner following . . . The said trustees shall with the "sanction of the court or a judge or of the Charity Commis-"sioners expend a sum not exceeding £2,500 in the purchase of "land and in erecting suitable buildings on the said land and "shall invest the sum of £2,000 out of the said residue in any "investments authorized by law for charitable trust funds with "power to vary the investments thereof from time to time and "shall with and out of the income arising from such invest-"ments keep the said almshouses in proper repair and insured "against fire and shall apply the surplus of the said income for "the benefit of the inmates of the said almshouses. And I "desire my trustees in selecting the inmates to give preference "as far as possible to persons who have been in the employment "of Samuel Eden & Son Ltd. . . . and as to the remainder of "the residue of my estate I direct my trustees to divide the "same in such shares or sums as my trustees shall in their "absolute discretion decide among the persons who shall at the "date of the death of my wife be employed or who shall have "previously been in the employment of Samuel Eden & Son "Ltd. or in the service of myself or of my wife and my trustees "in determining the proportion to be paid to such employees or "to the wives or children of such employees shall have due "regard to the length and nature of the service." The testator died on October 2, 1909, and probate of his will was granted on January 14, 1910.

From the affidavit of the plaintiff, Edward Matthew Ellis, the trustee of the testator's will, it appeared that the company,

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Samuel Eden & Son Ltd., had been incorporated on February 19, 1901, as a private company with the purpose of acquiring a hosiery business, carried on by the testator and his father; that the testator's wife died on October 22, 1936, and after her death inquiries were made of her executors as to the persons who were, at her death, or had previously been, in the service of Samuel Eden & Son Ltd., and as to the persons who were at her death or had previously been in domestic service of the testator and his wife or of his wife alone, and a provisional list was compiled by her executors; that interim distributions were made in 1948 and 1949 by the plaintiff and by the wife's executors, among persons who appeared to them to qualify as recipients under the will. On January 14, 1949, a statement of the dispositions contained in the will and of the distributions which had been made was published in a local newspaper and additional claims were received from persons who considered themselves eligible for benefit. Subsequently the plaintiff and the wife's executors compiled a list of persons who they believed would qualify as recipients under the will as persons who at the wife's death (a) were in the employment of the company and (b) had previously been in that employment. Further, in January, 1954, in order to ascertain a complete list of such persons they inserted a notice in the "London Gazette" and in seven local newspapers, those notices referring to wives and children of employees who had died after the wife's death, but no claims were received from any such wives or children and the plaintiff made no further attempt to trace such persons, or the widows of and children of employees who died in the wife's lifetime or domestic servants of the testator and his wife. He had no information in regard to persons who had been in the employment of the testator or of the widow, and had made no attempt to ascertain the existence of any such employees.

The first and third defendants were a man and woman who were at the death of the wife in the employment of the company, and the second and fourth defendants had previously been in the employment of the company. The fifth defendant was the widow of an employee of the company who died in the lifetime of the wife. The sixth defendant was an executor of the wife's estate.

The plaintiff now sought to determine by originating summons whether the direction contained in the will of the testator failed for uncertainty or whether it constituted a valid and effective trust.

Milner Holland Q.C. and *Hubert Rose* for the plaintiff.

J. A. Plowman Q.C. and *W. J. C. Tonge* for the first and third defendants.

G. D. Johnston for the second and fourth defendants.

J. H. Hames for the fifth defendant.

C. A. Settle for the sixth defendant.

Denys B. Buckley for H.M. Attorney-General.

The following cases were cited in argument: *In re Whitrod* [1]; *In re Parnell* [2]; *In re Villar* [3]; *In re White's Will Trusts* [4]; *In re Hughes* [5]; *In re Arnold* [6]; *In re Gestetner* [7]; *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [8]; *In re H. J. Ogden* [9]; *In re Taylor* [10]; *In re Hooper's 1949 Settlement* [11]; *In re Sayer* [12]; *Thompson* v. *Thompson* [13]; *Cope* v. *Wilmot* [14]; *In re Wright* [15]; *In re Sutton* [16]; *In re Good's Will Trusts.* [17]

WYNN-PARRY J. The first point with which I have to deal is whether or not the gift [in the terms set out above] in the testator's will is a valid gift or is void for uncertainty.

The test to be applied can be conveniently taken from a passage in the judgment of Jenkins L.J., who delivered the judgment of the Court of Appeal in *Inland Revenue Commissioners* v. *Broadway Cottages Trust.*[1] In the course of his judgment he said [2]: "In our view, the construction placed on "behalf of the Crown on the above-quoted observations of "Tomlin J. in *In re H. J. Ogden* [3] is the right one, and we see "no reason for questioning the correctness of those observations "of that eminent judge. On the contrary, Tomlin J.'s view, "which we take to be that a trust for such members of a "given class of objects as the trustees shall select is void for "uncertainty, unless the whole range of objects eligible for "selection is ascertained or capable of ascertainment, seems to "us to be based on sound reasoning, and we accept it "accordingly." In that case there was an admission that it was impracticable to ascertain the whole range of objects eligible for selection. In this case no such admission is made. It is, therefore, primarily a question of fact whether or not upon the evidence it can be said that it would be impossible for any inquiry to ascertain the whole range of objects eligible for selection.

Undoubtedly, in view of the terms of the gift, considerable difficulty is likely to be encountered in ascertaining the whole of the objects; but, as the authorities show, mere difficulty is not to be treated as a ground for regarding the gift as invalid. That

[1] [1926] Ch. 118.
[2] [1944] Ch. 107; 60 T.L.R. 154.
[3] [1929] 1 Ch. 243; 45 T.L.R. 13.
[4] [1955] Ch. 188; [1954] 3 W.L.R. 314; [1954] 2 All E.R. 620.
[5] [1921] 2 Ch. 208.
[6] [1947] Ch. 131; 62 T.L.R. 686; [1946] 2 All E.R. 579.
[7] [1953] Ch. 672; [1953] 2 W.L.R. 1033; [1953] 1 All E.R. 1150.
[8] [1955] Ch. 20; [1954] 3 W.L.R. 438; [1954] 3 All E.R. 120.
[9] [1933] Ch. 678; 49 T.L.R. 341.
[10] [1940] Ch. 481; 56 T.L.R. 588; [1940] 2 All E.R. 637.
[11] (1955) 34 A.T.C. 3.
[12] [1957] 1 W.L.R. 261; sub nom. *In re Sayer Trust* [1956] 3 All E.R. 600.
[13] (1844) 1 Coll. 381.
[14] (1772) Amb. 704; cited in (1844) 1 Coll. 396 n.
[15] [1954] Ch. 347; [1954] 2 W.L.R. 972; [1954] 2 All E.R. 98, C.A.; affirming [1954] 2 W.L.R. 481; [1954] 1 All E.R. 864.
[16] [1901] 2 Ch. 640; 17 T.L.R. 703.
[17] [1950] W.N. 435; 66 T.L.R. (Pt. 2) 465; [1950] 2 All E.R. 653.
[1] [1955] Ch. 20; [1954] 3 W.L.R. 438; [1954] 3 All E.R. 120.
[2] [1955] Ch. 20, 35.
[3] [1933] Ch. 678; 49 T.L.R. 341.

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can be illustrated by reference, first, to *In re Villar.*[4] That was a case in which a testator gave his property to his trustees upon certain trusts as to income and capital for his participating issue, as stated in the will and codicil, using a well known common form so as to tie it up in such a way that the capital was not to vest until the expiration of "the period ending at the expiration of "20 years from the day of the death of the last survivor of all "the lineal descendants of Her Late Majesty Queen Victoria "who shall be living at the time of my death." In the course of his judgment Lawrence L.J. said[5]: "In the present case "there is in my opinion no infringement of the rule against "perpetuities. All that is said is that there will or may be "great difficulty in ascertaining the lives upon the death of the "survivor of which the ultimate vesting depends. If it could "now be established definitely that it is impossible to ascertain "who were the descendants of Queen Victoria living at the "death of the testator, and that any inquiry for the ascertain-"ment of such descendants which might be directed by the court "would necessarily prove abortive, there would be solid ground "for holding that the gift was void for uncertainty. That how-"ever cannot be said in this case. The evidence shows at "most that it is difficult at the present time to ascertain who "are the lineal descendants in question, and that it may probably "be more difficult in the future to ascertain who is the survivor "of such descendants. But it cannot properly be said now that "it is impossible to ascertain which of the lives mentioned by "the testator were in existence at his death, and it is mere "speculation whether it would be difficult or easy to ascertain "the date of the death of the survivor of such lives. In my "judgment the evidence falls far short of proving that the "number of lives exceeds that to which testimony can be "applied to determine when the survivor of them drops. The "mere fact that difficulties may hereafter arise in ascertaining "which is the survivor of the lives mentioned by the testator is "not in my judgment a ground for holding that the gift in "question is void for uncertainty."

In the later case of *In re Taylor*[6] the court had to consider a provision by which a testator "directed his trustee to stand "possessed of his residuary estate in trust for the Midland Bank "Staff Association, Liverpool and District Centre, 'Edgerley "'Taylor Fund,' which he had himself constituted and which "was governed by a constitution and rules setting out its "objects." It was held[6] "that the members of the association "were entitled to deal with the fund as they wished and to "direct the trustee to divide it among them, putting an end "to the provisions of the constitution and rules, and that, "accordingly, the gift was valid. The fact that the trustee "might have difficulty in determining what persons were

[4] [1929] 1 Ch. 243; 45 T.L.R. 13.
[5] [1929] 1 Ch. 243, 251.
[6] [1940] Ch. 481; 56 T.L.R. 588; [1940] 2 All E.R. 637.

"members of the association did not invalidate the gift." Farwell J., in the course of his judgment, having pointed out that the gift as a gift was a gift to the association, went on to say [7]: "But if the members of the body defined therein—[that "is, in the rules]—are entitled to put an end to the association "and to direct the company to divide the funds in its hands "among all the members there is nothing which can, in my "opinion, render this gift invalid. It may be difficult to ascer-"tain what persons the 'past and present members of the staff "'of the Midland Bank' include; but that is primarily a matter "for the trustee, in whose hand the money is, to determine. "The fact that there may be a question with regard to that does "not in itself render this gift invalid. It is in truth a gift to an "association, the funds of which may be dealt with in accordance "with the wishes of the members, for there is nothing, so far "as I can see, in the rules which regulate it to prevent the "whole concern being wound up and the fund being distributed "among the persons who are entitled to it." That is another illustration of the rule that mere difficulty of ascertainment is not of itself fatal to the validity of the gift. As has been pointed out, it is a matter of degree and it is only when one reaches a conclusion on the evidence that it is so vague, or the difficulty is so great that it must be treated as virtually incapable of resolution, that one is entitled to say that a gift of that nature is void for uncertainty.

There is a recent decision of Danckwerts J. to which I ought to refer: *In re Hooper's 1949 Settlement.*[8] In that case, as the headnote states [8]: "The settlement in issue was created by a "deed dated May 4, 1949, and was made in pursuance of the "settlor's desire to make provision for persons employed in or "connected with a named company and for the relatives and "dependants of such persons, and for other benevolent purposes." I need not trouble with the further details of the trust. The interesting part of the case is the approach which is made to the problem by Danckwerts J. which, if I may say so, with respect, accords with the approach made by the court in the two cases to which I have already referred. Danckwerts J. referred to and dealt with *Inland Revenue Commissioners* v. *Broadway Cottages Trust*,[9] and said this [10]: "The point, as I understand it, is that "in this case—[the *Broadway Cottages Trust* case [11]]—it was "admitted that the specified class was unascertainable at any "given time, and it seems to me, as contended for by Mr. "Plowman, that that is a very important feature of the case. "It was accepted that the class could not be ascertained; and "that as it was a trust with power of selection among that class, "the whole of the trusts were void for uncertainty. Accordingly "the trusts in question failed." With respect, I accept every

[7] [1940] Ch. 481, 486.
[8] 34 A.T.C. 3.
[9] [1955] Ch. 20.
[10] 34 A.T.C. 3, 6.
[11] [1955] Ch. 20.

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word of that view of what was decided in the *Broadway Cottages Trust* case.[11] Then Danckwerts J. referred to *In re Ogden*,[12] which was referred to by the Court of Appeal in the *Broadway Cottages Trust* case,[11] and proceeded to deal with the evidence before him. Having referred to the decision in *In re Ogden*,[12] where it was said the question was one of degree in each case whether, having regard to the language of the will and the circumstances of the case, there was such uncertainty as to justify the court in coming to the conclusion that the gift was bad, Danckwerts J., quoting the affidavit in that case, said[13]: "The company has very substantial records of past employees "of the company. As a general rule an employee who retired "after a long period of service received a pension. It is, how-"ever, possible that the company would not have a record of "an employee who had been dismissed or had retired after a "short period of service." Then his Lordship said[14]: "He "[the deponent] only says it is possible; he does not say "definitely it is so," and I think those words are very important. Then he goes on[14]: "The affidavit sworn on behalf of the trustees "by Mr. Edward Basil Green says this in paragraph 9: 'I and "'my co-trustees are and have for many years past been "'directors of the company, and have access to all the records "'thereof. The existence of the said settlement is known to a "'number of the employees past and present of the company, "'and we have had applications for grants or other benefits. "'We are quite satisfied that when we are exercising the "'discretionary powers given to us by clauses 3 and 4 respec-"'tively of this said settlement, we can and do take into account "'all the past and present employees of the company and their "'wives and dependants of those whom we should consider as "'being suitable objects of such discretionary powers.'" I may observe in passing that upon the reasoning of the Court of Appeal in the *Broadway Cottages Trust* case[15] that would be insufficient as affirmative evidence to show positively that the range of objects could be completely ascertained. The judge continued[16]: "The first question is whether it would be possible to ascertain "all the possible objects of the trusts in question. It does not "seem to me to be impossible to ascertain that as a matter of "inquiry by the trustees and by such advertisements as they "might think fit to put up in the company's works or in the "appropriate newspapers. It seems to me that they could "ascertain in that way all the names of any employees who "have been employed at any time by the company so far as is "necessary to supplement the records which they already have "and which seem to me to be exceedingly complete. But Mr. "Stamp says that that leaves out of account this much more "dangerous word or this uncertain description, 'dependants.'

[11] [1955] Ch. 20.
[12] [1933] Ch. 678.
[13] 34 A.T.C. 3, 7.
[14] Ibid.
[15] [1955] Ch. 20.
[16] 34 A.T.C. 3, 7, 8.

"He says 'dependants' is a very uncertain word, and one which "would give great difficulty in regard to the ascertainment of "every possible beneficiary in the present case. No doubt that "increases the class or widens the class which has to be con-"sidered, but it does not seem to me that it is more than a "question of fact, once you have ascertained the names of the "employees and of the dependants they have or may have had. "That seems to me perfectly possible of ascertainment."

The result of this case, so far as it concerns the present case. seems to me to be this: In considering what answer I should give to this question, I have to review the evidence, not so much with a view to saying that it demonstrates that at the material date the whole range of objects eligible for selection was ascertained, but rather with a view to seeing whether it demonstrates beyond peradventure that it is impossible to ascertain the range of objects at that date. The evidence is contained in the affidavit of Edward Matthew Ellis, and in particular in a number of paragraphs towards the end of that affidavit. It states that the executors have made certain inquiries and they have in certain cases been able to draw up provisional lists. But it also clearly shows that the inquiries have been far from exhaustive and have not proceeded to anything like the extent that would be required in an inquiry directed by the court.

I entirely agree with the observations made by Mr. Settle in his submission that any inquiry, whether by the trustees or by the court, would have to be, in view of the language of this gift, of a very wide nature, and it may well be that a large part, even the whole of the funds available, would be consumed in the inquiry. To say the least of it that would be unfortunate, but that cannot of itself constitute any reason why such an inquiry, whether by the trustees or by the court, should not be undertaken. Looking at the relevant paragraphs of the affidavit of the plaintiff, I am not convinced that it will be impossible to ascertain the complete range of objects, and I am not prepared, therefore, to say that this gift is invalid on the ground of uncertainty. Upon the evidence before me I propose, therefore, to answer question 1 of the summons by declaring that the gift constitutes a valid and effective trust.

Declaration accordingly.

Solicitors: *Steadman, Van Praagh & Gaylor for Robert Barber & Sons, Nottingham; Taylor, Jelf & Co. for Shacklock, Bosworth & Hooton, Sutton-in-Ashfield; Treasury Solicitor.*

P. P.

[PROBATE, ETC., DIVISION.]

1957
May 7.

Lord Merriman P. and Wallington J.

* MEANEY *v.* MEANEY.

Husband and Wife—Maintenance—Justices—Variation—Jurisdiction to hear application in court other than that making the original order —Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 122 (1) (*g*), (2)—*Magistrates' Courts Rules,* 1952 (*S.I.* 1952, *No.* 2190 (*L.*18)), *r.* 34—*Magistrates' Courts* (*Forms*) *Rules,* 1952 (*S.I.* 1952, *No.* 2191 (*L.*19)), *Forms* 89, 90.

A court of summary jurisdiction has power under the combined effect of section 122 (1) (*g*), (2) of the Magistrates' Courts Act, 1952, and rule 34 of the Magistrates' Courts Rules, 1952, to hear an application to vary an order made by another court.

In such cases the requirements of the rules and appropriate forms should be complied with.

APPEAL by husband from the dismissal by the Slough justices of his application for the revocation of an order for maintenance.

On April 24, 1956, the justices sitting at the Rotherham Magistrates' Court in the County Borough of Rotherham, Yorkshire, made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground that the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife. The order was varied as to amount by the same court on June 28, 1956. On December 4, 1956, the justices for the petty sessional division of Slough dismissed a summons on the complaint of the husband for the discharge of the order on the ground that he had made a bona fide offer of a reconciliation.

At the hearing of the appeal the question of the jurisdiction of the Slough justices was raised by the court. It further appeared that the summons which had been issued in that court was adapted to the form normally used when the same court had made the original order (see note 5 below).

The case is reported solely upon the question of jurisdiction.

John B. Gardner for the appellant husband.
W. R. K. Merrylees for the respondent wife.

No cases were cited in argument, but reference was made to section 7 of the Summary Jurisdiction (Married Women) Act, 1895,[1] paragraph 6 of the Second Schedule to the Emergency Laws (Miscellaneous Provisions) Act, 1947,[2] to sections 43, 44, 53 and

[1] Summary Jurisdiction (Married Women) Act, 1895, s. 7: "A court "of summary jurisdiction acting "within the city, borough, petty "sessional or other division or "district, in which any order under "this Act . . . has been made, may, "on the application of the married "woman or of her husband . . . "alter, vary, or discharge any such "order, . . ."

[2] The Act made provision for complaints under section 30 (3) of the Criminal Justice Act, 1914, and section 7 of the Summary Jurisdiction (Married Women) Act, 1895 (as

122 of the Magistrates' Courts Act, 1952,[3] to rule 34 of the Magistrates' Courts Rules, 1952,[4] and to Forms 76, 89 and 90 of the Magistrates' Courts (Forms) Rules, 1952.[5]

It appeared from these sections and rules that the jurisdiction of the Slough justices was founded on the rules, and not specifically on the statutes, which referred to the jurisdiction to vary, etc., of the original order.

amended by section 9 of the Money Payments (Justices Procedure) Act, 1935), for the revocation, discharge, revival, alteration or variation of an affiliation or a maintenance order in cases where the complainant was within the jurisdiction of a court other than that which made the order or in which the complaint was made to the original court and it appeared that the parties were within the jurisdiction of another court. The provisions reproduced Regulation 17B of the Defence (Administration of Justice) Regulations, 1940, and the paragraph of the 1947 Schedule (together with paragraphs 5, 7 and 8 relating to enforcement, evidence and interpretation) were repealed by the Sixth Schedule to the Magistrates' Courts Act, 1952. See now (as to paragraph 6) rule 34 of the Magistrates' Courts Rules, 1952, note 4 below.

[3] Magistrates' Courts Act, 1952, s. 43: "Subject to the provisions of "this Act, where a complaint is made "to a justice of the peace acting for "any petty sessions area upon which "a magistrates' court acting for that "area has power to make an order "against any person, the justice may "issue a summons . . ."

S. 44: "Where no express provision is made by any Act or the "rules specifying what magistrates' "courts shall have jurisdiction to "hear a complaint, a magistrates' "court shall have such jurisdiction if "the complaint relates to anything "done within the petty sessions area "for which the court acts . . ."

S. 53: "Where a magistrates' "court has made an order for the "periodical payment of money, the "court may, by order on complaint, "revoke, revive or vary the order."

S. 122: "(1) The power to make "rules conferred by section 15 of the "Justices of the Peace Act, 1949, "shall, without prejudice to the "generality of subsection (1) of that "section, include power to make provision as to—(*a*) the practice and "procedure of justices in exercising "functions preliminary or incidental "to proceedings before a magistrates' "court . . . (*g*) what magistrates' "court shall have jurisdiction to hear "any complaint; . . .

"(2) Where any Act expressly confers jurisdiction on any magistrates' "court to hear a complaint, rules "made under paragraph (*g*) of the "preceding subsection shall not take "away that jurisdiction, but may "extend it to any other magistrates' "court. . . ."

[4] Magistrates' Courts Rules, 1952, r. 34: "(1) This rule shall apply to "a complaint for the revocation, discharge, revival, alteration or variation of an affiliation order or order "enforceable as an affiliation order, "but shall not apply [to certain "orders relating to children and to "the Maintenance Orders Act, 1950, "s. 22 (1)].

"(2) A complaint to which this rule "applies may be made to a justice "acting for the same petty sessions "area as the court which made the "order . . . or to a justice acting for "the petty sessions area where the "complainant is for the time "being. . . ."

[Provision is then made for the furnishing by the complainant of certain written particulars of the nature of the evidence it is proposed to adduce, the names and occupations of witnesses, the addresses of the parties (r. 34 (3)), which are required before a justice of the peace can take action, and other matters relating to procedure.]

[5] Magistrates' Courts (Forms) Rules, 1952, Form 76: Form of summons to defendant.

It appeared that this was the form which the Slough justices had adopted in the present case.

Form 89: Form of complaint to vary, etc., order for periodical payment under rule 34.

Form 90: Form of summons to vary, etc., order for periodical payments under rule 34. The form requires a reference to the complaint and the original order, the nature of the application and the ground on which it is made, and a statement that written particulars have been furnished pursuant to rule 34 (3).

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WALLINGTON J., who was asked to deliver the first judgment, held upon the evidence that the appeal should be dismissed.

LORD MERRIMAN P. I agree, and do not wish to add anything on the merits of the case, because it seems to me there is ample justification on the face of the evidence for the very clear reasons which the justices have given for dismissing this application.

I would like to add a few words, however, on the matter of jurisdiction. This order, as my brother has already pointed out, was originally made by the Rotherham justices, and the application to discharge the order, made and varied by the Rotherham justices, has been raised before the justices of Slough. As it is the first case of this kind which, so far as I know, has come before the Divisional Court, I would like to say a word about what the position was originally and the form which the procedure has now taken.

Under section 7 of the Summary Jurisdiction (Married Women) Act, 1895,[1] the original Act, it is quite clear that applications to vary or to revoke orders have to be made to the same court which made them. There were temporary relaxations of that rule during the war, into which it is unnecessary for me to go, but the whole thing was swept up and made regular by the Magistrates' Courts Act, 1952, by section 122 of which [2] the court has power to make rules, amongst other things, deciding under section 122 (1) (*g*) "what magistrates' court shall "have jurisdiction to hear any complaint." In subsection (2) of that section there is a provision that where any Act expressly confers jurisdiction on any magistrates' court to hear complaints (that is to say, reducing it in this case to the Rotherham court, which plainly had jurisdiction to vary, as being the original court and at one time the only court), rules made under the paragraph that I have just referred to shall not take away that jurisdiction, but may extend it to any other magistrates' court.

Now, a rule has been made, rule 34 of the Magistrates' Courts Rules, 1952,[3] giving effect to that, and it is quite clear that it covers the present case. But I would like to point out that there are certain additional precautions called for, both in the making of the complaint and in the form of the summons to the respondent, if the complaint is made otherwise than at the original court.

It is perfectly plain that so far as the summons is concerned, the additional precautions, or requirements, as I will call them, which are provided for in Form 90 of the Magistrates' Courts (Forms) Rules, 1952,[4] have not been complied with. We have not seen the complaint, but from the recital of the complaint in that summons I doubt very much, though I do not say any more than that I doubt very much, whether the complaint was taken

[1] See footnote 1, supra.
[2] See footnote 3, supra.
[3] See footnote 4, supra.
[4] See footnote 5, supra.

in the requisite form; and it is rather important, with this marked relaxation of the old rigid rule that complainants had to go to the original court to obtain a variation or discharge of a former order, that the requirements of this statutory relaxation should be strictly complied with in all particulars.

With these observations I agree that this appeal fails and should be dismissed.

Solicitors: *Charsley Leonard & Co., Slough; Jackson & Jackson for J. W. Fenoughty, Dunn & Co., Rotherham.*

J. B. G.

[CHANCERY DIVISION.]

*BETTY'S CAFÉS LTD. *v.* PHILLIPS FURNISHING STORES LTD.

1957
April 1.
Danckwerts J.

[1955 B. No. 4526.]

Landlord and Tenant — Act of 1954 — *Business premises (Security of Tenure)—Landlord's intention to reconstruct—Fixed and genuine intention — Relevant time of landlord's intention to reconstruct — Relevance of undertaking given by counsel on behalf of landlord at hearing—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

The tenants of business premises applied pursuant to the Landlord and Tenant Act, 1954, for a new lease. The landlords opposed under section 30 (1) (*f*) of the Act on the ground that they intended to demolish and reconstruct the premises. Plans had been proposed, but no formal resolutions of the board had been passed until the hearing of the application before Danckwerts J., when it was resolved by the landlords (1) that in the event of the landlords obtaining possession of the premises from the tenants on the termination of their current tenancy, certain specified works should be carried out forthwith and that expenditure of up to £20,000 for such works be approved; (2) that counsel appearing for the landlords should be authorized to give an undertaking either to the court or to the tenants that these works would be carried out as soon as practicable in the event of possession being obtained:—

Held, that the fact that the landlords had passed the resolution only because they foresaw that they might not obtain possession of the premises was not necessarily evidence of a lack of genuine intention to carry out the works, and that this resolution, coupled with authority to counsel on behalf of the landlords to give an undertaking that the works would be carried out forthwith, showed the necessary qualities of fixity and genuineness.

ADJOURNED SUMMONS.

Betty's Cafés Ltd., who were the tenants of business premises known as Nos. 42 and 44 Darley Street, Bradford, applied to the court under section 24 of the Landlord and Tenant Act, 1954, for

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[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

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the grant of a new tenancy. The application was opposed by the landlords, Phillips Furnishing Stores Ltd., under section 30 (1) (*f*) of the Act, on the ground that they intended to reconstruct the premises on the termination of the tenancy, and that they could not do so without obtaining possession of the holding. No formal resolution of the board had been passed until April 23, 1956, when the hearing of the application was in progress before Danckwerts J. The resolution was as follows: "(1) That in the "event of the company obtaining possession of these premises "from Betty's Cafés Ltd., on the termination of the last men-"tioned company's current tenancy thereof, the works detailed "in Mr. Overden's [the architect's] specification dated January, "1955, and plan numbered 45/2 be forthwith carried out and "that expenditure of up to £20,000 upon such works be approved. "(2) That counsel appearing for the company in the application "by Betty's Cafés Ltd. now proceeding in the Chancery Division "be authorized to give an undertaking either to the court or to "Betty's Cafés Ltd. that the above mentioned works will be "carried out as soon as is practicable in the event of possession "being so obtained." Danckwerts J. held [1] that the resolution was out of time and ineffective as the relevant date for determining the existence of the landlords' intention was the date of the service of the notice of opposition. On appeal, the Court of Appeal held,[2] by a majority, that the landlords might prove the necessary fixity and genuineness of intention at any time down to the making of the order, and remitted the application to Danckwerts J. to determine whether the resolution passed by the landlord company possessed the necessary qualities of fixity and genuineness.

Lionel A. Blundell and *C. B. Priday* for the tenants.
J. P. Widgery for the landlords.

DANCKWERTS J. (having stated the facts, considered the judgments of the Court of Appeal and the authorities) continued: The truth of the matter is that it is perfectly plain from an examination of the minutes of the company's directors' meetings that the company never formed any intention at all in regard to the matter of reconstruction or works to be done upon the site during the period right down to the hearing of the summons. It was only after the case had been going for some days that it became apparent, it would appear, to those advising the company that they were in danger of losing the case and that the tenants were liable to get a further tenancy awarded to them.

In those circumstances Mr. Blundell on behalf of the tenants does not say that the resolution passed on April 23, 1956, was dishonest, but he does say this, that it was not a genuine resolution showing a genuine intention on the part of the company to

[1] [1956] 1 W.L.R. 678; [1956] 2 All E.R. 497.

[2] [1957] Ch. 88; [1956] 3 W.L.R. 1134; [1957] 1 All E.R. 1.

carry out the works of reconstruction which the terms of the section of the Act require; and further he says that it does not show that fixity and certainty of purpose which the cases have laid down as being necessary ingredients of such an intention.

I should be very much inclined to agree with him if it were not for the fact that the resolution of the directors was coupled with authority to counsel on behalf of the company to give an undertaking, and it seems to me that that part of the resolution makes an important difference.

In the first place, on the authorities and in particular the observations in such cases as *Fisher* v. *Taylors Furnishing Stores Ltd.*,[1] it is apparent that if the landlords really intend to carry out the works, it is not a valid objection that they may be impelled to that view by the fact that unless they are prepared to carry out such works they cannot obtain possession and defeat an application by a tenant for a further tenancy. Therefore I think that the mere fact that they found themselves driven to adopt this position, because otherwise they saw the case would go against them, is not necessarily evidence of a lack of genuine intention to carry out the works.

Moreover, it is to be observed that in the present case the works which were adopted according to Mr. Ovenden's plans and specification were not works of the kind mentioned by Romer L.J. as indicating a lack of a genuine intention but were precisely the kind of works which would be required by the landlords on obtaining possession of the premises in order to use the premises for the purposes of their own business. Therefore the observations of Romer L.J. seem to show that the fact that the works are of this type is some evidence of a genuine intention.

I am forced to the conclusion, therefore, by reason of the decision of the majority of the Court of Appeal, that the resolution which is not too late may none the less be a genuine exhibition of intention to carry out the reconstruction as required by the terms of the Act. I think that the course the case has taken shows in an extreme manner the unfairness and undesirability of the landlords being able suddenly to alter their position at the last moment in this manner; but I am faced with the law as it is laid down for me and I have to apply it, and consequently I must hold that the resolution of April 23, 1956, shows a genuine intention to carry out these works, coupled with the authority to give the undertaking which I have mentioned.

Furthermore, the question of fixity of course is important, because once the landlord has obtained possession he may, it seems, alter his intention and no remedy would then be open

[1] [1956] 2 Q.B. 78; [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78.

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Danckwerts J.

to the tenants who have been dispossessed and lost their occupation of the property; but the undertaking seems to me to compel fixity of intention, because I shall, if I decide in favour of the landlords, of course require such an undertaking as is offered to be given to the court; and, if that undertaking was neglected or broken, the consequences of a serious nature, which would involve perhaps sequestration of the company's property and possibly the sending of the directors responsible to gaol, provide a sanction to see that the fixity of purpose remains and is duly carried out. Therefore it seems to me that the offer of the undertaking necessarily involves a fixity of purpose which satisfies the observations which have been made by the courts in various cases.

Accordingly I must conclude that the passing of the resolution on April 23, 1956, by the board of directors is effective and therefore the application for a new tenancy must fail.

Application for new tenancy refused.

Solicitors: *Clifford Turner & Co.; Ward Bowie & Co.* for *Booth & Co., Leeds.*

[PROBATE, ETC., DIVISION.]

1957
May 13.

Lord Merriman P. and Wallington J.

* SMITH *v.* SMITH.

Husband and Wife — Justices — Probation officer — Husband's alleged admission of desertion to probation officer—Impropriety of evidence of such admission in husband's absence.

Husband and Wife — Justices — Appeal to Divisional Court — Delay in appealing — Husband's sworn statement of a good defence — Rehearing ordered.

At the hearing of a wife's complaint of desertion the justices heard evidence from the probation officer that he had seen the husband that morning and been told that he was unable to wait for the hearing. The probation officer further stated that the husband, after referring to his means, had said "that he was "prepared to pay £3 a week, and admitted desertion." The justices, who did not order an adjournment, made an order in favour of the wife.

At the hearing of the husband's appeal and of his application for leave to appeal considerably out of time, sworn evidence was tendered on his behalf that he had been unable to wait for the hearing because of his business, and that he denied making any admission of desertion, although he might have admitted that he had left his wife. His case was that she had refused to live with him in another home and had told him to go when he said that he would have to live there on his own:—

Held, (1) that although the probation officer would have been justified in telling the court that the husband had been unable to wait, it was inconsistent with his duties to interview him, without apparently any warning, and then give evidence against him, and he had exceeded his authority in considering himself an agent to make vital admissions on the merits.

(2) That although the husband had put himself in the wrong, not merely by not waiting for the hearing, but by his delay and by making payments under an order which for a time he had accepted, he had sworn that he had a good defence and he should not be shut out from putting that defence forward.

Scutt v. *Scutt* [1950] W.N. 286 and *Winter* v. *Winter* [1942] P. 151; [1942] 2 All E.R. 390; 58 T.L.R. 365 applied.

APPEAL to Divisional Court by a husband against an order of the justices for the Manchester Petty Sessional Division of the County of Lancaster sitting at Strangeways on October 30, 1956, and application for leave to appeal against the order out of time.

The wife by her complaint had alleged that she had been deserted; there was evidence before the Divisional Court, including an affidavit by the husband, that half an hour before the summons was due for hearing the husband had arrived at the court in his lorry and, having seen a clerk, was sent to the probation officer, whom he told that he had a rush job which made it impossible for him to wait. The probation officer apparently accepted the explanation, and the husband left.

The hearing was not, however, adjourned. The wife gave evidence that the husband had two businesses, one of which, a good one, he had disposed of, the other of which, a pet shop, was said by her to have been no good. She said that her husband had left her on three occasions prior to the one upon which her allegation of desertion was based, that he drank, and that he had come home drunk on the day he left.

At the close of her evidence the probation officer went into the witness box. It was not clear whether he had volunteered to give evidence, or whether the court was told that he had seen the husband and might be able to assist. The probation officer said: "I saw the defendant this morning. He said he could "not appear this morning. He has a small lorry with a gross "profit of £10 a week. He pays £3 a week for his caravan [in "which he was then living]. He said he was prepared to pay "£3 a week and admitted desertion."

Upon the evidence of the wife and the probation officer the justices found desertion proved and made an order accordingly. It appeared that the husband had for a time accepted the order, and made payments under it, before filing his notice of appeal and application for leave to appeal out of time.

In an affidavit before the Divisional Court the husband

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averred that he did not admit to the probation officer that he had deserted his wife. "I told him I had left her. I believe "he asked me if I had left her and I said 'Yes.'" He further alleged (on terms more fully considered in the judgment of Lord Merriman P.) that he had hoped to make a success of the pet shop business, where there was a dwelling, but that his wife had refused to go with him; and that when he had told her that if she would not come with him he would have to go and live there on his own she had told him to go.

The justices, in their reasons, stated: "The defendant "attended, but apparently could not wait for his case to be "heard, and the bench accepted evidence of his statement "admitting desertion and made an order accordingly."

The husband applied for leave to appeal out of time, which was granted.

Gore for the husband.

C. R. Beddington for the wife.

The cases cited in argument are referred to in the judgment.

LORD MERRIMAN P. stated the facts and, after referring to the evidence by the probation officer and the statement that the husband had said he was prepared to pay £3 a week and admitted desertion, continued: I find that evidence a little difficult to reconcile with what I understand to be the duty of a probation officer. It certainly is not his duty to obtain admissions, to bring a case before the court. I must not be taken to approve a probation officer interviewing a man without, apparently, any caution or anything of that sort, and then going into the witness-box to give evidence against him. It seems to me to be inconsistent with the known duties of probation officers. However, I do not want to use any hard words, and it seems to me that the simpler way to put this, on what we know of the facts, is to say that I have no doubt that something passed between the husband and the probation officer which justified the probation officer going into court and telling the court that this man was not in default; he had been there, he could not stay, and he gave a reason why he could not stay. If it had gone no further than that, it is plain that the justices would have had a discretion, after hearing what the solicitor for the wife said, about whether to grant an adjournment or whether not to grant an adjournment. It would have been entirely a matter for their discretion, and I must not be taken, having regard to the course the case took, to be attributing any blame to the justices for going on with the case. They were put in some difficulty. But I do not think it

was the business of the probation officer to give this evidence against the husband that he had admitted desertion.

We have a very long affidavit from the husband, which unfortunately does not deal with this aspect of the case at all, except in this one sentence: "I did not admit to the "probation officer that I had deserted my wife. I told him I "had left her. I believe he asked me if I had left her and I "said 'Yes.'" It does not need any words from me to show that that admission does not necessarily mean that he had deserted her; and in the course of some nine paragraphs of affidavit he sets out his case. Let me be plainly understood not to be expressing any opinion whatever about the merits. What he says, in effect, is that he was forced to give up the case-making business, the one the wife said was a good business, because he was satisfied that the pet shop had possibilities; there was a dwelling there; his wife was living near her parents, and she was unwilling to go and live with him at the pet shop; and because he could not run both businesses through her not living with him at the pet shop he had to close the case-making business, as it was ruining him to keep both places going. He says: "She refused to come with me and told me to get a job, but I "refused because I was sure that the pet shop could be made "into a good business, and when I told her that if she would not "come with me I should have to go and live there on my own "she told me to go."

Obviously there is room for a lot of explanation and careful inquiry between the wife's version of the closing of the business and the way in which the husband gave it; and not only so, but the version of the husband leaves it in doubt whether it is a case of his wife telling him to clear out and making herself a deserter, or whether it was that he asked her to go, she said No, she preferred to stay where she was, and they agreed to part on that basis: but either way, it is possible that there might be an answer to a charge of desertion, and no more than that do I think it necessary to say.

It has been argued by Mr. Beddington that whether the husband had been heard, and told the whole of this story or not, the justices would have been bound to come to the same decision. I do not think it is for us to say that, one way or the other. I think that this sort of situation was very fully discussed in *Scutt* v. *Scutt*,[1] to which we have been referred, where Hodson J. and Pearce J. sat as a Divisional Court. In a case in which there had been the same sort of omission by the husband to put his case before the justices Hodson J. said[2]: "This husband has "sworn that he has a good defence, in that he was turned out

[1] [1950] W.N. 286. [2] Ibid. 287.

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"of the house. Exactly what he means by 'turned out of the "'house' he will have an opportunity of showing"; and then lower down on the same page Hodson J. said: "It would not "be in the interests of justice to shut him out from that defence, "even though the position which he has reached has been brought "about entirely by his own fault." He likened the case to the type of case where there is an application for a rehearing after a decree nisi even, as in *Winter* v. *Winter*,[3] when everything had been done to make it perfectly clear that the applicant for a rehearing had stood by and allowed the thing to go by default, without making the slightest attempt to defend himself or herself. Then Pearce J. said[4]: "Of the merits of his case it is best not "to say much, since the matter is sub judice. The husband says "that he did not desert his wife but that she turned him out; "and he exhibits letters which, he says, supports his case." (Incidentally, Hodson J. made it clear that the court did not think the letters advanced the matter very much.) Then, finally, Pearce J. said: "How much force there is in that should in my "opinion be investigated by the justices on the oral evidence of "the parties themselves."

In my opinion that is exactly what applies here. I accept the contention of Mr. Beddington that the man has put himself in the wrong, not merely by not waiting on the morning of the hearing—(but it may have been that it was too big a business risk for him to throw up the job he was engaged on)—but certainly by the delay, and by paying under the order, accepting the order and paying under it for a time, for there certainly is a delay of at least two months which is not accounted for by anything.

But we have considered that already in connexion with giving leave to appeal, and the end of it all is that here is a man who says he has got a good defence. It is not for us to say whether it is a good defence. It is a defence that he wants to be put forward, and he was shut out from putting it forward because of the probation officer going, as I think, further than anything the man said to him warranted his going; and I put that as a matter of principle, rather than on the facts of the case. I think that the very fullest extent to which the probation officer should have gone was to say "This is what the man told me about why he "could not wait, and I leave it to your worships whether or "not to grant an adjournment." Putting it in contractual language, I think that the probation officer was authorized to ask for an adjournment, but certainly exceeded his authority in considering himself an agent to make vital admissions on the

[3] [1942] P. 151; [1942] 2 All E.R. 390; 58 T.L.R. 365.

[4] [1950] W.N. 286, 288.

merits of the case. And there I propose to leave it except as a matter of terms.

We have been told by Mr. Gore that he has instructions to undertake to pay the amount of the maintenance awarded, which, incidentally, was £1 more than the probation officer said the man had been willing to pay. However, he is willing to pay the maintenance ordered pending the rehearing, and that is a very proper undertaking. What is more, it is not a very serious one, because as soon as this complaint, as it will do, goes back to the justices for a rehearing, the wife could, as a matter of jurisdiction, go to the justices at once and ask for an interim order pending the rehearing. She has been saved from doing that by the husband's very proper undertaking that meanwhile the amount of the order will be paid.

I think that the question of costs had better wait until my brother has given his judgment, and then we can look at the certificates, both being legally aided, and see how to deal with the matter.

In my opinion this application should succeed, the order be set aside, and the wife's complaint referred back to be reheard by a fresh panel of justices for the petty sessional division.

WALLINGTON J. I agree. The justices' reasons in the case are in these terms: "The defendant attended, but apparently "could not wait for his case to be heard, and the bench accepted "evidence of his statement admitting desertion and made an "order accordingly." I can well understand that the justices, having had evidence from their probation officer, quite naturally relied upon it as an accurate account of what had passed between him and this husband. Unfortunately, however, the probation officer did, in fact, quite unintentionally and quite honestly misrepresent the effect of what the husband had said to him, in that he mistakenly treated the husband's admission that he had left his wife as an admission that he had thereby committed the matrimonial offence of desertion.

I sympathize with the justices, in these circumstances, because they were thus led into improperly assuming that they would be justified in acting upon the probation officer's statement as proving the charge of the matrimonial offence of desertion without first satisfying themselves that the words spoken by the husband to the officer were of such a character as to indicate that the husband intended them to be understood in the sense in which both the officer, and, in consequence of his testimony, also the justices, understood them.

In my opinion they made a serious mistake in taking that

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Wallington J.

course, with the result that the order which they made cannot stand.

It is a very serious thing to accept an expression like "He "admitted desertion" as conclusive of an admission of any offence. Between that expression and the words which are relied upon by the narrator of it there is often a very great divergence. Words are by some people understood to be an admission without any reasonable excuse for so doing. For example, a witness in the witness-box not infrequently says "Oh, yes, he admitted "adultery," and then, pressed for the words which he or she has assumed to be an admission of adultery, the answer is "Well, I told him that he had gone a bit wrong, and he did not "deny it." Obviously it is not in any sense an admission of adultery.

This case, perhaps, will be a sufficient warning of the grave danger of accepting evidence of this kind without an investigation into the circumstances attending the supposed admission, the words used, and the context in which they were used.

Further, I am unable, for myself, to find anything in the materials before us which could properly be regarded as conferring upon the probation officer an authority to make any such admission or give evidence about such an admission, though, as I have said, I can well understand the justices relying on him and treating what he gave evidence about as an actual admission that the husband had been guilty of desertion.

In the circumstances it seems to me that there has not been a trial of the issues between these two spouses upon desertion, and on the face of things it does not look as if the interests of justice have been completely well served. It seems to me, therefore, that the order that ought to be made is the one that my Lord has just announced. I agree with it.

Appeal allowed.
Rehearing ordered.

Solicitors: *Edward F. Iwi for Julian S. Goldstone & Co., Manchester; Taylor & Buckley, Oldham.*

J. B. G.

[QUEEN'S BENCH DIVISION.]

* REGINA v. LLANIDLOES LICENSING JUSTICES. *Ex parte* DAVIES.

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June 6.

Lord Goddard C.J., Hilbery and Devlin JJ.

NOTE.

Costs — Justices — Crown practice — Liability of justices for costs — Mandamus—Unsuccessful appearance by counsel for justices before Divisional Court—Power to file affidavits in lieu of appearance—Review of Justices' Decisions Act, 1872 (35 & 36 *Vict. c.* 26), *s.* 3.

APPLICATION for mandamus.

The Divisional Court, having granted an application for an order of mandamus to issue to the licensing justices for the division of Llanidloes, Montgomeryshire, the successful applicant applied for the costs of the motion. Counsel for the justices, who had unsuccessfully opposed the motion for mandamus, submitted that costs should not be awarded against the justices on the ground that it was usual for justices to appear by counsel when such application were made, and if they were unsuccessful, costs were not normally awarded against them unless the justices had acted oppressively or capriciously.

Richard Elwes Q.C. and *Sidney Lamb* for the applicant.
E. P. Wallis-Jones for the justices.

LORD GODDARD C.J. If the justices appear in the Divisional Court they make themselves parties to the lis. They take the risk of being ordered to pay costs, and they are entitled to receive costs if they succeed in defeating the application. I have been trying to remind justices all over the country, not only in court, but in addresses I have given to them, of their rights under the Review of Justices' Decisions Act, 1872. That Act was passed for the very purpose of allowing justices, against whom certiorari or mandamus was moved, to put in affidavits (on which they do not have to pay any stamp duty) giving their reasons, so that the court could decide the case on the affidavits; but if justices insist on instructing counsel to come before the court and argue the case, they are making themselves parties to a lis and will have to pay costs. At one time this court very rarely ordered costs, and I think the reason was that the Act of 1872 was overlooked; but for at least three years now I have been trying to remind justices of the presence of this Act on the Statute Book, and if they are not content with exercising the power Parliament has given them, but insist on appearing and arguing the case, they will have to pay costs if they lose. The justices in the present case have made themselves parties before

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this court and opposed the application, and the applicant is entitled to costs against them.

Order for costs.

Solicitors: *J. E. Lickfold & Sons for W. Emrys Jones & Co., Welshpool; Madgett & Ball for J. & A. Davies, Llanidloes.*

C. J. E.

[PROBATE, ETC., DIVISION.]

1957 *June 6.*

* PRACTICE DIRECTION (DISCLOSURE OF ADDRESSES).

Husband and Wife — Practice — Service of petition — Disclosure of addresses by Government Departments—Maintenance.

The following circular has been issued by the Registrar of the Divorce Registry.

Arrangements have been made whereby the address of a husband, if contained in social security records held centrally by Government Departments, may be disclosed to the court for the assistance of a wife seeking to obtain or enforce an order for alimony or maintenance for herself or the children. Requests for such information will be made officially by the registrar or district registrar, who must be satisfied that the wife has made every reasonable effort to find her husband's whereabouts by other means. She should, for example, have asked his close relatives: but she should not be required to incur the expense of employing inquiry agents.

The request, in addition to stating (or enclosing) the information mentioned below should certify either that (*a*) an order is in existence, but cannot be enforced because the husband cannot be traced, or (*b*) the wife has filed or issued a notice, petition or originating summons *containing an application for maintenance* which cannot be served because the husband cannot be traced. [The expression "maintenance" should be used for all forms of periodical payment.]

The department most likely to be able to assist is the Ministry of Pensions and National Insurance, whose records are the most comprehensive and complete. The possibility of identifying one man amongst so many will depend on the particulars given. An address will not be supplied by the Ministry unless it is satisfied from the particulars given that the record of the man has been reliably identified. The petitioner's solicitor should therefore be asked to supply as much as possible of the following information about the husband: (i) National Insurance number; (ii) surname; (iii) Christian (or fore-) names in full; (iv) date of birth (or, if not known, approximate age); (v) last known address with date when living there; (vi) any other known address(es) with dates; (vii) if

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the man is a war pensioner, his war pension number and service particulars (if known).

Inquiries should be sent by the registrar to: The Liaison Officer, Records Branch, Ministry of Pensions and National Insurance, Newcastle-on-Tyne.

Records held by other departments are less likely to be of use, either because of their limited scope or because individual records cannot readily be identified. If, however, the circumstances suggest that the address may be known to another department, application may be made to it by the registrar, all relevant particulars available being given. When the department is able to supply the address of the husband to the registrar, it will be passed on by him to the wife's solicitor (or, in proper cases, if she is acting in person to the wife herself) on an undertaking to use it only for the purpose of the proceedings.

Nothing in this circular affects the service of petitions which do not contain any applications for maintenance, etc. The existing arrangements, whereby the Ministry of Pensions and National Insurance will at the request of the solicitor forward a letter by ordinary post to a party's last known address, remain in force in such cases.

B. LONG,
Senior Registrar.

June 6, 1957.

[SOUTHWARK CONSISTORY COURT.]

* *In re* WOLDINGHAM CHURCHYARD.

1957
April 11.

Garth Moore Ch.

Ecclesiastical Law—Faculty—Costs—Tombstone—Unauthorized erection of tombstone by stonemasons in churchyard—Previous undertaking by stonemasons to obtain necessary permission for customer—Subsequent grant of faculty in part—Costs ordered against stonemasons for work erected without faculty.

A tombstone, consisting of a cross on a boulder, surrounded by a curb filled with granite chips, was erected in Woldingham Churchyard and a confirmatory faculty was afterwards sought by the stonemasons and their customer. The stonemasons who had carried out the work had given an oral undertaking to the customer that they would obtain any necessary permission, but failed to do so, and erected the tombstone without having obtained either a faculty or the permission of the incumbent:—

Held, (1) that a confirmatory faculty would be granted in respect of the cross on the boulder only and that the curb and chips must be removed.

(2) That the expenses of such removal should be borne by the stonemasons who should also bear all the costs of all parties involved.

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

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WOLDINGHAM CHURCHYARD, *In re.*

PETITIONS for a confirmatory faculty in the Consistory Court of Southwark.

A firm of stonemasons, Chas. E. Ebbutt & Sons Ltd. and their customer, by petitions dated October 12, 1956, and October 19, 1956, respectively, petitioned for a faculty for the erection in Woldingham churchyard of a tombstone. The petitions were consolidated, and were opposed by the incumbent of the parish and the Archdeacon of Kingston, both of whom appeared in person. The stonemasons appeared by their manager and the customer appeared by his solicitor.

GARTH MOORE Ch. These are two consolidated petitions, one by a firm of stonemasons, and the other by their customer, for a confirmatory faculty to authorise the retention of a monument put into the churchyard of Woldingham parish church. The monument is a tombstone and consists of a cross on a boulder with curbs and chips, all of Cornish granite. It is the sort of monument for which it is unlikely that a faculty would have been granted had one been sought. In fact no faculty was sought nor was the permission of the incumbent given.

The customer gave the order for the monument to the stonemasons on April 18, 1956, and they gave him an oral undertaking that they would first get the necessary permission before erecting the monument. On September 1, 1956, permission for the erection of the monument was sought by them from the incumbent, who informed them that, if they wished to erect this type of monument, they must first obtain a faculty from this court. On September 3, 1956, no permission having been granted nor a faculty obtained, the monument was nevertheless put in by the stonemasons. It must be emphasized that, strictly speaking, only this court can give permission for the erection of a tombstone in a churchyard, though in most cases the chancellor is content to delegate to the incumbent his authority to grant permission for the erection of an ordinary tombstone and to dispense with the need for a faculty. But, by entering the churchyard and erecting a monument after the incumbent had refused permission and without having obtained, or even sought, a faculty, the stonemasons were guilty of a gross trespass. Further, they were guilty of a breach of contract between themselves and their customer by not obtaining the necessary permission for the erection of this monument. For both of these they have rendered themselves liable to actions for damages in the common law courts.

I am prepared in the present case, though only out of consideration for the family of the deceased, to grant a confirmatory faculty in respect of the cross on the boulder only; the curbs and chips must be removed and their removal is a condition precedent to the grant of a faculty in respect of the cross and boulder. Further, the expense of removal of the curbs and chips must be borne by the stonemasons, and they must be

removed within a month. If within the month the curbs and chips are still in position, then the order will lie to the customer who will have a further month in which to remove them so as to satisfy the condition on which the cross and boulder may remain, and any expense incurred by him will be paid by the stonemasons. If they are not removed within this period, then the order will go to the incumbent for a further month, and likewise his expenses will be paid by the stonemasons. Lastly, if the curbs and chips are still in position after three months, then the order will lie to the archdeacon to remove them, and the expenses incurred by him will be paid by the stonemasons.

The stonemasons will further pay all costs of all the parties to this suit. If there is any repetition of this sort of behaviour by them, they are likely to find themselves banned from carrying out any work in consecrated ground in this diocese, and perhaps the neighbouring diocese of Canterbury will also be notified of this ban. The customer in the present case was entitled to rely on the stonemasons to comply with the requirements of the law, and no feeling can be entertained for him other than one of sympathy. It is intolerable, and will not be tolerated, that persons should without leave put things on ground which does not belong to them, and, if any monumental masons are under the impression that they can do this sort of thing and get away scot-free, the order as to expenses and costs in this case may disillusion them.

Faculty granted in part.

Solicitors: *Walker, Smith & Way, Chester.*

[CHANCERY DIVISION.]

* NORWICH UNION LIFE INSURANCE SOCIETY *v.* PRESTON.

1957
April 30.
Wynn-Parry J.

[1956 N. 320.]

Mortgagor and Mortgagee — Possession order — Ambit — Order against mortgagor for "possession" — Non-compliance — Eviction — Furniture and effects left on premises by mortgagee — Application for order to remove furniture and effects — "Possession" and "vacant possession" — R.S.C., Ord. 55, *r.* 5A.

On a mortgagor's failing to comply with an order for possession in the usual form under R.S.C., Ord. 55, r. 5A,[1] a writ of possession

[1] R.S.C., Ord. 55, r. 5A: "Any mortgagee or mortgagor, whether legal or equitable or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say—. . . Delivery of possession . . . to the mortgagee . . . by the mortgagor . . ."

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was issued. Eviction followed, but the mortgagor refused to remove his furniture, motor-car and effects from the premises. On the mortgagee's application for an order directing him so to do:—

Held, in making the order, that, although the order under R.S.C., Ord. 55, r. 5A, directed the mortgagor to deliver up, not "vacant possession," but "possession" of the premises, the court had to have regard to the common sense of the matter, since, without vacant possession, the mortgagee could not deal with the premises effectively and favourably to secure recoupment of what was owing on the mortgage.

Observations of Lord Greene M.R. in *Cumberland Consolidated Holdings Ltd.* v. *Ireland* [1946] K.B. 264, 270; 62 T.L.R. 215; [1946] 1 All E.R. 284 applied.

PROCEDURE SUMMONS.

This was an application on the part of Norwich Union Life Insurance Society as mortgagee for an order directing the mortgagor, Leonard John Armstrong Pearson, to remove his furniture, motor-car and effects from the mortgaged premises, 71, Shelley Crescent, Heston, Middlesex. Since July, 1955, he had not made any payments under the mortgage and the mortgagee proceeded against him under R.S.C., Ord. 55, r. 5A, for possession. On July 10, 1956, an order in the usual form was made directing him to give up possession within 28 days. On his non-compliance therewith a writ of possession was issued on December 19, 1956, and on January 9, 1957, the mortgagor was evicted, but he would not remove his furniture, motor-car and effects from the mortgaged premises. By this summons the mortgagee asked the court to direct him to remove them.

S. W. Templeman for the mortgagee.

The mortgagor in person.

The only case cited in argument is referred to in the judgment.

WYNN-PARRY J. The society brought proceedings against the mortgagor under R.S.C., Ord. 55, r. 5A, for possession. On July 10, 1956, an order was made in the usual form directing the mortgagor to give up possession within 28 days. He did not comply with the order and a writ of possession was issued. He was evicted by the sheriff but left his furniture and effects on the premises and refused to remove them, his contention being that, as he had been evicted from the premises, the order pursuant to which the writ was issued had no further operation.

True, the language of the order directed the mortgagor to deliver up, not "vacant possession" of the premises, but simply "possession" of them. It is, however, essential to have regard to the common sense of the matter. Without vacant possession the society cannot hope to deal with the premises effectively and favourably, in a manner enabling it to recoup itself for what the mortgagor owes to it. Theoretically, of course, it might take the furniture, car and effects out of the premises. Such a policy, however, is not practicable in these days, and it is in these

circumstances that the society now seeks the assistance of the court.

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Wynn-Parry J.

In support of the application I was referred to *Cumberland Consolidated Holdings Ltd.* v. *Ireland.*[1] That case concerned a vendor and purchaser summons and was in certain respects different from this case; but a principle which is, in my judgment, applicable in the present case was stated by Lord Greene M.R. in these terms: "Subject to the rule de minimis a vendor "who leaves property of his own on the premises on completion "cannot, in our opinion, be said to give vacant possession, since "by doing so he is claiming a right to use the premises for his "own purposes, namely, as a place of deposit for his own "goods inconsistent with the right which the purchaser has on "completion to undisturbed enjoyment."

It appears to me that that is a principle which ought to be applied where possible and to be applied in a case such as the present, although the order in the case before the Court of Appeal did not deal with a case of the giving up of vacant possession by a mortgagor.

Accordingly, in my judgment, the application succeeds, and I must make an order for the removal of the furniture.

Order accordingly.

Solicitors: *Collissons & Dawes for T. F. Barton, Norwich.*

K. R. A. H.

[1] [1946] K.B. 264, 270; 62 T.L.R. 215, 216; [1946] 1 All E.R. 284, 287.

[PROBATE, ETC., DIVISION.]

* CARGO LATELY LADEN ON BOARD THE FEHMARN (OWNERS) *v.* FEHMARN (OWNERS).

1957 *June* 6, 7.

Willmer J.

THE FEHMARN

[1956 F. 1260.]

Admiralty — Jurisdiction — Carriage of goods — Claim under bill of lading — Provision in bill of lading to refer disputes to a foreign tribunal — Action commenced in Admiralty Court — Motion to set aside writ and stay proceedings—Discretion of court to allow action to proceed—Administration of Justice Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 46), *s.* 1 (1) (*g*).

Arbitration—Stay of judicial proceedings—Submission to foreign court —Assignment of contract—Both parties strangers to foreign court— Refusal of stay—Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *s.* 4.

The plaintiffs, an English company and the holders of a bill of lading which acknowledged the shipment at a Russian port, in

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THE FEHMARN.

apparent good order and condition, of a cargo of turpentine by a Russian organisation for carriage to London, began an action against the owners of a German vessel in which the turpentine was carried for damages arising out of a dispute under the bill of lading, it being alleged that, on delivery in London, the turpentine was discovered to be contaminated. It was a term of the bill of lading that all claims and disputes arising thereunder "shall be "judged in the U.S.S.R." After discharge the turpentine and the vessel were surveyed in the United Kingdom, and all the plaintiffs' witnesses as to their title to sue were in the United Kingdom. The German vessel traded regularly to the United Kingdom. Counsel for the defendants intimated in argument that the defendants might wish to call evidence at the trial as to the condition of the railway wagons from which the turpentine had been loaded.

The defendants moved for an order that the writ of summons be set aside for want of jurisdiction, or, alternatively, that the action be stayed:—

Held, (1) that by reason of the express provisions of section 1 (1) (*g*) of the Administration of Justice Act, 1956,[1] the court had jurisdiction, and, accordingly, the writ of summons should not be set aside.

The Cap Blanco [1913] P. 130; 29 T.L.R. 557; *The Athenee* (1922) 11 Ll.L.Rep. 6 and *Bristol Corporation* v. *John Aird & Co.* [1913] A.C. 241; 29 T.L.R. 360 applied.

(2) That, prima facie, in view of the agreement between the parties to refer any dispute to a foreign tribunal, the defendants were entitled to have the action stayed, but that, in all the circumstances, and in particular, since both parties were strangers to Russia, and since the evidence of the plaintiffs was mainly in this country and that of the defendants from their vessel could be easily received in this country, the court ought to exercise its discretion in favour of the plaintiffs and allow the action to proceed.

MOTION.

The plaintiffs commenced an action in rem against the defendants for damages arising out of a bill of lading relating to the carriage of turpentine from Ventspils to London. The defendants entered an appearance under protest and moved for an order that the writ of summons be set aside for want of jurisdiction, or, alternatively, that the action be stayed.

Derek H. Hene for the defendants.

H. V. Brandon for the plaintiffs.

The following cases and authorities were cited in argument: *Temperley Steam Shipping Co.* v. *Smyth & Co.*[2]; *The Athenee*[3]; *Law* v. *Garrett*[4]; *Austrian Lloyd Steamship Co.* v. *Gresham Life*

[1] Administration of Justice Act, 1956, s. 1: "(1) The Admiralty "jurisdiction of the High Court shall "be as follows, that is to say, juris- "diction to hear and determine any "of the following questions or claims "— . . . (*g*) any claim for loss of "or damage to goods carried in a "ship; . . ."

[2] [1905] 2 K.B. 791; 21 T.L.R. 739.

[3] (1922) 11 Ll.L.Rep. 6; (1923) 14 Ll.L.Rep. 275.

[4] (1877) 8 Ch.D. 26.

Assurance Society Ltd.[5]; *Kirchner & Co.* v. *Gruban*[6]; *The Dawlish*[7]; *The Cap Blanco*[8]; *The Media*[9]; *The Vestris*[10]; *Racecourse Betting Control Board* v. *Secretary for Air*[11]; *Schintz* v. *Warr*[12]; *Leduc & Co.* v. *Ward*[13]; *Bristol Corporation* v. *John Aird & Co.*[14]; Dicey's Conflict of Laws, 6th ed., pp. 579 and 584; Russell on Arbitration, 15th ed., pp. 69, 70.

WILLMER J. This is a motion brought on behalf of the defendants to set aside the writ and all subsequent proceedings in an action brought by the owners of cargo lately laden on board the ship or vessel *Fehmarn* against the owners of that vessel. The ground upon which I am invited to set aside the writ is that the parties by their contract have agreed that all claims and disputes arising under it "shall be judged in the U.S.S.R."

The plaintiffs claim under a bill of lading which acknowledges the shipment, by a Russian organization called "V/O Sojuz-"chimexport," on board the defendants' steamship then lying in the Port of Ventspils (which I am told is the same as Windau), of 506,389 kilos of gum spirits of turpentine in apparent good order and condition, to be delivered at the Port of London in the like good order and condition.

The plaintiffs, as I understand their claim, have become the holders of that bill of lading. I am told that a charterparty is in existence; but the bill of lading makes no reference to it and, in those circumstances, it appears to me that the plaintiffs are strangers to the charterparty, and that the whole contract, as between them and the owners of the ship, is contained in the bill of lading.

The bill of lading by its terms provides: "The shipper, the "receiver of goods and the holder of the bill of lading as well "as any other person interested hereby expressly accept and "agree to all printed, written or stamped provisions, terms "and reserves of this bill of lading, including those on the back "hereof." On the back of the bill of lading is a very large assortment of terms, conditions and exceptions. Those which are important for the determination of this case are Nos. 25, 26 and 27. No. 25 provides that "General average shall be adjusted "according to York-Antwerp Rules, 1924, and the average adjust-"ment shall be prepared in the U.S.S.R." No. 26 says: "All "claims and disputes arising under and in connection with this "bill of lading shall be judged in the U.S.S.R." No. 27 says: "All questions and disputes not mentioned in this bill of lading "shall be determined according to the Merchant Shipping Code "of the U.S.S.R."

[5] [1903] 1 K.B. 249; 19 T.L.R. 155.
[6] [1909] 1 Ch. 413.
[7] [1910] P. 339.
[8] [1913] P. 130; 29 T.L.R. 557
[9] (1931) 41 Ll.L.Rep. 80.
[10] (1932) 43 Ll.L.Rep. 86.
[11] [1944] Ch. 114; 60 T.L.R. 147; [1944] 1 All E.R. 60.
[12] [1926] Ch. 710.
[13] (1888) 20 Q.B.D. 475; 4 T.L.R. 313.
[14] [1913] A.C. 241; 29 T.L.R. 360.

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The plaintiffs' claim, as I understand it, is founded upon an allegation that the turpentine in question arrived in the Port of London in a contaminated condition. It is in those circumstances that the plaintiffs instituted this action against the ship, claiming damages for breach of the bill of lading contract.

For the defendants it has been contended that this court is without jurisdiction, having regard to the express terms of the contract, to which I have referred, and to which the plaintiffs, on becoming holders of the bill of lading, bound themselves. In such circumstances I am invited to set aside the writ for want of jurisdiction. It should, I think, be observed in that connexion that the defendants did in fact enter an appearance under protest and obtained leave to move the court to set aside the writ. In the alternative, as I understand the argument, it is contended that, even assuming that the court has jurisdiction, I ought in my discretion to refuse to exercise that jurisdiction having regard to the express terms of the contract between the parties.

So far as any question of principle is concerned, I do not think the case raises any difficulties. My difficulty is with regard to the facts of the particular case and as to the appropriate course to be taken, having regard to those facts.

So far as jurisdiction is concerned, in my judgment the defendants' contention that there is no jurisdiction is quite unarguable, having regard particularly to the terms of section 1 (1) (*g*) of the Administration of Justice Act, 1956. There is no doubt, in my judgment, that that subsection gives the court admiralty jurisdiction in respect of a claim such as this. I am fortified in arriving at that conclusion by the express decision in *The Cap Blanco*,[1] where a similar point was taken, but the court decided that there was no question of want of jurisdiction, having regard to section 6 of the Admiralty Court Act, 1861. I am also fortified in that conclusion by a study of the proceedings in *The Athenee*,[2] which was decided by the Court of Appeal, consisting of Bankes, Warrington and Atkin L.JJ. I specifically name the three Lords Justices who took part in the hearing of that appeal, and I would like to couple with this the fact that it was argued by Mr. Langton and Mr. Balloch, as to whom I think I may be permitted to say that they were both very formidable exponents of the law with regard to the jurisdiction of this court. It is quite clear from the report of that case that the whole discussion of the case, which raised a problem very similar to that in the present case, proceeded on the basis that there was jurisdiction. The question which was being debated was whether the judge in his discretion ought, or ought not, to stay the proceedings. Bankes L.J., in giving judgment, said[3]: "It is not "disputed that this contract is one of the class in which a judge "of the courts of this country has a discretion as to whether he

[1] [1913] P. 130; 29 T.L.R. 557.
[2] (1922) 11 Ll.L.Rep. 6.
[3] Ibid.

"will or will not stay the action to enable the parties to go to "the tribunal which they selected." Atkin L.J. remarked[4]: "Such a bargain is treated as equivalent to an arbitration "clause." He then cited from the speech of Lord Moulton in *Bristol Corporation* v. *John Aird & Co.*[5] Having regard to those authorities, and to the express provisions of the Act of 1956, I am satisfied that it is not open to me to say that there is no jurisdiction. In those circumstances I could not in any case set aside the writ.

The question, however, arises, and I think it is an extremely difficult question, whether in my discretion I ought to stay these proceedings on the ground that the parties have by agreement selected a foreign tribunal. A number of cases have been cited to me in the course of the argument, where similar questions have arisen, and which have been treated as analogous to cases in which there was an arbitration clause. I think it is right, however, without expressing any opinion of my own on the matter, to refer to the remarks made by MacKinnon L.J. in *Racecourse Betting Control Board* v. *Secretary for Air*,[6] where the Lord Justice said[7]: "It is, I think, rather unfortunate that the power "and duty of the court to stay the action was said to be under "section 4 of the Arbitration Act, 1889. In truth, that power "and duty arose under a wider general principle, namely, that "the court makes people abide by their contracts, and, there-"fore, will restrain a plaintiff from bringing an action which he "is doing in breach of his agreement with the defendant that "any dispute between them shall be otherwise determined. "Section 4 of the Arbitration Act, 1889, only applies this "principle to one type of such an agreement."

It is not, I think, necessary for me to express any opinion of my own as to whether the court in a case of this character has an inherent jurisdiction to be exercised on wide general principles, or whether it merely proceeds by way of analogy to cases where there is a submission under the Arbitration Act. Whichever be the correct view, it is well established that, where there is a provision in a contract providing that disputes are to be referred to a foreign tribunal, then, prima facie, this court will stay proceedings instituted in this country in breach of such agreement, and will only allow them to proceed when satisfied that it is just and proper to do so. I think that fairly states the principle to be applied, and it is right to mention that Mr. Brandon, in arguing the case for the plaintiffs, frankly admitted that the burden of proof was upon him to displace the prima facie right of the defendants to have these proceedings stayed and to have the case tried by the chosen foreign tribunal. Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be

[4] (1922) 11 Ll.L.Rep. 6.

[5] [1913] A.C. 241, 257; 29 T.L.R. 360.

[6] [1944] 1 Ch. 114; 60 T.L.R. 147; [1944] 1 All E.R. 60.

[7] [1944] 1 Ch. 114, 126.

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overridden and that proceedings in this country should be allowed to continue. But in the end it is, and must necessarily be, a matter for the discretion of the court, having regard to all the circumstances of the particular case. That being so, I do not think it would be profitable to refer in detail to the numerous cases that were cited to me, where the principle as I have tried to state it has been stated over and over again, but the discretion of the court was exercised one way or another, having regard to the circumstances of the particular case.

I must apply my mind now to the facts of this particular case. It is a case of cargo loaded at a Russian port by a Russian shipper on board a German ship, a ship which I should remark is said by the defendants themselves to be a frequent trader to this country. The cargo was ultimately bought by the present plaintiffs, an English company, who are the holders of the bill of lading. In taking over the bill of lading they did, of course, agree to be bound by the terms thereof. It is the fact that the plaintiffs are persons domiciled in this country. The claim arises in this country. This is where the damage sued for was discovered. It is in this country that the cargo was surveyed and the damage ascertained. According to an affidavit by a member of the firm of solicitors acting for the plaintiffs, virtually all the evidence which would have to be called on behalf of the plaintiffs is to be found in this country; that is to say, such witnesses as may be necessary with regard to the plaintiffs' title to sue, such witnesses as can speak to the condition of the cargo on its discharge, and such witnesses as can speak to the condition of the ship, which is the subject-matter complained of. The only matter of evidence, so far as the plaintiffs' case is concerned, which does not arise in this country is with regard to the condition of the cargo on shipment at the Russian port. With regard to that the plaintiffs are, I suppose, in the first instance at any rate, entitled to rely on the representation in the bill of lading that it was shipped in apparent good order and condition. It may be—I say no more than that—that they will not desire to call any evidence on that aspect of the case. In those circumstances it is argued by the plaintiffs that far and away the most convenient place to try this dispute, in the events which have happened, would be in this country. Moreover, it is contended that that would be no hardship to the defendants, who are Germans, and, therefore, are equally foreigners in Russia or in this country. Reliance, however, is placed on the fact that the ship is said to be a regular trader to this country, so that, insofar as it is desired by the defendants to call witnesses from the ship, that could no doubt be done with convenience, in accordance with the usual practice of this court of fixing a date of trial at the convenience of the parties.

On the other side, stress was laid, and properly laid, in the first instance on the fact that the parties to this contract have specifically agreed to take their disputes to the Russian court.

Moreover, reliance was placed on the fact that there is reason for inferring that, wherever the dispute is to be tried, Russian law would be the proper law to be applied. So far as the ship is concerned, she is, so to speak, a neutral. It is no worse for the defendants to try the case in Russia than it is to try it in England. Moreover, the defendants suggest, through their counsel, although this is not on affidavit, that they may desire to adduce evidence to show that the railway wagons in which the cargo was delivered to the ship were contaminated, presumably to show that that was the reason for the contamination, and that it was not due to anything on board the ship. In those circumstances it is contended that it would be a hardship to the defendants to have the case tried here, when it might be that such a vital piece of evidence could only be obtained for them in Russia.

I have already said that I do not find this at all an easy matter to determine. One's natural inclination is to say that these parties have made their bargain and should keep to it. Moreover, I think it is right to say that this court must assume, and I do assume, that equal facilities for trying the case exist in Russia as exist in this country, and that the parties will get just as fair a trial in Russia as they will get here. But, having made all due allowances for that, in the end I have come to the conclusion that the plaintiffs have shown sufficient grounds for displacing the prima facie presumption, grounds which are, in my judgment, sufficient to entitle them to take advantage of the undoubted jurisdiction of this court.

Having read the solicitors' correspondence I am bound to say that I cannot fail to be left with the impression that the defendants do not really want this case to be tried in Russia. They have in the course of correspondence already expressed willingness, on certain terms, to have it disposed of in this country, and one is left with the suspicion that the principal object of the defendants is not to achieve a trial in Russia, but merely to make it more difficult for the plaintiffs to assert their claim. In making those observations I do not wish it to be thought that I am accepting the argument on behalf of the plaintiffs that the defendants have not acted bona fide. They are entitled to fight their case with all the weapons at their disposal. The weapon they have chosen in this motion is a perfectly legitimate one. But it is the fact that, if I were to stay these proceedings which have already been launched, I might be depriving the plaintiffs of any remedy at all. It is not as though the defendants' ship was a Russian ship belonging to an organization domiciled in Russia. There seems to be no possible guarantee that, if I ordered these proceedings to be stayed so as to enable the plaintiffs to start alternative proceedings in Russia, any judgment obtained would necessarily be of any value to them at all. Of course, it is equally true to say that the ship, being a German ship and not yet having been arrested, may keep clear of this country so as to avoid arrest, and that in those circumstances

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there is no guarantee that a judgment obtained in this country would be enforceable. But the fact is that there are at least proceedings under way in this country. If I stay them and leave the plaintiffs to start afresh in Russia, costs will be thrown away, there will inevitably be delay, and I apprehend that, if the plaintiffs' witnesses have to go to Russia, there will be very considerable added expense in disposing of the case.

All that, I think, is sufficient to justify me in the conclusion which I have already stated, namely, that the plaintiffs have proved enough to discharge the burden of proof which is upon them. In those circumstances not only do I not accede to the motion to set the writ aside, but also in my discretion I decline to stay the proceedings.

Judgment for plaintiffs.
Leave to appeal to the Court of Appeal.

Solicitors: *Bentleys, Stokes & Lowless; Clyde & Co.*

A. S-R.

[COURT OF APPEAL.]

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May 20, 21, 22, 24.

Lord Evershed M.R., Morris and Pearce L.JJ.

* INLAND REVENUE COMMISSIONERS *v.* POLLOCK & PEEL LTD. (IN LIQUIDATION).

Revenue — Profits tax — "Distribution" — Winding up distribution— Surplus assets distributed in liquidation — Whether a return of capital — Whether "gross relevant distribution" for purposes of profits tax—Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *ss.* 35 (1), 36 (1)—*Finance Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 43), *s.* 31 (1) (5).

Company—Winding up—Distribution of assets—Final distribution—Nature.

In 1952 an engineering company, of which the issued capital was £30,060, went into voluntary liquidation for the purpose of reconstruction, and its assets were transferred to a new company. After the transfer of assets to the new company and after the liquidator had paid all debts and liabilities of the company, including costs of winding it up, and after the distribution of shares in the new company, there remained a sum of cash belonging to the company, which amounted to £15,030. As a final step in the liquidation proceedings, the liquidator distributed this sum of cash to the executors of one shareholder and to the remaining shareholder, they being the only members of the company.

The Crown claimed that this sum was a "gross relevant "distribution" in respect of the last chargeable accounting period in which the trade or business of the company was carried on, within the meaning of section 35 (1) of the Finance Act, 1947,[1]

[1] Finance Act, 1947, s. 35 (1): "Subject to the provisions of this "and the two next succeeding "sections, the gross relevant distribu- "tions to proprietors for any charge- "able accounting period of a body "corporate, society or other body, are "the total distributions to the mem-

having regard to the terms of section 31 (1) of the Finance Act, 1951:—

Held, that the payment to the shareholders by the liquidator was not a return of share capital within section 31 (1) of the Finance Act, 1951 (even if it was to be assumed that that provision applied to a company which had gone into liquidation after capitalisation and had then made a return of share capital).

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"bers of the body corporate, society "or other body, not being distribu- "tions allowable as deductions in "computing the profits of the trade "or business for any period for the "purposes of the profits tax, and "being either—(*a*) dividends de- "clared not later than six months "after the end of that period which "are expressed to be paid in respect "of that period or any part thereof; "or (*b*) distributions (other than "dividends which, under paragraph "(*a*) of this subsection, are to be "treated as part of the gross relevant "distributions to proprietors for any "previous chargeable accounting "period) made in the period; or "(*c*) in the case of the last charge- "able accounting period in which the "trade or business is carried on, so "much of any distribution made after "the end of that period (not being a "distribution to which paragraph (*a*) "of this subsection applies) as is not "a distribution of capital, and, for "the purposes of paragraph (*c*) of this "subsection, the distributions which "are to be treated as distributions "of capital shall not, in the case of "distributions made by a body cor- "porate with a share capital, exceed "an amount equal to the total "nominal amount of the paid-up "share capital thereof together, where "the body corporate has issued "shares at a premium for cash, with "the aggregate of the amounts of the "premiums."

S. 36 (1): "Subject to the provi- "sions of the next succeeding sub- "section, wherever—(*a*) any amount "is distributed directly or indirectly "by way of dividend or cash bonus "to any person; or (*b*) assets are "distributed in kind to any person; "or (*c*) where the trade or business "is carried on by a body corporate "the directors whereof have a con- "trolling interest therein, an amount "is applied, whether by way of re- "muneration, loans or otherwise, for "the benefit of any person, there shall "be deemed for the purposes of the "last preceding section to be a distri- "bution to that person of that amount "or, as the case may be, of an amount "equal to the value of those assets: "Provided that no sum applied in "repaying a loan or in reducing the "share capital of the person carrying "on the trade or business shall be "treated as a distribution."

Finance Act, 1951, s. 31 (1): "Subject to the provisions of this "section, where—(*a*) whether . . . "a body corporate, unincorporated "society or other body capitalises "any distributable sum; and (*b*) then "or thereafter, whether before or "after the passing of this Act but "after the tenth day of April, 1951, "any sum is applied in reducing its "capital, there shall be deemed for "the purposes of section 35 of the "Finance Act, 1947 (which defines "the expression 'gross relevant distri- "'butions to proprietors' for profits "tax purposes), to be a distribution to "the members of the body corporate, "society or other body of an amount "equal to the sum so applied or to "the total amount of the distributable "sums previously capitalised by it as "aforesaid, whichever is the less, "taking place when the sum is so "applied."

Subs. (5): "In this section—'dis- "'tributable sum' means, in relation "to a body corporate, society or "other body, a sum which could be "utilised in making a distribution "within the meaning of subsection (1) "of section 36 of the Finance Act, "1947, to the members thereof; "'capitalise' means capitalise by "means of an issue of paid up or "partly paid share capital or by the "paying up, in whole or in part, of "share capital already issued or by "the creation of loan capital, and "'capitalisation' shall be construed "accordingly, and references to the "reduction of capital shall be deemed "to include references to the repay- "ment or return of share capital and "the repayment or redemption of "loan capital, other than loan capital "issued for full consideration paid in "cash to the body corporate, society "or other body or redeemable pre- "ference shares so issued."

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36 T.L.R. 575; 8 T.C. 101 (affirmed [1921] 2 A.C. 171; 37 T.L.R. 762) considered.

(2) That even if, by virtue of section 31 (1) of the Finance Act, 1951, the payment had been a "distribution," it was not a "gross relevant distribution" for the purpose of the relevant paragraph (*c*) of section 35 (1) of the Finance Act, 1947, for it was a distribution of capital not exceeding the nominal amount of paid up share capital.

Decision of Upjohn J. ([1956] 1 W.L.R. 951; [1956] 2 All E.R. 776) affirmed.

APPEAL from Upjohn J.[2]

Pollock & Peel Ltd. was incorporated in May, 1942, for the purpose of carrying on an engineering business. At the close of the calendar year, which was also the chargeable accounting period, ended December 31, 1951, the issued share capital of that company consisted of 2,004 fully paid shares of £1 each, all of the same class. Mr. and Mrs. Pollock were the sole shareholders and the two directors of the company. On November 6, 1952, by an appropriate resolution under the articles, the company capitalized a sum of £28,056 of profits and applied that sum in paying up on behalf of the two shareholders 28,056 £1 shares, the capital being increased accordingly. Thereafter, the issued share capital was 30,060 shares of £1 each. On October 31, 1953, that company went into voluntary liquidation, and a week later, on November 6, the liquidator entered into an agreement for the sale of the assets and undertaking of the company, with one exception hereafter mentioned, to a new company incorporated for the purpose of acquiring the assets, and having the same name as the liquidated company and having also as its shareholders Mr. and Mrs. Pollock. The consideration for the sale was the issue by the new company to the liquidator of the old of 30,060 shares of £1 each fully paid up in the new company, and those shares in the course of the liquidation were distributed, or transferred and handed over, to the two shareholders, Mr. and Mrs. Pollock. On November 8, 1953, Mr. Pollock died, so that his part of the share consideration passed to his personal representatives. The one exception was a sum of cash which, so far as is relevant, may be stated as £15,030, a figure which was arithmetically exactly 50 per cent. of the amount of the issued share capital of the old company. The balance figure of £15,030 was in the due course of liquidation paid out to the representatives of Mr. Pollock and to Mrs. Pollock as the contributories of the old company.

The Crown claimed that a distribution charge was payable by virtue of section 35 (1) of the Finance Act, 1947.

The relevant parts of the case stated by the Commissioners for the Special Purposes of the Income Tax Acts are set out in the report of the proceedings before Upjohn J.[3]

[2] [1956] 1 W.L.R. 951; [1956] 2 All E.R. 776.

[3] [1956] 1 W.L.R. 951, 953.

The commissioners held that the sum of £15,030 was not a "gross relevant distribution to proprietors" for the purposes of a charge to profits tax.

On appeal by the Commissioners of Inland Revenue, Upjohn J. dismissed their appeal, and they now appealed to the Court of Appeal.

Sir Reginald Manningham-Buller Q.C., A.-G., Sir Reginald Hills and *E. Blanshard Stamp* for the Crown.

Roy Borneman Q.C. and *Hilary Magnus Q.C.* for the respondent company.

Cases cited in argument not referred to in the judgments: *Inland Revenue Commissioners* v. *Bell & Nicholson Ltd.*[4]; *In re Doughty*[5]; *Montague Burton (in liquidation) Ltd.* v. *Inland Revenue Commissioners*[6]; *Lamson Paragon Supply Co. Ltd.* v. *Inland Revenue Commissioners*[7]; *In re Ramel Syndicate Ltd.*[8]

LORD EVERSHED M.R. The question raised in this appeal is whether the tax known as profits tax, or more strictly a certain aspect of profits tax called the "distribution charge," is leviable in respect of the sum of £15,030 which was paid out, to use a neutral phrase, by the liquidator of a company known as Pollock & Peel Ltd. to the two shareholders of that company in the course of its liquidation.

[His Lordship stated the facts and continued:] The claim of the Crown has been that a distribution charge, that aspect of profits tax, is payable in all the circumstances in respect of that sum of £15,030.

Profits tax, née National Defence Contribution, began its fiscal life in the year 1937. It acquired its later appellation under section 44 of the Finance Act, 1946. For the purpose of this appeal none of the statutory provisions is relevant until the Finance Act, 1947.

In substance this appeal turns on the meaning, in the proper context of the other relevant sections, of section 35 of the Act of 1947, and of section 31 of the later Finance Act, 1951, which in certain respects amended or supplemented the provisions of the Act of 1947.

I must, however, make a brief reference to certain other sections of the Act of 1947. Section 30, after varying the rate of profits tax, proceeded in subsection (2) to make provision for what was called non-distribution relief. It suffices for my purpose to state that the purpose of non-distribution relief was this; that if the profits of the company which prima facie would bear

[4] [1952] W.N. 61; [1952] 1 T.L.R. 301; [1952] 1 All E.R. 428; 33 T.C. 130.

[5] [1947] Ch. 263; 63 T.L.R. 257; [1947] 1 All E.R. 207.

[6] (1936) 20 T.C. 48.

[7] [1951] W.N. 470; [1951] 2 T.L.R. 723; 32 T.C. 302.

[8] [1911] 1 Ch. 749.

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profits tax were not in fact all distributed in any chargeable accounting period, a certain relief was given in respect of that part of them which was not distributed. For the purpose of making the necessary calculations and of arriving at the amount of the levy a formula was devised, known as "net relevant "distributions," and the relief was arrived at in respect of the difference in any chargeable accounting period between the net relevant distributions and the total profits for that period. But by subsection (3) there was imposed what is called in later sections of the Act a distribution charge. The point of that charge was as follows: where a company had obtained non-distribution relief and during a later chargeable accounting period distributed profits which were in excess of the profits for that period, that is to say, where the company availed itself, for the purpose of distribution in that year, of profits previously earned and not distributed, and in respect of which, therefore, non-distribution relief had been claimed, there was this imposition of a distribution charge on the excess distributed over the profits for the year of distribution. That distribution charge was subject to a limit stated in the proviso to subsection (3). I hope I have stated, with sufficient accuracy but with necessary brevity, the point of that section.

Its relevance is first in regard to the introduction of the formula "net relevant distributions," and, secondly, because a distribution charge, in or in respect of any chargeable accounting period, depends in fact upon the business, or in this case the company, having previously had the benefit of non-distribution relief. It is an undoubted fact in this case that Pollock & Peel Ltd., that is the first company, the liquidated company, had in a previous year enjoyed the non-distribution relief so that the question of a distribution charge did arise in the period with which we are concerned.

The formula "net relevant distributions" is defined in section 34 of the Act of 1947. Again I need not pause further than to state that "net relevant distributions" are discovered by taking a proportion therein indicated of the gross relevant distributions. So one comes to section 35, one of the two vital sections for present purposes, which provides the meaning of the latter phrase "gross relevant distributions."

It will, I think, be convenient now if I read, not in its entirety but substantially, the first subsection of section 35. "Subject "to the provisions of this and the two next succeeding sections," —I pause to say that only the immediately succeeding section is relevant to mention for present purposes—"the gross relevant "distributions to proprietors for any chargeable accounting "period of a body corporate, society or other body, are the total "distributions to the members of the body corporate, society or "other body, not being distributions . . ." therein stated, ". . . "and being either (*a*) dividends declared . . ." as therein more precisely defined; ". . . or (*b*) distributions . . ." other than

such dividends " . . . made in the period; or (*c*) "—and this is the most relevant—" in the case of the last chargeable accounting " period in which the trade or business is carried on, so much " of any distribution made after the end of that period (not being " a distribution to which paragraph (*a*) of this subsection " applies)"—that is the paragraph relating to dividends—" as is " not a distribution of capital, and, for the purposes of para- " graph (*c*) of this subsection, the distributions which are to be " treated as distributions of capital shall not, in the case of " distributions made by a body corporate with a share capital, " exceed an amount equal to the total nominal amount of the " paid-up share capital thereof together, where the body corporate " has issued shares at a premium for cash, with the aggregate " of the amounts of the premiums." The last two lines have no application here, for this body corporate had not issued shares at a premium at all.

Relating briefly paragraph (*c*) to the facts of this case, the last chargeable accounting period of the first Pollock & Peel company was the period beginning on January 1, 1953, and ending with its liquidation on October 31 of the same year. As a matter of fact, at that date the total nominal amount of the paid up share capital of the company was £30,060, if you treat, as I think you must, the bonus shares issued in the previous year as being paid up share capital at the relevant date. There is nothing else in section 35 which it is relevant to mention.

Section 36 defines distributions. It will be recalled from my reading of section 35 that gross relevant distributions consist of certain distributions, not all distributions, but such distributions as are specified in section 35 (1); and I emphasize the fact that all the distributions which go to make up gross relevant distributions are, by the wording of the subsection, distributions *to the members*. Section 36 provides what are distributions, forming as it were the general class out of which the gross relevant distributions will be extracted. I do not propose to read them all, but it suffices to take one example. Subsection (1): " Subject " to the provisions of the next succeeding subsection, wherever " . . . (*b*) assets are distributed in kind to any person . . . there " shall be deemed for the purposes of the last preceding section " —that is section 35—" to be a distribution to that person . . . " of an amount equal to the value of those assets." If, therefore, any assets in the first company were distributed to any person, then that person would have been treated as having had distributed to him an amount equal to the value of those assets. There follows a proviso: " Provided that no sum applied in " repaying a loan or in reducing the share capital of the person " carrying on the trade or business shall be treated as a distribu- " tion." That is to say, as I read it, sums applied in reducing capital are not regarded as distributions at all, and therefore it follows that, as the Act then stood, such distributions could not be regarded as possibly comprising gross relevant distributions.

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Section 36 (4) has to do with a particular kind of case, of which the present is one, namely, a scheme of amalgamation or arrangement whereby the assets of one company are transferred to another. The object of that subsection was this: that if both the transferor and the transferee companies agreed in writing, addressed to the commissioners as therein stated, then, putting it again quite generally, certain of the obligations for a distribution charge which might have fallen upon the first company were thrown upon the second. Thus, where such a transfer and election have been made, it is provided in this subsection that this Part of the Act applies, "... subject to the following "modifications, that is to say—(i) any distribution of those "shares"—that is, shares in the second company—"to any "person in a winding up of the first company shall, notwith-"standing anything in subsection (1) of this section,"—which I have read—"not be deemed for the purposes of the last preceding "section"—that is section 35—"to be a distribution to that "person." Then it goes on in paragraph (ii) to say this: "in "considering what distribution charge, if any, falls to be made "on the second company, any difference on which non-distribu-"tion relief for chargeable accounting periods before the transfer "was given to the first company ... shall, except so far as it "has already operated to increase a distribution charge on the "first company, be taken into account as if it had been a "difference arising in relation to the second company on which "non-distribution relief had been given to that company, and "shall also be taken into account, in the case of the last charge-"able accounting period of the second company, so as to increase "the amount which, for the purposes of paragraph (*c*) of sub-"section (1) of the last preceding section, is to be treated as not "a distribution of capital." That, of course, throws one back to the provisions of section 30, and particularly to subsection (3) of section 30. But the effect is that in making one's calculations to see (among other things) what limit ought to be placed on the distribution charge, the second company is treated as though the differences from which the non-distribution relief was calculated for the first company have been facts in the life of the second company.

The last few lines of the subsection, to which some attention was directed in the argument, do not I think assist to solve the present problem. For one thing the last chargeable accounting period of the second company has not arisen, and I cannot find in these last few lines, and in particular in the reference to "distribution of capital," anything which materially affects, when I come to it, the proper construction of the phrase "distribution of capital" in section 35.

But there is this significance to the present facts of section 36. Election by the first and second Pollock & Peel companies was made pursuant to subsection (4), and it seems to me inevitably to follow that the distribution of the shares in Pollock & Peel

No. 2 to the persons who were in fact the shareholders of Pollock & Peel No. 1 cannot be treated as distributions to those persons at all for any relevant purposes, including, of course, for the purposes of the earlier subsection (1) of section 36 and also of section 35.

Having mentioned those facts I can at this point consider, in passing, an argument of Mr. Stamp to the effect that we should, or might, treat the distribution of the shares in Pollock & Peel No. 2 to the shareholders in Pollock & Peel No. 1 as being a relevant distribution of capital on any view under section 35 (1) (*c*), so that the limit of the last six lines of section 35 (1) would have been passed before the £15,030 came to be distributed. I do not think that can be right because in my reading of these sections, in the circumstances, one cannot look upon the distribution of the Pollock & Peel No. 2 shares as being distributions at all for any relevant purpose.

So much for the Finance Act, 1947; and I will now pass to section 31 of the Finance Act, 1951. Again I must read a substantial part of the first and second subsections, and also make a reference to the definitions. [His Lordship read section 31 (1) and continued:] Subsection (2) I will not read in full, but I summarize it by stating that it covers the converse case where the reduction of capital precedes the capitalisation. Subsection (5) contains some definitions, the last five lines of which are in these terms: "... and references to the reduction of capital shall be "deemed to include references to the repayment or return of "share capital and the repayment or redemption of loan capital "..." That completes the reading which I must make from the Acts, and I will now proceed to deal as best I can with the arguments.

To dispose, however, first of a point which is significant though it was never in dispute in this court; it will be recalled that in section 35 of the Act of 1947 paragraph (*c*) relates to distributions which take place after the end of the last chargeable accounting period referred to. It is in that respect unlike, for example, paragraph (*b*) which is limited to distributions made in the chargeable accounting period itself. It will, however, be remembered from my reading of paragraph (*c*) that it does not in terms deal with a case of a company which has ceased to carry on any trade or business because it is being wound up, as distinct from a company which ceases to carry on a particular trade or business though it continues to exist as a company carrying on perhaps other trades or businesses, the sort of case which has been met with in these courts in coal mining companies where the coal mining operations of the businesses have ceased. There is no doubt, I think—and, indeed, it was so held in *Inland Revenue Commissioners* v. *Universal Grinding Wheel Co. Ltd.*[1]

[1] [1955] A.C. 807; [1955] 2 W.L.R. 892; [1955] 2 All E.R. 29; 35 T.C. 551.

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—that section 35 (1) (*c*) does apply to cover the case, though it is not limited to that case, of a company which has ceased to carry on business altogether by virtue of its having gone into liquidation.

In this court the argument of the Crown, who are appellants from the judgment of Upjohn J., was first based upon section 31 of the Act of 1951. The case, let me say at the beginning of this part of my judgment, has involved some refinement of argument upon the language which is sought to be construed; and it is, as I think, one of the difficulties, though not of course fatal, in the way of the Crown's argument that they have sought to say, and do say, that although the payment out of the £15,030 is a repayment of capital within section 31 of the Act of 1951, it is not a distribution of capital within section 35 of the Act of 1947. The maintenance of that distinction has made the argument at times a little difficult to follow, although it is fair to say that each side has accused the other of putting forward arguments on one section which are inconsistent with their arguments upon the other. However, I do not myself think that the argument of the respondents here, which prevailed before Upjohn J., fails through any inconsistency, and, indeed, I say at once that my conclusion of the case is that Upjohn J.'s judgment was right and ought to be affirmed.

The argument of the Crown was that this payment of the £15,030 was a return of capital within the meaning of section 31 of the Act of 1951. One question which arises, at the first reading of section 31, is whether the section is really intended to apply at all otherwise than to a company which is at all relevant times continuing in existence.

To practitioners in company law the process known as reducing capital is, of course, familiar. It may take the form of reducing capital which is lost by reducing the amount of the nominal as well as the paid up share capital by cancellation, nothing being returned to any shareholder. It may, on the other hand, take the form, where capital is in excess of the company's wants, of returning excess capital to the shareholders, at the same time reducing the nominal amount of the capital by corresponding figures; and to my mind, at first reading, the reference in the definition phrase that a reduction of capital is to be deemed to include a repayment or return of share capital is, as a matter of ordinary sense, applicable to the sort of case, of which my last example was an illustration, where the shareholder receives a return of his capital in the case supposed because the capital is in excess of the company's business requirements.

I think that Upjohn J. was inclined to the view that section 31 really was not dealing at all with a case where the company at any stage had gone into liquidation. It is, of course, quite plain that the second subsection cannot apply to a company which has gone into liquidation at any relevant date because the second of the two operations there mentioned is the capitalization which

must ex necessitate rei take place during the company's life; but it is possible, referring to the first subsection, that the reduction of capital which takes the form of repayment might be said to occur after the company has gone into liquidation—provided that the repayment in the liquidation could be regarded as a repayment or return of share capital within the meaning of that subsection as defined.

I will assume in favour of the Crown, without expressing any view on it, that one should not treat section 31 (1) as limited in its application only to cases where the whole of the operations have occurred during the company's life. I will assume that, if there has been a capitalization and the company then goes into liquidation, the subsection may be apt to cover an operation taking place after liquidation—provided, of course, that operation can fairly be described as a return of share capital. But it was Upjohn J.'s view that the payment out by the liquidator to the shareholders in this case could not properly be described as a return of share capital, as a repayment of share capital, within the meaning of section 31 (1); and I agree with him for my part upon that point.

I think, as did the judge, that in some cases where a company's capital consists of shares of different classes and where shareholders of one class are limited under the company's regulations strictly in liquidation to what has been described as a return or repayment of capital paid up, one might (on the assumptions I am making) treat such an operation as falling within section 31 (1) to the extent that the shareholders whose capital has been "reduced" were shareholders of a class whose rights were limited as I have mentioned. But in this case the shares are all of one class, and I cannot myself fit into the scheme of the actual operations anything which could fairly be described as a return or repayment of share capital as contemplated by section 31 (1) of the Act of 1951.

The Attorney-General, in support of this part of his argument, referred to language used by Scrutton L.J. in *Inland Revenue Commissioners* v. *Blott* [2]: "A company is liquidated during the "year of assessment, and the liquidator returns to the share-"holders, (1) their original capital, (2) accretions to capital due "to increase in value of the assets of the company, (3) the "reserve fund of undivided profits in the company, (4) the "undivided profits of the last year of assessment." The Lord Justice, however, went on: "Heads (3) and (4) will have paid "income tax through the assessment of the company; but it "appears to me that none of the heads will be returnable to "super-tax as assessment; they are not income from property, "but the property itself in course of division." It is no doubt quite accurate as a factual statement of what happens in the case of a solvent company that the liquidator may proceed in

[2] [1920] 2 K.B. 657, 675; 36 T.L.R. 575; 8 T.C. 101 (affirmed [1921] 2 A.C. 171; 37 T.L.R. 762).

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the order that Scrutton L.J. stated. But the Lord Justice was not, I think, intending to make a general statement applicable to a case in which the point to be considered was that with which we are concerned in this case. It is to be remembered that in *Inland Revenue Commissioners* v. *Blott* [2] the question was as to an assessment to super-tax of individuals under the Finance Act, 1910, the claim of the Crown being to charge the individuals with super-tax on certain shares which had been allotted as bonus shares. I therefore do not think that any help for present purposes can be taken from the particular language Scrutton L.J. used in that context.

But, again, let me assume that it is proper and possible to say that the £15,030 might be treated as a return or repayment of capital, at any rate for some purposes, within section 31 of the Act of 1951. It is, I think, clear that that alone does not gain the necessary result for the Crown.

What the Attorney-General therefore then goes on to say is that one must treat section 31 of the Act of 1951 as adding, as it were, two additional paragraphs, which he called (*d*) and (*e*), to section 35 (1) of the Act of 1947, following after paragraph (*c*); with this effect, that "gross relevant distributions" will include as a separate head, and unlimited by any restrictions one finds in paragraph (*c*), the distributions which are described in section 31. The Attorney-General frankly stated that he did not press that argument too strongly upon us, and encouraged perhaps by that admission, I reject it. I do so on two grounds. In the first place it seems to me that difficulty would be created in that there is no statement in section 31 (which would at any rate be applicable in this case) of the chargeable accounting periods to which these distributions would be related; and, secondly, as Upjohn J. pointed out, all section 31 is doing is stating that certain sums of money, or the equivalent of certain sums of money, are to be treated as "distributions" for the purpose of section 35; and as I have earlier said, not all distributions constitute gross relevant distributions automatically: it is only such of the distributions as fulfil the qualifications of section 35 that become gross relevant distributions. It seems, therefore, to me that the attempt to rely exclusively upon section 31 by adding something new and distinct to section 35 fails.

The Attorney-General next submitted that one must treat paragraph (*c*) of subsection (1) of section 35 as having added to it, by virtue of the Act of 1951, some words to this effect, "and "including so much of any distributions as are deemed to be "such by virtue of section 31 of the Act of 1951." Those words or comparable words would, it was contended, remove "the "deemed distributions" of section 31 from the limitation of the last few words in paragraph (*c*), "as is not a distribution of "capital." Again I find myself unable to accept that argument. I cannot see any justification for adding such words to section 35.

[2] [1920] 2 K.B. 657.

It seems to me that the joint effect of the two sections is this: that in considering what distributions may amount to gross relevant distributions you bear in mind that section 31 has said that certain things are distributions; and then, if they answer the other characteristics set out in section 35, they may become gross relevant distributions.

It is sometimes not difficult, and always a little tempting, to criticize the results of the efforts of parliamentary draftsmen. But the matter is perhaps in the present case made a little complicated in that, although section 31 of the Act of 1951 is expressed as amending or adding to section 35, its more immediate effect was rather to amend section 36; for it will be recalled from my reading that at the end of subsection (1) of section 36 there was this proviso: "Provided that no sum applied . . . in "reducing the share capital . . . shall be treated as a distribu- "tion." It seemed, therefore, to follow, as the Act originally stood, that sums applied in reducing share capital were not distributions at all. It is now, I think, manifest that, by virtue of section 31 of the Act of 1951, certain sums applied in reducing share capital may be distributions. But I cannot myself accept the argument, if I rightly apprehend it, that the Attorney-General put forward, that the amendment went further, and had the rather oblique result of making the proviso to section 36 (1) read: "Provided that no sum applied . . . in reducing the share "capital . . . shall be treated as a distribution" *of capital* within section 35. It seems to me there is no justification for making that emendation to the language of section 36.

I therefore come to the last point upon which the argument mostly turned in the end, namely, that apart altogether from anything that section 31 did or might have done, this was not a case in which the sum of £15,030 could be fairly described as a "distribution of capital" at all within section 35 (1) (*c*). I have already indicated that the argument of the Crown on this point is in some respect not entirely easy to reconcile with some of the argument on section 31. But nevertheless it is obviously, I think, a legitimate alternative argument for the Crown to say that this sum of £15,030 is not a distribution of capital within section 35 (1) (*c*). Put in its simplest form, what the Attorney-General was saying is this: that once the company has gone into liquidation all the distinctions between capital and income for the liquidator's purposes are gone. No such distinction exists. All he has got is assets; and all he can distribute is assets. They cease to have labels such as capital, or income, or revenue, or profits, or anything like that. And he said, accordingly, that this formula "distribution of capital" ought to be confined to something which really was and could fairly be described on the facts of the case as a return eo nomine of capital to some class of shareholder—which this payment was not.

I said a little earlier in my judgment that paragraph (*c*) clearly applies to a company in liquidation, but I said also that

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it is not exclusively referable to such a case. The language which the draftsman selected is language which must be applicable both to the case of a company in liquidation and to the case of a company which is making a payment out to shareholders when a particular business has ceased in the last chargeable accounting period to be carried on; and it seems to me that the formula chosen, and I suggest happily chosen in the circumstances, is "distribution of capital." Of course, if the draftsman had said, not "distribution of capital," but "return or "repayment of capital," having his eye mainly, if not exclusively, on the case of a company still a going concern, it might have made the argument in the present case easier, particularly where it could be said in the liquidation that there was not, strictly, a return of capital at all. I do not repeat what I have already said of the same kind in reference to section 31 of the Act of 1951. But the draftsman has not said "return of capital." He might again, if he had been thinking only of a company in liquidation, have said "distribution of assets." But that, as a phrase, would have been inapposite in the case of a company which was still a going concern; and although, if he had said that, it would have made the argument in this case very short and simple, again the answer to the point is that he has not said it. What he has said is "distribution of capital."

In the course of the argument many references were made to well-known authorities in regard to the duties of liquidators and what is the subject-matter of their operations when they carry out the final winding up of a company. In particular, reference was made to *Birch* v. *Cropper*[3] and to *Inland Revenue Commissioners* v. *Burrell*.[4] There are in the judgment of Upjohn J. citations from both those cases, and since the case has already found its way into the law reports there is no necessity for me merely to repeat citations which are already found in the judge's judgment. I confine myself to one extract from the speech of Lord Macnaghten in *Birch* v. *Cropper*,[5] which will also be found in Upjohn J.'s judgment.[6] Lord Macnaghten said[7]: "I think "it rather leads to confusion to speak of the assets which are "the subject of this application as 'surplus assets' as if they "were an accretion or addition to the capital of the company "capable of being distinguished from it and open to different "considerations. They are part and parcel of the property of "the company—part and parcel of the joint stock or common "fund—which at the date of the winding up represented the "capital of the company. It is through their shares in the "capital, and through their shares alone, that members of a "company limited by shares become entitled to participate in "the property of the company. The shares in this company

[3] (1889) 14 App.Cas. 525; 5 T.L.R. 722.
[4] [1924] 2 K.B. 52; 40 T.L.R. 562; 9 T.C. 27.
[5] 14 App.Cas. 525.
[6] [1956] 1 W.L.R. 951, 959; [1956] 2 All E.R. 776, 781.
[7] 14 App.Cas. 525, 546.

"were all of the same amount." The last sentence I have read because it is strictly applicable to this case.

The formula used by the draftsman is, for better or worse, "distribution of capital." If, as the Attorney-General says, the word "capital" is not appropriate in a winding up, nevertheless the formula has been used by the draftsman in a context which requires it to be applied to a winding up. If then it is true to say that in the hands and in the mind of the liquidator the distinction between capital and income is not significant, it is none the less true that to a shareholder the question whether what he receives is capital or income may well be significant. If you take the case of shares held under a trust, whereunder persons are entitled to income for life only and others are entitled to corpus, it is well established that once a liquidation has supervened, then anything which comes to the trustees from the liquidator, whatever its source may earlier have been, must in the absence of something special in the trust instrument be received by the trustees as capital.

I think that in using this short phrase the draftsman must be taken to have had in mind something of that kind. The vital word, after all, I think, is "distribution" for present purposes. Here is a distribution of assets which in their nature and certainly in the hands of the recipients will be capital rather than, or as distinct from, revenue. That is the consequence of the liquidation. I therefore think it inescapable, without elaborating the point at length, that on the facts of this case the £15,030 was a "distribution of capital" in the sense that it was a distribution of something which, so far as it was relevant to consider the distinction between capital on the one hand and income or revenue on the other, was capital. If that is so, then, of course, the qualification of the last six lines of section 35 (1) applies. Indeed, I think the existence of that qualification, ". . . and, for the "purposes of paragraph (*c*) of this subsection, the distributions "which are to be treated as distributions of capital shall not . . . "exceed an amount equal to the total nominal amount of the "paid up share capital thereof together" does lend emphasis and support to the view that it was that consideration which the draftsman had in mind. I have already stated that for the purpose of the last six lines I think the limit was £30,060 and not the original figure of £2,004; and therefore on any view, if I am right in saying that the £15,030 was a distribution of capital, it has not exceeded the limit and is therefore excluded from the gross relevant distributions under paragraph (*c*).

Upon all this last part of the case I am well content to accept and, if I may say so, endorse the following language of Upjohn J.[8]: "Section 36 of the Finance Act, 1947, provides that a reduction "of capital is not to be treated as a distribution. Section 31 of

[8] [1956] 1 W.L.R. 951, 962.

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"the Finance Act, 1951, in effect amends that section by providing that if certain conditions are fulfilled a reduction of capital is for the purposes of section 35 'to be a distribution' not, be it noted, 'to be a gross relevant distribution.' Reference back to section 35 is then necessary to see whether this distribution is included in the definition of 'gross relevant 'distribution' for the relevant chargeable accounting period, that is the period that ended with the commencement of the liquidation. The relevant paragraph is (*c*) and that does not apply to distributions of 'capital.' Thus this return of capital though a distribution for the purposes of section 35 is found not to be a 'gross relevant distribution' because it is a distribution of capital. If the liquidator had returned not 10s. in respect of each £1 share but a sum which exceeded the total allowed as capital by the concluding words of the subsection, the excess would not for the purposes of the tax be treated as capital, but income, and would fall to be included in the gross relevant distribution for the period. Reading the sections together, that seems to me how the scheme works and I see no conflict real or apparent between the sections and certainly no justification whatever for reading in the words which the Attorney-General submits ought to be read in."

One final point should be mentioned, though it was not much pressed before us. It was said, and said quite truly, that the Special Commissioners in the case did not in terms find that the £15,030 was capital. It was therefore suggested, particularly in the court below, that the proper course would be to refer the matter back to the Special Commissioners in order that they might investigate the origins of this figure and say whether it, or if not the whole what part of it, was capital. I am quite satisfied that it would be wrong for us to follow that course, and for two reasons. In the first place it has been laid down authoritatively that this court should be extremely slow to send a case back to the Special Commissioners. But, more important, I do not think any useful purpose could be achieved by so doing. All the necessary facts about the history of this company and what happened to its assets in the liquidation have been found, and are not in dispute. The question whether this particular figure is a distribution of capital is not, as I apprehend it, one of fact for the Special Commissioners, but one of law to be determined on the meaning of paragraph (*c*) of section 35 (1) of the Finance Act, 1947.

For the reasons which I have tried to state, I think this appeal fails, and should be dismissed.

Morris L.J. The question which arises is whether for the purposes of profits tax the payment by the liquidator of the sum of £15,030 to the members of the company constituted a distribution which was a "gross relevant distribution" within the meaning of section 35 (1) of the Finance Act, 1947, while having

regard to the provisions of section 31 of the Finance Act, 1951.

It is said by the Crown that the effect of section 31 of the Finance Act, 1951, as applied to the facts of this case, is that an amount equal to the sum of £15,030 is deemed for the purposes of section 35 of the Finance Act, 1947, to be a distribution to members. It is further said that the consequence of this is that such a distribution should be regarded as being or forming a part of a "gross relevant distribution" for the purposes of section 35 of the Act of 1947. It is said that this results either, first, because the intent and the effect of section 31 of the Finance Act, 1951, was notionally to add distributions as described by section 31 of the Finance Act, 1951, to distributions described either under paragraph (*a*) or (*b*) or (*c*) of subsection (1) of section 35 of the Finance Act, 1947, or, secondly, because the wording of paragraph (*c*) of section 35 (1) of the Act of 1947 must be read as impliedly modified in the case of any distribution covered by section 31 of the Act of 1951.

In considering these submissions the question arises whether section 31 of the Finance Act, 1951, has application to the facts of this case. A section which relates to capitalizing distributable sums and to reducing capital would not seem on first approach to be a section which would operate during the course of a liquidation. The provisions of section 31 (2) would not come into operation after the commencement of a liquidation. There would not after such date be a capitalization of a distributable sum in the sense in which the word "capitalization" is in the section defined. It is said, however, that the provisions of section 31 (1) could operate after a liquidation. It is said that the provisions of paragraph (*a*) of subsection (1) are satisfied because of the capitalization of profits which took place in November, 1952. It is then said that the provisions of paragraph (*c*) are satisfied in that the £15,030 which the liquidator paid to the members of the company was a sum "applied in reducing its capital."

When the liquidator paid out the £15,030 it would be surprising if the process could be described as one which effected a "reducing" of capital. By subsection (5) of the section it is, however, provided that references to the reduction of capital are to be deemed to include references to the repayment or return of share capital. It is submitted that a distribution by a liquidator of money which remains in his hands can be regarded as including or performing the operation of repaying or returning share capital.

Reliance was placed upon certain observations to be found in *Inland Revenue Commissioners* v. *Blott*,[9] *Inland Revenue Commissioners* v. *Burrell*[10] and *Hill* v. *Permanent Trustee Co. of New South Wales*,[11] and in certain other cases.

But even assuming that the payment out by the liquidator of the sum of £15,030 could be regarded as a repayment or return

[9] [1920] 2 K.B. 657, 675.
[10] [1924] 2 K.B. 52, 64.
[11] [1930] A.C. 720, 729.

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of share capital, in my judgment the only result is that the sum is then, by the operation of section 31, deemed for the purposes of section 35 of the Finance Act, 1947, to be a distribution to the members of the company of an amount equal to the sum so applied. On this footing attention must then be directed to section 35 of the Act of 1947, and I do not feel able to accept the submissions that at this stage the provisions of section 35 must be regarded as either extended or, alternatively, modified. I can see no statutory provision which warrants this. The provisions of section 35 must then merely be construed and operated. This will be so whether section 35 comes directly under consideration or comes under consideration because made applicable by section 31 of the Act of 1951.

Section 35 extends to cover a liquidation. In his speech in *Inland Revenue Commissioners* v. *Universal Grinding Wheel Co. Ltd.*[12] Lord Cohen said[13]: "It deals with the position in a "liquidation when every distribution is strictly a distribution of "assets, not of profits, and it imposes a necessary limitation for "the protection of the revenue."

In considering section 35 it is clear that the payment out of the £15,030 is not covered by either the words of paragraph (*a*) or paragraph (*b*) of subsection (1). In regard to paragraph (*c*) the last chargeable accounting period was that between January 1, 1953, and October 31, 1953. The payment out of the £15,030 was, I think, a distribution. It was made after the end of the period. The question then arises: was it a distribution of capital? If it was, then, subject to the operation of the proviso, it was not a "gross relevant distribution," and it did not fall to be treated as a part of or as swelling the total of the gross relevant distributions.

There is, however, the proviso. The sum which for the purposes of paragraph (*c*) is to be treated as a distribution of capital must not, in the case of a distribution made by a body corporate with a share capital, exceed an amount equal to the total nominal amount of the paid up share capital together with the aggregate of the amounts of any premiums where the body corporate has issued shares at a premium for cash. In the present case the £15,030 was less than the nominal amount of the paid up share capital, which must, I think, be said to be £30,060.

The only question, therefore, is whether the £15,030 which was distributed was capital. The word "capital" is used in a context which distinguishes it from "share capital." It is recorded in the case stated that, after the transfer of assets to the new company and after the liquidator had paid all debts and liabilities of the company, including the costs of winding it up, there remained a sum of cash belonging to the company amounting to £15,030. The shares in the new company, which were received in consideration of the transfer of the business to the

[12] [1955] A.C. 807. [13] Ibid. 825.

new company, were distributed; but subsection (4) of section 36 enjoins that such distributions must be ignored. In those circumstances was the £15,030 capital? In my judgment it was.

It was submitted on behalf of the Crown that proof should be forthcoming that the sum was capital. But, leaving aside any question where the onus of proof lies, the facts as found lead to the conclusion that the sum was capital. The £15,030 represented what was left in the hands of the liquidator. The sum of £15,030 represented the surplus assets in his hands.

In *Inland Revenue Commissioners* v. *Burrell* [14] Sargant L.J. said [15]: "In the liquidation of a limited company the distribution "of the surplus assets of the company is almost necessarily of a "final and non-recurrent character, and reaches the hands of the "shareholders quite irrespective of the sources from which the "assets have accrued to the company."

In my judgment the payment out of the £15,030 was a distribution of capital within the meaning of paragraph (*c*) of subsection (1) of section 35. I would dismiss the appeal.

PEARCE L.J. I agree.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Frank Simmonds, Parker & Hammond for Percy Holt & Nowers, Croydon.*

E. D.

[14] [1924] 2 K.B. 52. [15] Ibid. 73.

[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION (COUNSEL'S FEES).

1957
June 24.

Barrister—Fees—Legal aid—Divorce—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *Sch. III.*
Legal Aid — Costs — Taxation — Barrister — Divorce — Legal Aid and Advice Act, 1949, *Sch. III.*

The following circular has been issued by the Senior Registrar of the Divorce Registry.

The registrars of the Divorce Registry have at the request of the professional bodies issued the following statement of their policy as regards counsel's fees on taxations under the Third Schedule to the Legal Aid and Advice Act, 1949. They wish to make it clear that while this statement represents their general policy, it cannot fetter the discretion of the individual officer of the court taxing any particular bill.

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PRACTICE DIRECTION (COUNSEL'S FEES).

1. *Settling Documents*

(*a*) *Pleadings.* A fee will always be allowed, unless the document is a plain denial or joinder of issue and a conference or advice has already been allowed on it.

(*b*) *Discretion Statement.* A fee will be allowed, unless the facts are so simple that it is little more than a verbatim extract from the proof.

(*c*) *Application for Particulars.* A fee will be allowed, except when confined to a request for particulars of the "general "charge" or other short and simple request.

(*d*) *Affidavits.* A fee will usually be allowed if the affidavit is more than a simple statement of facts, though less readily in undefended applications. Under R.S.C., Ord. 65, r. 27 (15), one suitable fee only will be allowed for a group of affidavits.

(*e*) *Summonses.* No fee will be allowed unless the summons is of a technical or complicated character.

2. *Opinion and Advice*

A clear distinction is drawn between a preliminary opinion and advice on evidence.

A preliminary opinion before, or with, the settling of the petition will be allowed only if the case has features of special difficulty: for instance, if the party has disclosed details which suggest further inquiries might be necessary to support an alternative charge, or if questions of domicile or jurisdiction arise. An opinion specially required by an area or local committee will always be allowed. One appropriate fee only will be allowed for such an opinion, whether given in writing or in conference.

One fee for advice on evidence will always be allowed if it is taken after the close of pleadings, but not if taken earlier. Any further advice must be justified on the facts.

3. *Conference*

A fee will always be allowed on a main brief, but not on a brief for a summons or interlocutory proceeding which is of a very simple character or in which counsel has already advised or settled the papers. Conferences other than on a brief must be justified on the facts. A fee will seldom be allowed for a conference held before appearance.

4. *Brief fees on summonses and other interlocutory proceedings*

(*a*) A certificate for counsel will not be given on either side where the application is a simple procedural one which does not justify his attendance. Examples of applications on which a certificate will be given only in exceptional circumstances are:—

All unopposed applications (i.e., by consent, or agreed "no "cause to show," or not requiring service), whether included in the list below or not.

Leave to amend pleading
Discovery
Appointment of medical inspectors
Further time or leave to file out of time

To stay prayer and proceed on answer
Particulars, if confined to the "general charge" or other very simple request
Security for costs
Removal of solicitor's name from record
Variation of venue
Removal of stay of proceedings
Appointment of guardian
Garnishee or charging order.

(*b*) A certificate will be given on opposed applications for ancillary relief where the circumstances and the complexity of the parties' affairs are such that the attendance of counsel is likely to be of assistance to the registrar.

(*c*) Ordinary consent orders for alimony, maintenance, etc., are not regarded as requiring the attendance of counsel. If, however, a deed of settlement or a secured provision is the subject of a compromise affecting the interests of an infant, this may be regarded as an exceptional circumstance justifying the attendance of counsel even on a consent application.

B. LONG,
Senior Registrar.

June 24, 1957.

[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* MOORE.

C. C. A.
1957
June 25.
Lord Goddard C.J., Byrne and Devlin JJ.

Criminal Law—Court of Criminal Appeal—Abandonment of appeal to —Power to withdraw notice of abandonment—Criminal Appeal Rules, 1908 (*S.R. & O.*, 1908, *No.* 227), *r.* 23.

Where a notice of abandonment of an appeal is given to the Court of Criminal Appeal the appeal is deemed to have been dismissed by the court by virtue of rule 23 of the Criminal Appeal Rules, 1908, and, accordingly, where there has been a deliberate abandonment of an appeal, the court has no power to allow the notice of abandonment to be withdrawn and the appeal reinstated.

If, however, the appellant alleges a mistake or fraud, which, if established, would enable the court to say that the notice of abandonment should be treated as a nullity, the court would exercise its inherent jurisdiction to treat the notice as such.

APPLICATION for leave to withdraw a notice of abandonment.

Leslie Arthur Moore was convicted on February 13, 1957, at Hertfordshire Quarter Sessions of shopbreaking, larceny and wounding and received a sentence of five years' imprisonment. On February 21 he applied for leave to appeal and on March 5 he abandoned his appeal. By a notice dated May 20, he applied for leave to withdraw his notice of abandonment.

The appellant did not appear and was not represented.

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v.
MOORE.

LORD GODDARD C.J. stated the facts and continued: The court wishes to take this opportunity of stating their view with regard to the withdrawal of notices of abandonment. The Criminal Appeal Act, 1907, says nothing about appellants who have once abandoned their appeals, having a right to apply for leave to withdraw the notice of abandonment. Rule 23 of the Criminal Appeal Rules, 1908, provides: "An appellant at any time after "he has duly served notice of appeal or of application for leave "to appeal, . . . may abandon his appeal by giving notice of "abandonment thereof . . . and upon such notice being given the "appeal shall be deemed to have been dismissed by the Court of "Appeal." This appeal, therefore, has accordingly been dismissed.

There have been from quite early days in the history of the court, applications for leave to withdraw a notice of abandonment, and it is exceedingly difficult to understand what power the court has to give leave to withdraw a notice of abandonment, considering that by the rules, which have the force of a statute, the appeal has been dismissed. An examination of the cases has shown that, except in one case at any rate, the court has only allowed notice of abandonment to be withdrawn if they are satisfied that there has been some mistake. No doubt if a case could be made out that an appellant had in some way or another been fraudulently led or induced to abandon his appeal, the court in the exercise of its inherent jurisdiction would say that the notice was to be regarded as a nullity; but where there has been a deliberate abandonment of an appeal, in the opinion of the court there is no power or right to allow the notice of abandonment to be withdrawn and the appeal reinstated, because the appeal having been dismissed the court has exercised its powers over the matter and is functus officio. Accordingly, the court is not going to entertain applications for the withdrawal of notices of abandonment unless something amounting to mistake or fraud is alleged, which, if established, would enable the court to say that the notice of abandonment should be regarded as a nullity. Though I do not wish to encourage prisoners to petition the Home Office, it seems to the court that once the appeal has been dismissed, as it is dismissed when a notice of abandonment is received, the only thing a prisoner can do is to petition for the exercise of the prerogative or for the Home Secretary to take such steps as he thinks right.

Therefore, this application is refused. There is no ground whatever here for saying that the notice of abandonment was given under any misapprehension or that the appellant was misled into giving it. Therefore, we refuse to allow the notice to be withdrawn, and we hope notice will be taken of what I have said, that once a notice of abandonment has been given the appeal is dismissed, and no further step can be taken in the case unless the court can be satisfied that the notice abandoning the appeal must be treated as a nullity.

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REGINA v. MOORE.
Lord Goddard C.J.

A form of application has been printed and used called Form 9 (*a*), on which appellants apply for leave to withdraw their notice of abandonment. That form has never been scheduled to the rules, and therefore has no effect because the rules provide for certain definite forms being used for certain definite purposes. This form, which has been printed, I suppose, by some direction at some time—we do not know when—has no force whatever, and we have given instructions for the form to be withdrawn. We feel that if there is a form distributed to prisoners giving them an opportunity to apply to withdraw their notice of abandonment, they may think they have some right under the rules or the Act to make this application. There is no such right, and there is no such rule, and there should be no such form. Accordingly, that form will be withdrawn from circulation.

Application refused.

C. J. E.

[COURT OF APPEAL.]

* SHEFFIELD CORPORATION *v.* TRANTER (VALUATION OFFICER).

C. A.
1957
June 5, 6.
Lord Evershed M.R., Morris and Pearce L.JJ.

Rates and Rating — Rateable occupation — Refreshment pavilion in public park—Occupation for trade by private individual—Whether distinct hereditament carved out of park or inherent in and ancillary to use of park.

A refreshment pavilion in a public park (which was not rateable) was let to an ice-cream merchant on a yearly tenancy. By the terms of the tenancy agreement the tenant was permitted to sell light refreshments and so forth to park users only. He was required to keep open to the public on all weekdays between 10 a.m. (11 a.m. on Sundays) and half an hour before the park closed, and the quality of the goods sold and the prices were to be approved by the corporation. On appeal against a decision of the local valuation court to add the pavilion to the valuation list, the Lands Tribunal held that the pavilion was not a rateable hereditament:—

Held, that, prima facie, a public park was to be treated as in the occupation of the public and therefore not rateable; that that exemption was not removed by the circumstance that on certain parts of the park the public were excluded, as, for example, certain parts of refreshment premises conducted by the corporation; moreover the situation was not necessarily altered by the fact that those premises were conducted by some third party by way of licence or tenancy. In the present case the pavilion was an inherent and essential part of the park as an entity in the occupation of the public. It was ancillary to the use of the park and provided a necessary amenity; it had not been so carved out as to acquire a distinct status and, accordingly, was not liable for assessment.

Lambeth Overseers v. *London County Council* [1897] A.C. 625; 13 T.L.R. 527 and *Burnell* v. *Downham Market Urban District Council* [1952] 2 Q.B. 55; [1952] 1 All E.R. 601 applied.

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Manchester Corporation v. *Chorlton Union Assessment Committee* (1899) 15 T.L.R. 327 considered.

Decision of Lands Tribunal affirmed.

CASE STATED by the Lands Tribunal.

The Lord Mayor, Aldermen and Citizens of Sheffield appealed against a decision of the local valuation court for the West Riding of Yorkshire (South) given on June 29, 1955, directing that a hereditament consisting of a refreshment pavilion in High Hazels Park, Sheffield, should be entered in the valuation list in the name of one George Dale as occupier and of the corporation as owners at gross value £105 and net annual and rateable value £84. The following facts were proved or admitted before the tribunal: The park was acquired in 1894 under the provisions of the Public Health Act, 1875, upon trust by deed to permit it to be used for ever as public walks and pleasure grounds within the meaning of section 164 of the Act. It was agreed that the park (with the exception of the pavilion under appeal) was not rateable and that the cost of maintaining the park as a whole exceeded any income therefrom.

The refreshment pavilion was let out to Dale, who was an ice-cream merchant, under a tenancy agreement dated April 22, 1954. A copy of the agreement was annexed to the case and the relevant terms are set out below. No main meals were provided in the pavilion. The tenant sold the usual ices, sandwiches, cakes and tea, which, as provided by the tenancy agreement, had to be sold at a price to be agreed by the corporation. The only customers frequenting the pavilion were people who were using the park.

The tribunal was of opinion that the provision of a refreshment pavilion such as the present in any public park was just as essential as the provision of other amenities associated with a public park and did not go outside the requirements of the park. The tenant did nothing that the corporation themselves would not have been bound to do for the purpose of providing the usual amenities expected in a park of this nature. The tribunal allowed the appeal, basing its decision on *Manchester Corporation* v. *Chorlton Union Assessment Committee*.[1] The valuation officer appealed.

By the tenancy agreement dated April 22, 1954, the pavilion was let to the tenant from March 25, 1954, at the yearly rent of £225 0s. 0d., payable in advance by equal quarterly payments. The relevant terms were as follows.

1. . . . the tenant shall have the right to supply and sell refreshments and, subject to his obtaining the necessary licences, to supply and sell tobacco, cigarettes and cigars from the interior of the said premises for the use of persons resorting to the said park only.

[1] (1899) 15 T.L.R. 327.

2. The tenant hereby agrees with the corporation as follows:— . . . (v) to ensure that the said premises are kept open to the public for the supply of refreshments on all week-days (except Christmas Days) between the hours of 10 a.m. and half an hour before the official time for the closing of the said park, and on Sundays between the hours of 11 a.m. and half an hour before the official time for the closing of the said park. (vi) To cause a list of the prices of all commodities sold on the said premises to be hung in a conspicuous position in the said premises. (vii) To take all reasonable care of the landlords' furniture, fixtures and fittings specified in the said schedule hereto, and to replace with similar articles of equal quality and value any of the said furniture, fixtures and fittings which may be lost, worn out or become unfit for use. (viii) At all times during the continuance of the tenancy to keep the said premises in a clean and tidy condition to the satisfaction of the corporation. (ix) At his own expense to provide all crockery and other utensils, and any furniture, fixtures and fittings which, in addition to those specified in the said schedule hereto may be required by the tenant for the purpose of carrying out his obligations under the terms of this agreement and which shall remain the property of the tenants. (x) All refreshments to be provided for sale on the said premises and the prices to be paid therefor shall be to the requirements and satisfaction of the corporation. (xi) Not to sell or cause to be sold any refreshments outside the said premises and not to allow the said premises to be used as a general saleshop or store. (xii) Not to sell or permit the sale of any intoxicating liquors for consumption on or off the said premises, and not to make any application for a licence for such purposes. (xiii) Not to permit the holding of any public dancing, singing, music or other entertainment upon the said premises. (xiv) Not to do or permit or suffer to be done in or upon the said premises any act or thing which, in the opinion of the corporation, is or may be or become a nuisance, damage, annoyance or inconvenience to the corporation or any person or persons resorting to the said park or the neighbourhood. (xv) Not to underlet or part with the possession of the said premises without the prior consent in writing of the corporation. (xvi) To accept all responsibility for and be answerable for all accidents, damages, injuries or losses whatsoever which may occur or be sustained by any persons using or upon the said premises, or by the tenant during the continuance of the tenancy, and to indemnify and keep indemnified the corporation from and against all actions, suits, claims and demands, costs and expenses whatosever which the corporation may pay, suffer, sustain or become liable to, in respect of any such accidents, damages, injuries or losses. (xvii) On the determination of the tenancy to deliver up the said premises and all items of furniture, fixtures and fittings belonging to the corporation as specified in the said schedule hereto in good order and condition (reasonable wear and tear only excepted).

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3. The corporation hereby agree with the tenant as follows:—(a) . . . to pay the general rates and water rent in respect of the said premises. (b) To keep the said premises in good and tenantable repair and condition including the interior and exterior decoration thereof. (c) To keep the structure of the said premises adequately insured against damage by fire.

4. Provided always and it is hereby agreed as follows:—(1) The tenancy may be determined by either party giving to the other not less than six months' notice in writing to expire on March 25 in any year; and (2) if the said rents or any part thereof shall be in arrear for the space of 28 days after becoming due (whether formally demanded or not) or if there shall be any breach by the tenant of any of the agreements or obligations on the part of the tenant or the conditions herein contained, or if the tenant shall become subject to the bankruptcy laws or make any assignment or arrangement for the benefit of creditors then, and in any of the said cases, it shall be lawful for the corporation at any time thereafter to enter into and upon the said premises or any part thereof in the name of the whole, and thereupon the tenancy hereby created shall absolutely determine but without prejudice to any right of action or other remedy of the corporation in respect of any rent in arrear, or of the breach of any of the terms and conditions herein contained and on the part of the tenant to be observed or performed.

Sir Harry Hylton-Foster S.-G., Q.C., and *Patrick Browne* for the valuation officer.

David Widdicombe for the corporation.

In addition to the cases referred to in the judgments, the following were cited in argument: *London County Council* v. *Wilkins*[2]; *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.*[3]; *Mitcham Golf Course Trustees* v. *Ereaut.*[4]

LORD EVERSHED M.R. This is an appeal by way of case stated from a conclusion of the Lands Tribunal to the effect that a certain piece of land, in the actual occupation of one George Dale but being within the confines of the High Hazels Park, Sheffield, is not liable to rating assessment. The High Hazels Park, Sheffield, was acquired, according to the statement in the case stated, in the year 1894 under the provisions of the Public Health Act, 1875, by a deed under the terms of which the respondents, the Lord Mayor, Aldermen and Citizens of the City of Sheffield, were bound to permit the park to be used for ever after as public walks and pleasure grounds within the meaning of section 164 of the Public Health Act, 1875. We do not know more about the terms of the deed, but it must, I think,

[2] [1956] 3 W.L.R. 505; [1956] 3 All E.R. 38.
[3] [1895] A.C. 117; 11 T.L.R. 132.
[4] [1937] 3 All E.R. 450.

be taken—and it has not really been in dispute before us—that this park, in all relevant respects, should be treated as of a similar character to such a park, for example, as the Brockwell Park, the subject-matter of the well-known *Lambeth Overseers* v. *London County Council*,[1] which came before the House of Lords in 1897 and to which I shall later return. But according to the case stated an agreement was made in April, 1954, between the Corporation of Sheffield and Dale whereby a refreshment pavilion was let to Dale, by profession or trade an ice-cream merchant. I shall more particularly allude hereafter to the term of the agreement which provided that Dale was to make available to users of the park certain light refreshments, ice-creams and so forth, together with cigarettes and tobacco.

The parties before us have been, as appellant, the valuation officer and, as respondents, the Corporation of Sheffield. In order to dispose of the matter, it appeared at first a point of some materiality that Dale was not himself before the court. But Mr. Patrick Browne has drawn our attention to the relevant provisions of the Acts of Parliament, and it is sufficient for me to say that, in accordance with those provisions, a notice was served by the valuation officer upon Dale and he had, if he had chosen to take it, an opportunity of contesting the claim to rate this refreshment pavilion. Under the same statutory provisions it was no less competent for the owner of the pavilion, the Sheffield Corporation, also to contest the claim to rateability. In the event, only the corporation have challenged the valuation officer, and so it is that the parties before us are those which I have named. But it is to be borne in mind that this is a case in one respect unlike others which have been before the court and particularly the *Brockwell Park* case.[2] In this case the claim to put a hereditament on the valuation list is limited to the particular pavilion occupied by Dale. It is not a claim to rate at large the park or parts of the park in the actual occupation of the local authority.

The case for the Crown has, if I may say so, the attractions both of simplicity and of common sense; for here the situation is, if you go and look at this refreshment pavilion, that you will find it in the exclusive occupation of the ice-cream merchant Dale, who is carrying on there in an ordinary sense the business of a proprietor of a refreshment house. The confines of the pavilion and the surrounding area are defined, and the business is his business, out of which no doubt he is making his living. Not only so, but if you take the requisite ingredients for rateable occupation as they were formulated in 1949 by Mr. Rowe in the course of his argument before this court in *John Laing & Son Ltd.* v. *Kingswood Assessment Committee*,[3] you find, as the Solicitor-General observed, that all the four ingredients submitted

[1] [1897] A.C. 625; 19 T.L.R. 372.
[2] [1897] A.C. 625.
[3] [1949] 1 K.B. 344, 350; 65 T.L.R. 80; [1949] 1 All E.R. 224.

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to, and accepted by, Tucker L.J. are, on the face of them, satisfied in this case.

First, there must be actual occupation; second, it must be exclusive for the particular purposes of the possessor; third, the possession must be of some value or benefit to the possessor; and, fourth, the possession must not be for too transient a period. Anticipating the effect of the agreement of 1954 it may be said that all four of those conditions are in this case satisfied. If the matter, then, stood alone thus: that the sole question for the court was to answer the question: Are those ingredients satisfied? the conclusion would, in my view, be for the valuation officer. But in truth that is not in the present case an exhaustive statement of the matters which have to be determined. It is of the essence of this case that the refreshment pavilion is upon a part, and an essential part, of the High Hazels Park. Again anticipating the conclusion which I have reached it seems to me that in light of the guidance we have had from decisions, particularly in the *Brockwell Park* case,[4] and in light of the findings of fact in this case, we must conclude here that there has not been such a "carving out" (to use the phrase of the Solicitor-General, of this pavilion from the park as a whole as to make it in relevant respects distinct from the park and so expose it to rating liability.

I think it will be convenient to go at once to the *Brockwell Park* case.[4] The facts in the case are set out most fully in the report before the Divisional Court.[5] It there appears that this park had been acquired by the London County Council under certain Acts empowering the county council to that effect in the year 1891. I need not read all the facts. The park itself, in area, was not very different from the area of the High Hazels Park. It had upon it certain particular features, including the former mansion house, and in paragraph 11 of the case stated[6] I find: "The part"—that is the part of the former mansion house—"which is entered by the original back door, consisting "of eight living rooms and a small office, is occupied by the "resident superintendent of the park and his family." The case went on to say that such a resident superintendent was reasonably necessary for the protection and proper management of the park for the purposes of the Act. The case further states that certain other premises had been converted into use as a gymnasium and other like conveniences, and of the mansion house, of the part which was entered by the original front door, the ground floor and basement were occupied under a certain licence while the other floors were unused. The occupation of the ground floor and basement was for the purposes of providing refreshment. We were provided by the Solicitor-General with a copy of the licence agreement from which it appears that its terms were such that the occupier, a Mrs. Hart, was not treated as having exclusive rights of occupation; but beyond a doubt that part of

[4] [1897] A.C. 625.
[5] [1895] 2 Q.B. 511.
[6] Ibid. 513.

the former mansion house was used in the same way and for exactly the same purpose as the refreshment pavilion in the present case; namely, for providing for users of the park refreshments in the ordinary course.

Now, I have already said that in the *Brockwell Park* case [7] the claim was not made to rate as a separate rateable hereditament this mansion house or any part of the mansion house; it was a general claim for rating the park as a whole. Indeed, the opinion of the Divisional Court was that the claim was well founded. In the Court of Appeal,[8] however, a different view was taken. The basis of the decision in the Court of Appeal was, I think, alternatively put on the two grounds, first, that the occupation by the London County Council was really and in truth occupation by the public and, second, on the ground, which finds a place in the headnote, that the occupation could not be treated in the circumstances as having any net annual value at all and, therefore, on one or both grounds, the claim to rate could not be supported.

In the course of the argument, however, a subsidiary point was taken. I think I can best state it by reading from the leading judgment of A. L. Smith L.J.[9]: "A subsidiary point "was taken by the respondents that certain parts of the park— "for instance, that part of the old mansion-house which is now "used for refreshments for the public, and the other part of the "old mansion which was not occupied at all, and also the lodge "and cottage—were subject-matters for separate assessments "distinct from the park itself, and had a rateable value of their "own. The Divisional Court held that this was not so, and I "agree with them. The obligation imposed upon the London "County Council by the Act of 1890 was to lay out, maintain "and preserve Brockwell Park, and every part of it, as a park "for the perpetual use thereof by the public for exercise and "recreation. As before stated, the London County Council could "let off no part of it. The legislature enacted that if the London "County Council purchased Brockwell Park, they should take "to it as a whole, and for ever maintain it as a whole, and that "the whole should be used for a public purpose for ever."

The case then went to the House of Lords, and in the House the only two speeches which were delivered were those of Lord Halsbury L.C. and Lord Herschell. In Lord Halsbury's speech he said [10]: "I have hitherto dealt only with the question of "occupation, and, as I have said, I think there is no occupation "at all, the county council being merely custodians and trustees "for the public." In other words, Lord Halsbury L.C. was basing his opinion—and that must, in my judgment, be taken to be the ratio of the decision in the House—on the former of the two alternatives I earlier mentioned, namely, that the occupation in the circumstance by the London County Council

[7] [1897] A.C. 625.
[8] [1896] 2 Q.B. 25.
[9] Ibid. 40.
[10] [1897] A.C. 625, 630.

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was in truth occupation by the public. Lord Halsbury L.C. went on [10]: "But I do not disagree with the reasoning of Smith L.J. "and Rigby L.J. as to the rateability of an occupation where "an occupation exists," and he goes on to say that no tenant would give anything for an occupation such as that which would give him no capacity to make anything out of it.

Then later [11] Lord Halsbury L.C. proceeded as follows: "It "is hardly necessary to deal with the other point, if it can be "called another point, in respect of the mansion-house and "refreshment rooms," and I take that to be a reflection of what A. L. Smith L.J. had called the subsidiary item. "They are "and must remain part of the park, and are no more capable "or in fact subject to different considerations than the park "itself. They are and must be part of the park. They cannot "be separated from it, and are within the principle which I have "already explained."

In the opinion of Lord Herschell the matter is put as follows [12]: "Here these very lands and every part thereof, by "statute, must be held in perpetuity for the use of the public, "and the question is, whether, under these circumstances, they "are rateable at all. I think that on principle they are not." Then a little later, after referring to the *Putney Bridge* case,[13] I add one further sentence: "They"—that is, the London County Council—"seem to me to be merely custodians or "trustees to hold it and manage it for the use of the public."

Now, it is quite true that emphasis is laid in the speeches and in the judgments in the Court of Appeal upon the particular legislation which prevented, as A. L. Smith L.J. had pointed out, the London County Council from letting off any part of the park, and I have earlier said that we have not got any very precise or full statement of the exact terms on which the Sheffield Corporation hold the High Hazels Park. But I cannot think that in that respect there is any relevant difference between the two cases. After all, it is not here suggested that the corporation have let this refreshment pavilion off as being surplus to the requirements of the park, or anything of that kind. They are using it or securing its use as part of the park, and that matter is made more plain when I come to deal with the particular facts as to the tenancy agreement, which I shall do presently.

There were other cases cited, and two particularly I will mention, though I propose to do so briefly. One was *Manchester Corporation* v. *Chorlton Union Assessment Committee*.[14] The significance of that case is that the Lands Tribunal here regarded it as governing the present case. It had, at any rate, features in its facts which made it fairly closely comparable to this case: for in that case, as in the present, there was a refreshment pavilion or refreshment room, and that refreshment place was

[10] [1897] A.C. 625, 630.
[11] Ibid. 631.
[12] Ibid. 632.
[13] (1881) 7 Q.B.D. 223.
[14] (1899) 15 T.L.R. 327.

the subject of an arrangement which had been made with a Miss Davis. The facts as stated in the rather brief report about the refreshment pavilion were these: "The refreshment pavilion and "verandah were prior to and at the date of the rate in the "occupation of a Miss Davis under an agreement with the "appellants"—that is, the Manchester Corporation—"at a rent, "the agreement providing that the tenant should not carry on "any other business than that of a refreshment room keeper "upon the demised premises"; and there were other conditions about keeping the place open and accessible to the public and otherwise making it subject to a high measure of control on the part of the Manchester Corporation. On the facts, then, there was much in common between that case and the present, for whether Miss Davis was a tenant or a mere licensee would not of itself be a relevant consideration in light of the well-known passage from the speech of Lord Russell in *Westminster Corporation* v. *Southern Railway Co.*[15] But the *Manchester Corporation* case,[16] as Mr. Widdicombe, in the course of his very clear address, conceded, did not raise in terms the precise point raised in this case; that is to say, it was not a case in which the rating authority were seeking to rate as a separate hereditament in the occupation of Miss Davis the refreshment pavilion in the Alexandra Park, Manchester. The Divisional Court (according to the report) held that the attempt to rate the Manchester Corporation in respect of the whole park must be rejected because that claim must be decided adversely in the light of the *Brockwell Park* case.[17] To that extent, therefore, it may be said to be a matter of criticism of the present decision that the *Manchester Corporation* case[18] as reported cannot itself be treated as governing and conclusively deciding the present case.

The only other authority to which I shall make a brief allusion is the case which came before this court in 1952 in regard to the War Memorial playing fields and cricket ground at Downham Market in the county of Norfolk, *Burnell* v. *Downham Market Urban District Council.*[19] There again, the point was not the same as that presented to us, for there the claim was to rate the whole ground, and that claim was rested on the premise that if you looked at the facts you could not say that the ground was being held by the urban district council as custodians and trustees for the public. It was pointed out that what the council did was to let certain cricket and football pitches, at a price, to certain clubs and on certain occasions to exclude the public altogether except on payment of entrance gate fees; and so it was suggested that the case could be distinguished from the *Brockwell Park* case.[20] It was the view of this court that when you looked at the facts as a whole there was a justification for the conclusion

[15] [1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322.
[16] 15 T.L.R. 327.
[17] [1897] A.C. 625.
[18] 15 T.L.R. 327.
[19] [1952] 2 Q.B. 55; [1952] 1 All E.R. 601.
[20] [1897] A.C. 625.

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that, notwithstanding the temporary and limited exclusions of the public, still the principle that the public was really in occupation remained as valid in the *Downham Market* case [21] as in the *Brockwell Park* case.[22]

In the course of the judgment of the court it is pointed out [23] that "free and unrestricted use" by the public does not involve this, that any member of the public must be free to go upon every part of the park at any time he chooses during the day or night. The judgment proceeds with this language: "But those exclu-"sions were the manifestations of the duty and exercise of "management, and their total area compared with that of the "whole park was of course negligible." Then, after referring to *Liverpool Corporation* v. *West Derby Assessment Committee*,[24] which has also been drawn to our attention, that part of the judgment concludes in reference to the *Liverpool* case [24] with this sentence: "but this court found no difficulty in concluding "that the Liverpool corporation's power of exclusion and its "exercise were merely ancillary to the dedication of the land as a "public park."

Now, I conclude from these authorities that the principle to be applied in the case of a public park such as this is that, prima facie, a public park—that is, a place dedicated to, and used as such, by the public—is to be treated as in the occupation of the public. Since, therefore, the public are not rateable, the park is itself free from rating liability, and that exemption is not removed by the circumstance that in certain respects and on certain parts of the park the public may, in the course of the ordinary necessities of proper management, be in fact subject to exclusion. If, for example, in the present case, the provision of refreshments was conducted directly by the Corporation of Sheffield through its own servants or agents, it must be taken as clearly established that the fact that they occupied for that purpose some part of the park and excluded the public altogether from that part—for example, the kitchens, etc., where they prepare the refreshments and so on—would not render them liable to be rated in respect of that part. But it is of course here the fact that the local authority, the Sheffield Corporation, is not itself conducting the task, ancillary to the general management of the park, of providing proper refreshments. They made a specific arrangement with Dale whereby he carries on for that purpose what is in truth his own business.

At this stage I will refer to the terms of the arrangement with Dale. It is contained in an agreement attached to the case, and a reference to its terms will show how closely it resembles in essential characteristics the arrangement which the Manchester Corporation had made with Miss Davies in *Manchester Corporation* v. *Chorlton Union Assessment Committee*.[25]

[21] [1952] 2 Q.B. 55.
[22] [1897] A.C. 625.
[23] [1952] 2 Q.B. 55, 66, 67.
[24] [1908] 2 K.B. 647; 24 T.L.R. 701.
[25] 15 T.L.R. 327.

I should state (though I have already disposed of this point) that the form of the arrangement was, as I read it, a tenancy for year to year at an annual rent. From that circumstance it is quite plain that there is here the requisite degree of permanency of occupation, and also that by virtue of the tenancy Dale has the necessarily exclusive right of possession.

Paragraph 1 of the agreement provides that during the continuance of the agreement Dale is to have the right to supply and sell refreshments, and so on, "for the use of persons resorting "to the said park only." There is then a rather complicated arrangement about rates; but I do not think that any inference relevant to this decision can be derived from it, and I therefore pass it over. But it is provided in one of the sub-paragraphs to clause 2 that Dale should ensure "that the said premises are "kept open to the public for the supply of refreshments on all "weekdays (except Christmas Days) between the hours of 10 a.m. "and half an hour before the official time for the closing of the "said park, and on Sundays between the hours of 11 a.m. and "half an hour before the official time for the closing of the said "park." Now, that is one instance—and there are others—which shows that the case is not at all that of a man being given a lease of shop premises in the ordinary way so that he might conduct thereon a shop business according to normal shop hours and under the conditions which would be applicable in the case of an ordinary shop. There was here a positive obligation to keep this shop open every weekday except on Christmas Days between the hours I have named, and also on Sundays—to make sure, in other words, that it was a park amenity, no more, no less, for the users of the park.

Then later we find, in sub-paragraph (x) in the same clause: "All refreshments to be provided for sale on the said premises "and the prices to be paid therefor shall be to the requirements "and satisfaction of the corporation": and in sub-paragraph (xi): "Not to sell or cause to be sold any refreshments outside the "said premises and not to allow the said premises to be used as a "general saleshop or store." There were other provisions, which I shall not take time to read in detail, and all of them lead, I think, inescapably to this conclusion, that Dale's transactions as tenant of this refreshment pavilion were in the first place under a close supervision on the part of the Sheffield Corporation, and also were plainly such as to make them, and make them exclusively, a part of the park amenities.

I come then to two findings—though the latter is partly expressed rather in the form of an opinion—of the Lands Tribunal on the facts of the case. In paragraph 2, after referring to the fact that the cakes and the like must be sold at a price agreed by the corporation, sub-paragraph (*d*) reads: "The only "customers frequenting this pavilion are people who are using "the park." Then, in paragraph 7: "I was of opinion that the "provision of a refreshment pavilion such as this in any public

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"park nowadays is just as essential as the provision of other "amenities which one associates with a public park, and that "the amenities provided in this pavilion did not go outside the "requirements of the park. Mr. Dale did nothing that the "corporation themselves would not be bound to do for the purpose "of providing the usual amenities expected in a park of this "nature."

In my judgment, the tribunal was well justified in saying that the provision of refreshments such as are provided in this pavilion can properly be described as an essential amenity of a public park; and he was also, in my view, amply justified on the facts in finding that Dale's conduct of this refreshment pavilion was in truth nothing more than an ancillary activity of the conduct of the park itself. I have earlier said that, in my judgment, it could not now be questioned that the corporation themselves would be free of rating liability if they conducted, through an agent or servant, this pavilion, and I think it also follows that it is inherent in the judgment and speeches which I have read in this court and the House of Lords in the *Brockwell Park* case,[26] that the situation is not altered by the mere fact that the conduct of the refreshment pavilion is not in the hands of an agent of the park owner, the corporation, but is in the hands of somebody, some third party, with whom, for that purpose, the corporation makes the requisite arrangement, be it by way of a licence or a tenancy.

That is not to say that it follows that every letting off by a corporation of a part of a public park, assuming power so to let it off, to a man to carry on there some business of his own, will produce the result that the part so left off will be free of rating liabilities. I think it is in every case a matter of degree and of the facts to be found in the case. Mr. Widdicombe drew our attention by way of illustration to an instance where the opposite conclusion had been reached by the President of the Lands Tribunal, who himself decided the present case.[27] That was the case in which the London County Council had let off the Thamesside restaurant on the south side of the river, associated with the Festival of Britain some years ago, to certain individuals for the purpose of carrying on there a restaurant business. The tribunal in that case found as a fact that the restaurant could not properly and sensibly be regarded merely as an amenity of, or ancillary to, the Riverside Walk. It had acquired an altogether independent and distinct status as a restaurant, comparable to and competitive with other restaurants in London. He therefore concluded that the restaurant, so to speak, had been severed from the park as a park and, having the independent status of a restaurant, that there had been a sufficient carving out (and I revert to the Solicitor-General's phrase) from the hereditament of the park as a

[26] [1897] A.C. 625.

[27] *London County Council* v. *Robinson & Lambeth B. C.* (1955) 48 R. & I.T. 455.

park to make the case distinguishable from the cases of the Brockwell Park and the Downham Market.

We are not, of course, deciding that case, and it is unnecessary to express any view about it, though I must not be taken to be at all criticizing it. I cite it merely to illustrate the point that, as it seems to me, it must be a question of fact and degree in cases of this kind whether in truth it can be said that the refreshment pavilion—or, it might be, to take an example cited in argument, a hut or a shed for storing some other amenities of the park such as the park chairs—and the part of the park so occupied and used. is in reality still an inherent and essential part of the park as an entity, providing a necessary amenity for the park; or whether the hereditament in question has been so carved off as to acquire a distinct status from the park and, in the latter case, to render itself liable for rating assessment.

On the authorities which I have cited, and in light of their guidance which we must follow, and on the facts found in this case, which seem to me to be well justified, I conclude that the Lands Tribunal rightly held that this pavilion still was part of the park, still could be treated for relevant purposes as in public occupation or occupied on behalf of the public, and was, therefore, exempt from rating liability. For those reasons, I would dismiss the appeal.

MORRIS L.J. I have reached the same conclusion. It is found as a fact that High Hazels Park was acquired by the Sheffield Corporation for the purpose of its being used in perpetuity as public walks or pleasure grounds. It was so acquired by deed of trust under the provisions of section 164 of the Public Health Act, 1875. We were referred to *Yorkshire North Riding County Valuation Committee* v. *Redcar Corporation*.[28] The foreshore and the lands which were purchased by the Redcar Corporation were also purchased by the corporation under section 164 of the Public Health Act: but whereas in the *Redcar* case[28] there was most elaborate development and construction which brought about the result that the corporation became in occupation of profit-earning properties, in the present case the park is merely being maintained as a park.

The case stated records that it was agreed that the park is not rateable. This means that the corporation are not in rateable occupation of the park. They are the owners of it, but, in the words used by Lord Herschell in the *Brockwell Park* case,[29] they are merely custodians or trustees to hold it and manage it for the use of the public. In truth the public are the real occupiers. The case stated records that the corporation acquired the park "upon trust by deed to permit the said hereditament to be for "ever used hereafter as public walks and pleasure grounds." This appears to show, and the actual maintenance as a park appears

[28] [1943] K.B. 114; 59 T.L.R. 38; [1942] 2 All E.R. 589.

[29] [1897] A.C. 625.

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further to show, that there is in the public what Lord Halsbury L.C., in his speech in the *Brockwell Park* case,[29] referred to as "the free and unrestricted use." Furthermore, the case finds that the cost of maintaining the park as a whole exceeds any income derived from it.

But I see no reason why in certain circumstances some particular place contained within the perimeter of a park might not be a rateable hereditament. This will not be so, however, in the case of a hereditament which is used in a way which is merely ancillary to the use of the park. If, in managing the park as custodians for the public, the corporation had themselves opened and maintained this refreshment pavilion in order to supply the needs of visitors to the park, I cannot think that the corporation would have become rateable in respect of the pavilion. The pavilion would merely be used as a means of providing a modest amenity for members of the public using the park. The position would be comparable to that in *Manchester Corporation* v. *Chorlton Union Assessment Committee*.[30] So, too, in the *Brockwell Park* case[31] itself, the use of part of the house in the park as refreshment rooms was merely ancillary to the use of the park.

It is found in the present case that the only customers frequenting this pavilion are people who are using the park, and the amenities provided in this pavilion did not go outside the requirements of this park. The circumstances make the present case a very different case from the one referred to in argument by Mr. Widdicombe in which the use of a restaurant sited in a place or park dedicated to the public could not be said on the facts of that case to be ancillary to the use by the public of the public place or park. If, then, the nature of the use of this refreshment pavilion was such that, had the corporation themselves been running it, the pavilion would not have been rateable and the corporation would not have been in rateable occupation, the position should not, I think, be different if the corporation, instead of running it themselves and employing servants or agents or a manager, grant a licence to someone else to do so, and grant a tenancy to someone else in terms such as the tenancy in this case to Dale.

Mr. Widdicombe, in his argument, submitted that it would be anomalous if the corporation would not be in rateable occupation if they themselves managed, whereas Mr. Dale, merely doing what the corporation might have done, would be. In reply to that submission the Solicitor-General referred us to a passage in *Mersey Docks* v. *Cameron and Jones*[32]: "The exemption "depends entirely on the occupier and not on the title to the "property. The tenants of Crown property, paying rent for it, "are rateable like all other occupiers; and it has even been "determined that where apartments in Hampton Court, a royal

[29] [1897] A.C. 625.
[30] 15 T.L.R. 327.
[31] [1897] A.C. 625.
[32] (1865) 11 H.L.Cas. 443, 463.

"palace, were gratuitously assigned to a subject, who occupied "them by the permission of the Sovereign but for the subject's "benefit, the subject was rateable in respect of her occupation "of this royal property." But it seems to me that the reason why the corporation is not rateable in respect of the park is not that the corporation as a corporation enjoy any special immunity but because the corporation is not in rateable occupation of the park.

My Lord has referred to the terms of the agreement with Dale, and, in my judgment, those terms are of importance. They show that Dale is under obligation to run this refreshment pavilion, and under obligation to keep it open at the times referred to in clause 2 (v) of the agreement. The other terms of this agreement which are imposed on Dale, particularly those to which my Lord has referred, show, in my judgment, that the purpose of the agreement with Dale was to ensure that the needs of the public when using the park would be met. The position remains the same, that the real occupiers of the park are the public, and that in the circumstances of this case this pavilion ought not to be regarded as a kind of island hereditament with activities and purposes detached from those for which a public park exists. The corporation have, so to speak, delegated to Dale certain activities which form a part of the function of managing the park for the benefit of the occupiers of the park, that is to say, the public.

In my judgment, therefore, the pavilion was not in rateable occupation, and I would dismiss the appeal.

PEARCE L.J. I agree.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Solicitor of Inland Revenue; John Heys, Town Clerk, Sheffield.*

E. D.

[COURT OF APPEAL.]

*PATTERSON AND OTHERS *v.* ELLIS AND ANOTHER.

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May 27.
Lord Goddard C.J. and Devlin J.

County Court — High Court — Application to transfer action to — "Important question of law or fact likely to arise"—Difficult question between the parties sufficient — County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 44 (*as substituted by the County Courts Act,* 1955 (4 *Eliz.* 2, *c.* 8), *s.* 1 (4), *Sch.* 1, *Part* 1, *para* 3).

A defendant to an action in the county court, based on fraudulent misrepresentation, applied, under section 44 of the County Courts Act, 1934, for the action to be transferred to the High Court on the ground that "some important question of law "or fact is likely to arise":—

[Reported by DAVID CALCUTT, Esq., Barrister-at-Law.]

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Held, that if in the opinion of the county court judge the case was likely to raise difficult and important questions of law or fact between the parties, the judge might properly transfer it to the High Court under section 44 (2) (*b*) even though important questions of law or fact affecting people other than the parties did not arise.

APPEAL from Judge Gordon Clark sitting at Epsom County Court.

The plaintiffs, who had formerly been in partnership, were directors of and shareholders in a limited company, which carried on the business of coach-building. In an action for damages it was alleged, in the particulars of claim, that the first defendant had induced the plaintiffs to enter into an agreement with the second defendants, a limited company, whereby certain lands were purported to have been demised to the plaintiffs, by fraudulently misrepresenting to the plaintiffs that the second defendant had been granted a lease of the lands.

The agreement provided, inter alia, that "the tenancy subject "to annual review shall be for seven years in the first instance ". . . At the end of the first year of tenancy this agreement shall "be reviewed revised or remain extant as the result of joint "discussion between both parties."

The plaintiffs further alleged that the second defendants had not held at the time of the agreement, and indeed never had held, a lease of the lands in question; that the second defendants impliedly covenanted that they had a good title thereto; and that there was accordingly a breach of the implied covenant.

By reason of the alleged fraudulent misrepresentation and breach of implied covenant, it was alleged that the plaintiffs' company had suffered damage; and that the damage suffered by the company was the damage suffered by the plaintiffs.

On April 15, 1957, the defendants served a notice in accordance with section 44 of the County Courts Act, 1934,[1] objecting to the action being tried in the county court, on the ground that important questions of law or fact were likely to arise. On April 17, 1957, an affidavit was sworn on behalf of the defendants in the following terms: ". . . Both the defendants will deny that "the said representation was made or that it was fraudulent "or that the plaintiffs were influenced thereby or that . . . [the "plaintiffs' company] or the plaintiffs have suffered the alleged

[1] County Courts Act, 1934, s. 44 (as substituted): "(1) Where there "is commenced in a county court any "action founded on contract or on tort "wherein the plaintiff claims a sum "exceeding £40, the defendant may, ". . . give notice that he objects to "the action being tried in the court."

"(2) Where such a notice is given, "the judge shall order that the action "be transferred to the High Court, if "—(*a*) the defendant (unless ex-"empted by s. 20 of the Crown Pro-"ceedings Act, 1947) gives security "approved by the registrar for the "amount claimed and the costs of "trial in the High Court, not exceed-"ing in the aggregate the sum of "£450; and (*b*) the judge certifies "that in his opinion some important "question of law or fact is likely to "arise."

"or any damage; the defendant company will deny the alleged "implied term . . . By letters dated August 22, 1956, and "August 28, 1956, the plaintiffs . . . asserted that the said "agreement expired on July 25, 1956, denied the defendant "company's right to rent thereafter and denied the said defen-"dants' title to the land or the buildings thereon. In an action "in [the Epsom County Court] in which the [present] defendant "company were the plaintiffs and [the present plaintiffs (as a "firm and together with their company)] were the defendants ". . . the defendant company claimed inter alia possession of "the premises occupied by the plaintiffs. By their amended "counterclaim in the said action [the plaintiffs] claimed damages "against the defendant company for breach of an implied "covenant in the said agreement that the defendant company "had a good title to let. On November 21, 1956, it was "adjudged inter alia that the defendant company recover . . . "possession; . . . the said counterclaim was by consent of the "parties dismissed with no order as to costs.

"Having regard to the matters set out above I am of the "opinion that: (*a*) the following important questions of fact "will arise:—(i) whether or not the alleged misrepresentation "was made or made fraudulently; (ii) whether or not the plain-"tiffs were influenced thereby; (iii) whether or not the plaintiffs' "company have suffered the alleged or any damage. (*b*) the "following important questions of law will arise:—(i) the true "construction of the said agreement and in particular the dura-"tion of the term thereby granted; (ii) whether or not the "plaintiffs are estopped from raising again the claim for damages "based upon the alleged breach of an implied covenant for title "in the said agreement, which said claim was raised in their "counterclaim aforesaid and disposed of in the manner set out "above; (iii) whether in the circumstances a covenant for good "title can or should be implied in the said agreement; "(iv) whether or not the damage alleged to have been suffered "by the [plaintiffs' company] is too remote; (v) whether, even "if the plaintiffs' company have suffered the alleged or any "damage, the same can be recovered by the plaintiffs."

On May 1, 1957, the defendants' application to the county court judge, for an order transferring the action to the High Court was heard. The judge dismissed the application, and his reasons for so doing appear fully from the judgment of Lord Goddard C.J. The defendants appealed.

L. K. E. Boreham for the defendants. The county court judge was wrong in that he confined the expression "important "question of law or fact" to questions of importance to persons other than the parties. This was placing an unnecessary fetter on "importance." Damages claimed for fraudulent misrepresentation and breach of an implied covenant clearly raised important questions of law and fact.

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K. R. Bagnall for the plaintiffs. The plaintiffs will be prejudiced if this action is transferred to the High Court: the county court judge is already familiar with the litigation; the trial would be delayed. The county court judge was right. The considerations which govern the grant of the Attorney-General's fiat to appeal to the House of Lords under the Criminal Appeal Act, 1907, are the same as those which govern the exercise of the county court judge's discretion in an application under section 44 of the County Courts Act, 1934. This court should not interfere with the exercise of the county court judge's discretion.

No case was cited in argument.

LORD GODDARD C.J. This is an appeal from a decision of Judge Gordon Clark, before whom an application was made to remove an action based on fraudulent misrepresentation from the Epsom County Court into the High Court. The application was made pursuant to section 44 of the County Courts Act, 1934, which provides that a notice may be given by the defendant saying that he objects to the case being tried in the county court and wishes it removed, and that "Where such a notice is given, "the judge shall order that the action be transferred to the "High Court, if (*a*) the defendant (unless exempted by . . . the "Crown Proceedings Act, 1947) gives security approved by the "registrar for the amount claimed and the costs of trial in the "High Court, not exceeding in the aggregate the sum of £450; "and (*b*) the judge certifies that in his opinion some important "question of law or fact is likely to arise."

I need not go through all the pleadings in the case for the purposes of this application; but the particulars of claim which are filed seem to me to show that this is an action of considerable complexity. It relates to title to land; to the construction of a curious provision in a lease or agreement; to questions of damage, and whether the damage suffered, if any, is suffered by the plaintiffs or by a company in which they are shareholders.

The judge refused the application, and has given his reasons for so doing. He said: "This is a case of difficulty and of "obvious importance to the parties, and one which I would "gladly transfer the burden of to another court if I can properly "do so. But I accept [the plaintiff's] argument that "'important' must mean of some importance to people other "than the parties—i.e., a point of fact including a number of "outside interests"—I think he means "a point of fact affecting "a number of outside interests"—"or a point of law which will "affect other cases. I cannot find that any point arising here "is important in that sense." I think that the judge is meaning to say "I must find some point of law which will affect other "cases, or else on fact I must find that it is a test case, or "something in the nature of a test case."

I think that that is putting too narrow a construction on the

section. No doubt a judge may very properly look to see whether there are what he calls "outside interests" affected. But if the case is one which he regards as raising difficult questions of law or fact between the parties, he may certify that important questions of law or fact would arise. I do not think he has to say that questions of law or fact must arise which would affect other parties. The judge, as it seems to me, was probably influenced by the argument which was addressed to him based on the Criminal Appeal Act, 1907, which provides that if there is "a point of law of exceptional public importance" the Attorney-General may give his fiat for a case to be taken to the House of Lords. I do not think that is the governing question here. I think that the judge simply has to see whether the issues which are raised in the case are difficult, and that an important question of law or fact is likely to arise. I think there is an important question here—a question sufficiently important to justify the removal of an obviously very difficult and complicated case to the High Court. For these reasons, I think we should allow the appeal.

DEVLIN J. I agree.

Appeal allowed.

Solicitors: *W. H. Matthews & Co.; Bowles & Co., Epsom.*

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* MINISTER OF FUEL AND POWER. *Ex parte* WARWICKSHIRE COUNTY COUNCIL.

1957
June 26.

Lord Goddard C.J., Byrne and Devlin JJ.

Town and Country Planning—Statutory undertaker—"Operational "land"—Land owned by statutory undertaking for the purpose of their undertaking—Not yet used for such purpose—Whether "operational land"—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 119 (1).

By section 119 (1) of the Town and Country Planning Act, 1947: "'operational land', in relation to any statutory undertakers, "means land which is used for the purpose of carrying on the "undertakings of those undertakers and land in which an interest "is held for that purpose, not being land which, in respect of its "nature and situation, is comparable rather with land in general "than with land which is used, or in which interests are held, "for the purpose of the carrying on of statutory undertakings."

The West Midlands Gas Board, which held an interest in certain land for the purpose of carrying on their statutory undertakings, applied to the county council for planning permission to erect a gasification plant on the land, which had not previously been used for the purpose of the undertaking. The county council refused permission and the gas board appealed. The Minister of Fuel and Power determined that the land was "operational land" within section 119 (1) of the Town and Country Planning Act, 1947.

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The local county council applied for an order of certiorari to bring up and quash the Minister's determination:—

Held, that the first part of the definition referred not only to the land which the statutory underakers had already begun to use for the purpose of their undertaking, but also to land which they intended to use in the future; whether the land was comparable with land in general rather than with land used for the purposes of the statutory undertaking was a question of fact which was decided in favour of the gas board, and accordingly, the correct principles having been applied by the Minister, in coming to his decision, there was no ground for granting the application for certiorari. It is not necessary for the land in question to be contiguous with or adjacent to land already being used for the purpose of the statutory undertaking in order to come within the latter part of the definition.

APPLICATION for certiorari.

On November 15, 1955, the West Midlands Gas Board made an application, under section 14 of the Town and Country Planning Act, 1947, to the Warwickshire County Council for outline planning permission to erect a gasification plant on certain land which the gas board owned on the outskirts of Birmingham. In that application the land was described as being occupied and used for agricultural purposes. Permission was refused on November 20, and the gas board appealed under section 16 of the Act of 1947 to the Minister of Housing and Local Government. The gas board claimed that the land was operational land and the matter was referred to the Minister of Fuel and Power under section 119 (2) of the Act of 1947, and after hearing the parties the Minister issued his determination on October 19, 1956, in the following terms: "Whereas a question has arisen between "the Warwickshire County Council and the West Midlands Gas "Board whether the land specified in the schedule hereto being "land in which that gas board as statutory undertakers for the "supply of gas have an interest is or is not operational land: "now therefore the Minister of Fuel and Power in pursuance of "subsection (2) of section 119 of the Town and Country Planning "Act, 1947, hereby determines that the land so specified is "operational." The county council then pressed the Minister to state the reasons for his decision, which was done in a letter, dated January 1, 1957, as follows: "The Minister held, as a "matter of law, that the expression 'operational land' as defined "in section 119 (1) of the Town and Country Planning Act, 1947,[1] "should not be construed as being restricted to land upon which "a statutory undertaker has already obtained power to operate

[1] Town and Country Planning Act, 1947, s. 119: "(1) . . . 'operational "'land', in relation to any statutory "undertakers, means land which is "used for the purpose of carrying on "the undertakings of those under-"takers and land in which an interest "is held for that purpose, not being "land which, in respect of its nature "and situation, is comparable rather "with land in general than with land "which is used, or in which interests "are held, for the purpose of the "carrying on of statutory under-"takings."

"and that this was clear from the provisions of paragraph 1 of "the Fifth Schedule to the Act.

"He further held that the inclusion in the definition of "'operational land' of the words 'not being land which, in "'respect of its nature and situation, is comparable rather with "'land in general than with land which is used, or in which "'interests are held, for the purpose of the carrying on of statu-"'tory undertakings' should not be construed so as to imply the "necessity of the particular statutory undertaking concerned, in "this case the Gas Board, owning contiguous or adjacent land "which is used for the purpose of its undertaking, since such a "construction would run counter to the wording of the definition.

"In the light of these conclusions the Minister found as a "fact that the West Midlands Gas Board held an interest in the "land for the purpose of carrying on their undertaking and had "done so from April 27, 1955, when the Birmingham Corpora-"tion surrendered all interest it held in the land to the Board. "Further, as regards the land itself, after considering the report "of the officer holding the inquiry who viewed it, the Minister "found that it was not land which, in respect of its nature and "situation, was comparable rather with land in general than "with land which is used, or in which interests are held, for the "purpose of the carrying on of statutory undertakings."

The county council then applied for an order of certiorari to bring up and quash the Minister's decision.

S. Cope Morgan Q.C. and *D. P. Kerrigan* for the Warwickshire County Council. On the point raised by the first part of the definition. The matter is entirely one of law as to the meaning of "operational land" the definition of which is to be found in section 119 (1) of the Town and Country Planning Act, 1947. It is submitted that a mere subjective desire to use the land is not sufficient. Land becomes operational only when that operation is authorized. It is plainly a misreading of the definition to call this land, on which the gas board had no right to operate, operational land.

Sir Harry Hylton-Foster Q.C., S.-G., and *Rodger Winn* for the Minister of Fuel and Power and the Minister of Housing and Local Government were not called on.

J. Ramsay Willis Q.C. and *F. A. Stockdale* for the West Midlands Gas Board.

No cases were cited in argument.

LORD GODDARD C.J. In this case Mr. Cope Morgan moves on behalf of the Warwickshire County Council for an order of certiorari to bring up and quash a determination of the Minister of Fuel and Power dated October 19, 1956, in which he has determined that certain land specified by reference to a plan attached to the order was operational land.

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It seems that this land is on the borders of the City of Birmingham, and there is a very large power station on some adjoining land from which it is separated by a belt of trees which is put up as a screen, but apparently is not altogether an effective screen. That is neither here nor there, but behind the belt of trees there is a railway, a waterway and various industrial buildings. It is, in fact, a field on the very edge of a large industrial area and the field is the property of the gas board. The Warwickshire County Council very naturally, because this is part of what they call their Green Belt, does not want the land developed for industrial purposes, but the gas board propose to extend their statutory undertaking and works they are entitled to operate, and accordingly they appealed, when the Warwickshire County Council refused permission, to the Minister. The only question we have to decide on the motion for certiorari is whether or not the Minister has gone wrong in law in coming to a determination.

[His Lordship read the Minister's reasons and continued:] So far as the question of law is concerned, it entirely depends on the construction of the definition of "operational land" which is to be found in section 119 of the Act: "'operational land', "in relation to any statutory undertakers, means land which is "used for the purpose of carrying on the undertakings of those "undertakers and land in which an interest is held for that "purpose . . ." I pause there because that raises the first point the Minister has determined and which Mr. Cope Morgan controverts. As I understand the argument submitted on behalf of the county council it is that land cannot become operational, although it is held by statutory undertakers, unless they have begun to use the land in some way for the purpose of their undertaking. But the words are not only "land which is used "for the purpose of carrying on the undertakings," but "land "in which an interest is held for that purpose"; in other words, land in which the statutory undertakers have an interest either as freeholders or leaseholders, as the case may be, and they have an interest for the purpose of carrying on their undertaking.

Comparing those words with the words which immediately precede them seems to me to show that the section is dealing not only with the land which the statutory undertakers have already begun to use for the purpose of the undertaking, but land which they intend to use in the future. They are holding the land, and as statutory undertakers they are holding land for the purpose of their undertaking. It may very often happen that statutory undertakers acquire more land than they actually require at the moment when they first acquired it because they are perhaps only starting to develop their undertaking. They have other land they intend to use in the future for the purpose of their undertaking and that seems to me to be clearly operational land. I think the Minister's interpretation of the section

on that point is quite impeccable and we cannot say that there is any ground on which we can quash the order.

The second point is that the section goes on and says, referring to operational land: "not being land which, in respect of "its nature and situation, is comparable rather with land in "general than with land which is used, or in which interests are "held, for the purpose of the carrying on of statutory under-"takings." Prima facie, that seems to me to raise a pure question of fact. Whether land is comparable with land in general or land on which other of these undertakings is carried on is obviously a question of fact. In this case we know that the inspector who was sent down to hold the inquiry viewed the land. He went out and saw it for himself and came to the conclusion that the land was not comparable with land in general, and I suppose that means other agricultural land. Of course, if it is agricultural land, there is no question about it, but taking into account all the factors, seeing the situation of the land, it has been found it was not land which compared with land in general; it compared with land which is used for the purpose of carrying on statutory undertakings. It seems to me that that is essentially a question of fact. As I understand it, Mr. Cope Morgan says that the Minister cannot find that, unless statutory undertakings are actually being carried on on the land in question. That does not seem to me to be the right construction of the section. In my opinion, this second question raises a question of fact and we cannot reverse the Minister on that. As far as I can see he has adopted and his inspector has used and applied the right principles. They have not taken into consideration anything they ought not to have taken into consideration. They have come to a perfectly right opinion so far as the first point is concerned, and there is no fault to be found with the decision on the other point. For these reasons the motion fails, and is dismissed with costs.

BYRNE J. I agree. The Minister found in fact that the gas board held an interest in the land for the purpose of carrying on their undertaking. That being so, the question is whether the land comes within the definition of "operational land." As I understand the argument on behalf of the applicants, it appears to me to amount to this: that the land or part of it must have been operated upon in order that it shall become operational land. In my view, that argument is erroneous. "Operational "land" is not restricted to land upon which operations have taken place because that situation is provided for in the first part of the definition. Neither, in my opinion, is it necessary that it should be land which is contiguous to other land which is being used for the statutory undertaking. In my opinion, the Minister made no mistake in law.

DEVLIN J. I agree. I think the point we are called upon to

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decide is extremely narrow. The question is, as my Lords have said, whether the land which was considered at the inquiry comes within the definition of "operational land." That definition consists of two categories of land and of an exception that would take the land out of either of those categories—at any rate out of the second.

The Minister, having given his determination, was invited to give his reasons for it, so far as they raise questions of law. He stated in the letter of January 1, 1957, two conclusions of law at which he had arrived, and which were essential to his finding of fact. No complaint was made that the statement was not sufficient; it was not suggested there must have been other matters of law decided. Mr. Cope Morgan's argument has been very far-reaching and I invited him in order that I might follow it to put into writing or formulate any further point of law about which he said the Minister must have been in error. He did not accede to that invitation. I therefore deal with the matter, so far as I am concerned, simply by inquiring whether the two propositions of law laid down in the letter of January 1 are correct or incorrect. In my judgment, they are manifestly correct. The first of them merely involves this: Is it necessary before you can properly conclude that land is land in which an interest is held for a particular purpose that there should be power immediately to put that purpose into effect? That is what I understand Mr. Cope Morgan's submission to be because he says land cannot be land held for a purpose unless there has previously been obtained planning permission to carry the purpose into effect. I can find no justification in the words of the section or in any other material to which Mr. Cope Morgan has directed our attention for holding that such a limitation should be read into the words. The words in their natural meaning are plain enough; one can have a purpose without the power to put it into immediate execution. Although cases may arise where the possibility of the purpose being put into execution is so remote that it might be held not to be within the Act, upon the point of law on which the Minister was asked to decide I think he has arrived at the right conclusion.

The second point is even simpler. It is whether within the exception in the definition land can be comparable with other land to which it is not contiguous or adjacent. I think that it quite plainly can. On that point also I think the Minister's conclusion was right, and I agree, therefore, that the motion fails.

Application refused.

Solicitors: *Sharpe, Pritchard & Co. for R. M. Willis, Warwick; Treasury Solicitor; Sherwood & Co. for A. C. Croasdell, Birmingham.*

C. J. E.

[QUEEN'S BENCH DIVISION.]

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Lord Goddard C.J., Byrne and Devlin JJ.

Rates and Rating—"Education"—Professional organization—Charter providing for provision and maintenance of central organization for promotion of efficiency and general development among persons engaged in insurance—Mainly engaged in tuition and conduct of examinations in insurance subjects—Whether "advancement of . . . "education" main object of organization—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

The Chartered Insurance Institute, which occupied certain premises in the City of London, claimed to be entitled to the benefit of the rating relief provided by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of its premises on the ground that they were a hereditament "occupied "for the purposes of an organization . . . not established or con-"ducted for profit and whose main objects are . . . concerned with "the advancement of . . . education" within the meaning of section 8 (1) (*a*).

By clause 2 of its charter the objects and purposes for which the institute was constituted included, first, "To provide and maintain "a central organization for the promotion of efficiency, progress "and general development among persons engaged or employed in "insurance . . . ," and, inter alia, to encourage and assist the study of any subjects bearing on any branch of insurance, to offer prizes for essays or research in any subject bearing on insurance, and to devise and impose means for testing the qualifications of candidates by examinations and to grant certificates. The remaining objects set out in the clause concerned the collection and publication of information relating to insurance legislation, the exercise of supervision and control over the members of the institute, safeguarding the interests and welfare of members, furthering their advancement and promoting the improvement of the status of insurance officials in general. Quarter sessions found that the work of the institute consisted of tuition and the conduct of examinations for its members, and that its main object was "education for "insurance":—

Held, that the main object and purpose for which the institute existed was to benefit the profession of insurance generally and to raise the status and dignity of the profession; the organization of tuition and examinations for young entrants to the profession was one of the means by which it endeavoured incidentally to achieve that objective, but education was not the main object of the institute, and accordingly it was not entitled to relief under section 8 of the Act.

Inland Revenue Commissioners v. *Forrest* (1890) 15 App.Cas. 334; 6 T.L.R. 456 considered.

Per Devlin J. "Advancement of education" within the meaning of the section means the advancement of education for its own sake, primarily in order that the mind may be trained, though it may be that education in a particular subject only is sufficient.

CASE STATED by City of London quarter sessions.

On October 10, 1956, the Chartered Insurance Institute appealed to the City of London quarter sessions against the rate

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made on March 29, 1956, by the City Corporation on the ground that the rate was not made in conformity with law, namely, the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1] in that the amount of rates charged in respect of the hereditament occupied by the institute exceeded that provided by section 8 of the Act, which applied to the hereditament.

The objects and purposes of the institute as set out in paragraph 2 of the charter and by-laws exhibited to the case were: (*a*) To provide and maintain a central organization for the promotion of efficiency, progress and general development among persons engaged or employed in insurance, whether members of the institute or not, with a view not only to their own advantage but to rendering the conduct of such business more effective, safe and scientific, and securing and justifying the confidence of the public and employers by reliable tests and assurances of the competence and trustworthiness of persons engaged or employed in insurance. (*b*) To encourage and assist the study of any subjects bearing on any branch of insurance. (*c*) To publish a journal and any other matter deemed desirable by the council of the institute. (*d*) To form a library for the use of members of the institute. (*e*) To offer money or other prizes for essays or research in any subject bearing on insurance. (*f*) To devise and impose means for testing the qualifications of candidates for the certificates of the institute by examination in theory and practice or by any other actual and practical tests, and to grant certificates of qualification to the successful candidates. (*g*) To promote personal and friendly intercourse between members of the institute; to hold conferences and meetings for the discussion of professional affairs, interests and duties, the reading of papers and the delivery of lectures; to compile lists, registers and records of events and proceedings of interest to the members, to issue copies of such lists, registers and records from time to time to members of the institute, and generally to collect, collate and publish statistical or other information of service or interest to members of the profession. (*h*) To ascertain the law and practice relating to all things connected with insurance, to collect and form a strong body of expert opinion with the view of obtaining the codification and amendment of the Acts relating to insurance companies, or otherwise relating to insurance, and to watch any

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to the following hereditaments, that is to say— "(*a*) any hereditament occupied for the purposes of an organization (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of . . . education . . . ; . . . (2) For the purposes of the making and levying of rates . . . for the year beginning with the date of the coming into force of the first new valuation list . . . the amount of rates chargeable in respect of a hereditament to which this section applies shall . . . be limited as follows . . . (*a*) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force; . . ."

legislation affecting insurance. (*i*) To exercise professional supervision and control over the members of the institute, to safeguard their interests and welfare, to further their advancement, and to promote whatever may lead to the improvement of the status of insurance officials in general and the members of the institute in particular. (*j*) To act as a means of communication between members or others seeking engagements in insurance and employers desirous of employing them. (*k*) To assist necessitous members, and the widows and children and relatives of deceased members, and to act as treasurer and distributor of any benevolent fund or funds which may be contributed by members or others, and to make any contribution to any such fund or funds out of the income or assets of the institute. (*l*) To purchase, rent, lease, hold and dispose of any building or buildings to be used as a place of meeting for the members of the institute or as a college, lecture or reading rooms or library, or for social purposes, or any other property, real or personal, for the advancement of the above objects or any of them. (*m*) To promote and encourage provision by the members against the contingencies of age, sickness, misfortune and death, and to assist, financially or otherwise, towards such provision. (*n*) To do all such other lawful things as are incidental or conducive to the attainment of the above objects or any of them.

At the hearing of the appeal the following were among the facts proved or admitted. The Chartered Insurance Institute originated in 1897 as a Federation of Insurance Institutes established locally in various cities in Great Britain and Ireland. In 1912 it assumed its present title. Its headquarters at Aldermanbury in the City of London were occupied for the purposes of the institute. The institute was not established or conducted for profit. It was not a charity, though its benevolent fund was recognized by the Inland Revenue as a charitable trust.

The work of the institute consisted of oral tuition by lectures and classes; the organizing of curricula by other bodies for institute members and others; postal tuition; and the conduct of examinations. The whole of the tuition service was under a director of education. Fees were charged to students. The main objects were education in insurance matters.

In addition to the London area there were 75 local institutes with education secretaries to organize educational facilities in their areas through local commercial colleges and by similar means. Part-time tutors were employed in eleven centres to provide the necessary instruction. There were about 120 tutors so employed. In London in addition to its own classes the institute had four representatives on the London County Council Committee on Insurance Education, which supervised the council's insurance classes. Over 1,400 students attended the institute's own classes, not including those attending classes sponsored by other bodies under the supervision or guidance of the institute. Postal tuition was provided in more than 80

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distinct courses. Over 3,000 students took the postal courses alone. Examinations were conducted by the institute and comprised the preliminary examination in school subjects; the associateship, covering the work, normally, of three years' study with at least nine papers in the main branches of insurance work; the fellowship, covering a further two years' work, with at least seven papers. In addition there were certain advanced examinations in specialised subjects including two languages. In April, 1956, more than 11,000 candidates at home and abroad entered for the examinations. Considerable administrative work had to be carried out in connexion with the activities and the work was carried out at the hereditament in question. In addition to tuition and examination work the institute organized advance study groups, the results of whose researches and studies were published in the institute's journal. A library of works on insurance and cognate subjects was provided which was mainly used by students and advanced study groups. A journal was published annually containing reports of advanced study groups, prize papers, news of legislative developments and similar technical information, which was free to certain categories of members.

The secretary of the institute was a member of the Council of British Association for Commercial and Industrial Education, the Ministry of Education Joint Committee for National Certificates in Commerce, an elected member of the Senate of London University, a member of its Council for External Students and its Commerce Degrees Advisory Bureau. The institute maintained membership records. It had a disciplinary committee, but, most of the members being employees, it had not been necessary for the institute to exercise discipline and the committee had never met. The institute sought to achieve a high standard of knowledge for persons occupied in insurance and to enable them to obtain qualifications. One effect of that was that employers were able to distinguish the qualification of persons seeking employment, and to that end the institute issued certificates to Fellows. If the tuition and examination activities ceased about 40 of the staff of 50 could be dispensed with. At times practically all the staff were engaged in work for those activities. The effect on the salary bill and administrative expenses would be of a similar order. The institute could discard its tuition work, taking that in a general sense, and remain a very live organization in respect of its examination work, which was directed to examining insurance men primarily, though not wholly, in subjects that would prepare them for jobs or better jobs and make them more valuable to the community and to their employers in the matter of insurance.

The basement of the hereditament in question was a members' common room. There was also in the building a conference hall, offices and class-rooms. Lunches were provided for members on weekdays. Social meetings were held after lectures. The work

of the benevolent fund was done in the building. The contributions from insurance companies amounted in 1954 to £13,975, which represented about 17 per cent. of the total income of the institute.

It was contended on behalf of the institute that it was entitled to the benefit of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, on the ground that its main objects were concerned with the advancement of education.

It was contended on behalf of the London Corporation that the institute was not so entitled upon the grounds that its main objects were not concerned with the advancement of education but were concerned with promoting the competence for their work of those employed in insurance business and the advancement of the occupational interest of its members.

Quarter sessions came to the conclusion that while greatly impressed by the evidence with regard to many of the activities which brought the objects of the institute very close to the line where it would be entitled to the benefit of section 8 of the Act of 1955, they found it difficult to accept the view that the institute came within the section which entitled it to temporary relief. In their view the hereditament was occupied mainly for purposes which could not be described as educational in the sense in which they interpreted the work; that the charter of the institute did not conclude the matter and they had been referred to definitions of "education" in the Oxford English Dictionary and in Stroud's Judicial Dictionary, the latter of which defined "education" as "the training of the young in general, not teaching for a business "or profession." They came to the conclusion that the institute was maintained for the purpose specified in clause 2 (*a*) of the charter with a view to securing the competence of persons engaged or employed in insurance and that it was for that special purpose that its activities were designed and for which they were maintained. They accordingly dismissed the appeal.

Michael Rowe Q.C. and *W. L. Roots* for the institute.

N. E. Mustoe Q.C. and *G. B. Graham* for the City Corporation were not called upon to argue.

The following cases were cited by counsel for the institute: *Commissioners of Inland Revenue* v. *Forrest* [2]; *In re Berridge* [3]; *Smith* v. *Kerr* [4]; *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.* [5]

LORD GODDARD C.J. This is a case stated by quarter sessions for the City of London, to whom the Chartered Insurance Institute appealed against a rate made in March, 1956, on the ground "that the said rate was not made in conformity with

[2] (1890) 15 App.Cas. 334; 6 T.L.R. 456.
[3] (1890) 63 L.T. 470.
[4] [1902] 1 Ch. 774; 18 T.L.R. 456.
[5] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

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"law, namely, the Rating and Valuation (Miscellaneous Pro-"visions) Act, 1955, in that the amount of rates charged in "respect of the hereditament aforesaid exceeds that provided by "section 8 of the said Act, which applies to the said "hereditament."

The point of the case is this: section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, gives a certain relief from rating to "any hereditament occupied for the purposes "of an organisation (whether corporate or unincorporate) which "is not established or conducted for profit and whose main "objects are charitable or are otherwise concerned with the "advancement of religion, education or social welfare." There is no question that the institute is not one conducted for profit. It is not suggested that it is a charity, but it is suggested that its main objects are concerned with the advancement of education, and as the argument has proceeded, one can see that the words "advancement of" do not add very much to the word "education," because what it means is whether the main objects of the institute are education.

His Lordship referred to the facts set out in the case, read the conclusion of quarter sessions and continued: That conclusion seems to me to go rather away from the finding that "The "main objects are education in insurance matters." To my mind, and the ground on which I propose to base my judgment, the question depends on the interpretation of the charter, to which we have to look to find the main objects of the institute, because it is a chartered body with a charter granted by the Sovereign, and its objects are set out. The objects and purposes for which the institute is constituted are set out in paragraph 2 of the operative part of the charter, and the first is (*a*): "To "provide and maintain a central organization for the promotion "of efficiency, progress and general development among persons "engaged or employed in insurance, whether members of the "institute or not, with a view not only to their own advantage "but to rendering the conduct of such business more effective, "safe and scientific, and securing and justifying the confidence "of the public and employers by reliable tests and assurances "of the competence and trustworthiness of persons engaged or "employed in insurance." In other words, the Chartered Insurance Institute is set up for the purpose of getting a competent and reputable body of insurance practitioners. Then comes (*b*): "To encourage and assist the study of any subjects "bearing on any branch of insurance." Whether that is education of young members or even older members, I feel some doubt, but I am prepared to give the institute the benefit of the doubt and say that that might be held to be education. Then (*c*): "To "publish a journal and any other matter deemed desirable by "the council of the institute." If I was satisfied that the rest of the objects were the advancement of education, I should not hold they were defeated by the publication of a journal. Then

(*d*): "To form a library for the use of members of the institute. "(*e*) To offer money or other prizes for essays or research in any "subject bearing on insurance. (*f*) To devise and impose means "for testing the qualifications of candidates for the certificates "of the institute by examination in theory and practice or by "any other actual and practical tests, and to grant certificates "of qualification to the successful candidates." There I think we find an object of education, but having read those sub-paragraphs I have read everything in the charter, although there are eight more sub-paragraphs which seem to me to refer to education. The next one is (*g*): "To promote personal and "friendly intercourse between members of the institute; to hold "conferences and meetings for the discussion of professional "affairs, interests and duties, the reading of papers and the "delivery of lectures; to compile lists, registers and records of "events and proceedings of interest to the members, to issue "copies of such lists, registers and records from time to time "to members of the institute, and generally to collect, collate "and publish statistical or other information of service or interest "to members of the profession." I do not think by any fair construction that can be regarded as a subject of education. Then comes (*h*): "To ascertain the law and practice relating to all "things connected with insurance, to collect and form a strong "body of expert opinion with the view of obtaining the codifica-"tion and amendment of the Acts relating to insurance com-"panies, or otherwise relating to insurance, and to watch any "legislation affecting insurance." That obviously means: "We "are going to establish regular and experienced practitioners to "keep themselves acquainted with the law and to get a strong "body to bring about alterations in the law if we can." Sub-paragraph (*i*) is: "To exercise professional supervision and control "over the members of the institute, to safeguard their interests "and welfare, to further their advancement, and to promote "whatever may lead to the improvement of the status of "insurance officials in general and the members of the institute "in particular." That is, of course, the sort of object which any professional body has in mind, namely, improvement in the status of their members and the dignity of the profession. Then (*j*): "To act as a means of communication between members or "others seeking engagements in insurance and employers "desirous of employing them." Then follow various other pro-visions with regard to the relief of the necessitous members of the profession, and (*m*): "To promote and encourage provision by "the members against the contingencies of age, sickness, mis-"fortune and death, and to assist, financially or otherwise, "towards such provision." This is in fact, it seems to me, a most desirable, a most worthy and a most respectable professional institution. It is instituted not only for the provision of exami-nations; it seems to me that its objects go far beyond that, and I should find without any hesitation that its main object is that

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which is set out in paragraph 2 (*a*): "To provide and maintain "a central organization for the promition of efficiency, progress "and general development among persons engaged or employed "in insurance, whether members of the institute or not, with "a view not only to their own advantage but to rendering the "conduct of such business more effective, safe and scientific, "and securing and justifying the confidence of the public . . ." I think it would be stretching the interpretation of this charter beyond that which is right to say that the main object is education. Moreover I think when one is considering the use of the word "education" in this statute we are helped by the views of Lord Macnaghten and others in *Inland Revenue Commissioners* v. *Forrest*,[1] where he says[2]: "That being so, the question at "issue may be stated shortly. Is the property of the Institution "of Civil Engineers legally appropriated and applied for the "promotion of the science of civil engineering, or is it legally "appropriated and applied for the benefit of civil engineers in "order to enable them to practise their profession to greater "advantage?" In the one case it was exempted from taxation and in the other case it was not.

I think that in the present case the main object of this institute is to benefit the profession of insurance generally, to establish it as a professional body with a council who can exercise a certain amount of discipline over the members of the profession, not discipline in the sense that the Benchers of the Inns of Court or the Disciplinary Committee of the Law Society can exercise it, because anybody can go into the profession of insurance if they can get employment. It is not a profession for which there is a statutory qualification. I think that the object of the institute is generally to raise the status and dignity of the profession. That is for what it exists, and, incidentally, one of the means of doing that is to hold examinations and give lectures to young entrants to the profession, because the better educated in the science or art of insurance they are the more dignity and respect will be paid to the profession. I cannot hold that this body comes within the exemption granted by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and I would dismiss this appeal.

BYRNE J. I agree. I think the question is, as my Lord has pointed out, are the main objects of this institute concerned with the advancement of education? Upon an examination of the charter, particularly having regard to clause 2 (*a*), it appears to me to be quite plain that the main objects are more concerned with the advancement of members of the profession or occupation of insurance. In those circumstances I agree that this appeal should be dismissed.

[1] (1890) 15 App.Cas. 334; 6 T.L.R. 456.

[2] 15 App.Cas. 334, 354.

DEVLIN J. I have come to the same conclusion, but by a slightly different route, in which I place rather less reliance on the terms of the charter and more on the findings of fact in the case. I agree that since what we have to ascertain under section 8 is whether this is a hereditament which is occupied for the purposes of an organization whose main object is concerned with the advancement of education, the natural place to look in the first instance in order to see what are the objects of the institute is the charter. The objects are set out and have been read by my Lord. But in considering what the main object is I do not think one can necessarily, as it were, count the different objects in the charter and see how many point one way to the advancement of education and how many point to such extraneous matters as disciplinary powers, the assistance of necessitous members, and so on. I think that in considering what the main object is one must have regard to the way in which those objects have actually been achieved or attempted, and that is to be ascertained from the evidence that is set out in the case. I think that it is a question of fact, and that there is evidence to support the conclusion set out in the case, which has been read, that the main objects are "education in insurance "matters." I note in particular the further finding: "That "if the tuition and examination activities ceased about 40 of "the staff of 50 could be dispensed with. At times practically "all the staff were engaged in work for these activities. The "effect on the salary bill and administrative expenses would be "of a similar order." From that I conclude and accept as a finding of fact that, very roughly speaking, about 80 per cent. of the work of the institute is devoted to tuition and examination activities rather than to the other matters which are set out in the later paragraphs in the charter. But it does not to my mind at all follow from that that because the institute is mainly engaged in tuition and examination activities, its main object is concerned with the advancement of education. In one sense the word "education" may be used to describe any form of training, by which a man may acquire an aptitude physical or mental, which he may desire to have for the purpose of his work. If that was what was intended it would not be apt, in my judgment, to use in section 8 the words "the advancement of . . . education." I think that the advancement of education means the advancement of education for its own sake in order that the mind may be trained. It may be that it is unnecessary that that should be general education—I accept for the purposes of the present case that education in a particular subject is sufficient—but the main object must be the advancement of education in the sense of the training of the mind. No one can doubt, for example, that a university gives education in that sense, although it may very well be that one of the ancillary advantages of attaining a university degree is to enable a man to do better in the profession which he has chosen by having some qualification which advances

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him. On the other hand education in a particular aptitude is primarily designed for the acquisition of some professional advantage. This distinction is made manifest in the passage from the speech of Lord Macnaghten in *Inland Revenue Commissioners* v. *Forrest* [2] which my Lord has cited. I think it follows that if the true view of the objects and work of this institute is that, although it is engaged mainly in tuition and examination activities, those tuition and examination activities are designed for the benefit of the members of a particular profession in order to enable them to practise their profession to greater advantage, then the institute is not concerned with the advancement of education.

I turn again to the facts in the case. The conclusion which quarter sessions has reached, having set out all the evidence, is that the main object of the tuition and examination activities is that set out as the first object in the charter. There appears to me to be ample evidence to justify that conclusion. It seems to me to be plain when the first object of the charter is read that it falls upon that side of the distinction drawn by Lord Macnaghten [2] which is concerned with the benefit of the members of the profession themselves in order to enable them to practise their profession to greater advantage. For that reason I think that the conclusion of quarter sessions was right, and the appeal should be dismissed.

Appeal dismissed.
Leave to appeal.

Solicitors:—*Linklaters & Paines; Comptroller & Solicitor, Corporation of London.*

E. M. W.

[PRIVY COUNCIL.]

J. C.†

1957
June 26.

*ADEYINKA OYEKAN AND OTHERS . . APPELLANTS;

AND

MUSENDIKU ADELE . . . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL (LAGOS JUDICIAL DIVISION).

West Africa (Nigeria)—Land—Treaty of cession—Lagos—Grant of Iga Idunganran (royal palace) to Oba Docemo, his heirs, etc., for ever —Nature of estate granted—English conceptions of absolute title inapplicable—Iga the official residence of reigning Oba—Grant subject to right of succeeding Oba under native law and custom to occupy the Iga—Crown Grants (Township of Lagos) Ordinance, No. 18 *of* 1947 (*Laws of Nigeria,* 1948, *c.* 44), *recital; s.* 3.

By a treaty of cession in 1861 Docemo, the then Oba or "King" of Lagos, a descendant of Ado, the first Oba, ceded absolutely to the

† *Present*: EARL JOWITT, LORD COHEN, LORD DENNING.

British Crown the port and island of Lagos. The British authorities thereafter allowed Oba Docemo to continue to occupy the Iga Idunganran, or royal palace, at Lagos, and in 1870 they made a Crown grant of the land on which the Iga stood "to the said King "Docemo, his heirs, executors, administrators and assigns for ever." The last of Docemo's line to be Oba died in 1949, and on his death the chiefs selected as his successor, "in accordance with customary "law and tradition," the respondent, who was also descended from the first Oba Ado but by a different line from that of Docemo. Immediately thereafter the respondent and his followers forcibly entered and occupied the Iga in the face of opposition by the family of Docemo, who thereupon, resting their case on the Crown grant of 1870, began the present proceedings against the respondent claiming a declaration of title to the Iga, damages for trespass, and recovery of possession. The respondent's defence was that he had been duly "capped" as Oba and occupied the Iga as his official residence in accordance with ancient native custom:—

Held, (1) that the evidence established that before the treaty of cession the Oba of Lagos by native custom had by virtue of his office a right to live in the Iga, and that on his death the Iga did not pass to his heirs or to his family but to his successor in office. It was the traditional home of the Obas where each of them lived.

(2) That the right to occupy the Iga was a right which the Oba possessed as Oba and, accordingly, the property in the Iga had, as provided by the Crown Grants (Township of Lagos) Ordinance, 1947, passed to the British Crown under the treaty of cession of 1861.

(3) That, approaching the case on that basis—that the Iga had passed to the Crown under the treaty—the Crown grant of 1870 did not transfer the property to the family of Docemo absolutely. Government grants did not convey English titles or English rights of ownership, and the words "his heirs, executors, administrators "and assigns for ever" in the grant of 1870 were to be rejected as meaningless and inapplicable in their African setting. The effect of a Government grant was only to ascertain and denote the chief or headman who had charge of the land for the time being—it being family land; it left the interests of the family or occupiers intact, to be determined as theretofore by the local law. While the cases which established this (*Sunmonu* v. *Disu Raphael* [1927] A.C. 881; *Idewu Inasa* v. *Oshodi* [1934] A.C. 99; 50 T.L.R. 168) were concerned only with the rights of the family or occupiers, whereas the present case concerned the rights of the Oba, those cases were confirmed and made of general application by section 3 of the Ordinance of 1947, which provided that "All grants of land . . . "within . . . Lagos . . . shall be deemed to have vested in the "grantee an estate free from competing interests and restrictions, "save only such interests and restrictions, recognized by native law "and custom, as at the date of the grant affected such estate."

(4) That, applying section 3 of the Ordinance of 1947, the grant of 1870 vested in Docemo an estate which was subject to "such "interests and restrictions, recognized by native law and custom" as affected it at that date. Accordingly, whatsoever estate passed to Docemo, it was subject to the right of his successor to occupy the Iga—this right being an interest and restriction recognized by native law and custom. The grant took effect only subject to that right.

(5) That the respondent, the present Oba, was accordingly entitled to occupy the Iga, was entitled to enter it as he did, and the Docemo family were wrong to resist him. No cause for action in damages lay: section 292 of the Criminal Code (Laws of Nigeria, c. 42).

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Hemmings v. *Stoke Poges Golf Club* [1920] 1 K.B. 720; 36 T.L.R. 77 applied.

Judgment and order of the West African Court of Appeal affirmed.

APPEAL (No. 39 of 1953) from a judgment and order of the West African Court of Appeal (November 17, 1952) affirming a judgment of the Supreme Court of Nigeria (January 18, 1951).

The following facts are taken from the judgment of the Judicial Committee: The principal question on this appeal was to whom did the royal palace at Lagos belong? Its modern description was No. 26, Upper King Street, Lagos, but it had been known for over 200 years as the Iga Idunganran. It was claimed by the present Oba of Lagos as his official residence, but it was claimed by the descendants of a previous Oba as their own property. The Oba had sometimes been described as the King of Lagos, but this was hardly a correct rendering. His position had no exact parallel in English institutions. He was a very influential person whose standing was shown by the fact that he was ex officio President of the Lagos Town Council.

The dispute was a family one. The first Oba or King from whom all others had descended was named Ado. He ruled from 1630 to 1689 A.D. One important branch of his descendants was the family of Docemo who was Oba or King from 1853 to 1885. From Docemo's accession in 1853 down to 1949 every Oba (save one for three years) was a member of Docemo's family. The last of Docemo's line to be Oba was Falolu, who was Oba from 1932 to 1949 and died on September 2, 1949.

On the death of Falolu the chiefs met together to select his successor. Various names were submitted to them. The family of Docemo presented one of their men as a worthy successor but the chiefs did not select him. They selected Adeniji Adele who was not a member of the family of Docemo. He was descended from the first Oba Ado but by a different line from that of Docemo. The announcement of his succession was made public in these words: "It is officially announced that Adeniji Adele, "having been properly selected in accordance with customary "law and tradition, is recognized by the Government as Head "of the House of Ado."

The new Oba Adele claimed to occupy the Iga Idunganran: but the members of the family of Docemo resisted the claim. The supporters of Adele put up notices on the verandah of the Iga saying that he was coming. They also put them outside on the walls. At about 6 o'clock in the afternoon of October 1, 1949, Adele came in a car followed by the chiefs and many others and sought to enter the Iga. The family of Docemo opposed them. They pushed them back and locked the gates. Adele's brothers got a crowbar and a hammer and forced a way in. Adele's car was then driven into the compound followed by the chiefs and many people. They went to the shrine in the Iga. The family of Docemo slipped out and got away in cars.

Twelve days later, on October 13, 1949, the family of Docemo brought this action against Adele in the Supreme Court of Nigeria in which they claimed a declaration of title to the Iga, £2,000 damages for trespass, and recovery of possession. The defence was that Adele was duly "capped" on October 1, 1949, as the Oba of Lagos by the chiefs entitled to do so and occupied the Iga in accordance with ancient custom. The action was tried by Reece J., who dismissed the claim. The family of Docemo appealed to the West African Court of Appeal (Foster Sutton P., Verity C.J. and Coussey J.A.), who dismissed the appeal. The family of Docemo now appealed to Her Majesty in Council. The family of Docemo rested their claim on a Crown grant. They said that in 1861 Docemo made a treaty of cession with Britain whereby the territory of Lagos, including the Iga, passed to the British Crown, and that in 1870 the Crown granted the Iga to the Docemo and his family for ever. They said that since the treaty of cession, 1861, there had been no Oba of Lagos except as a courtesy title, and that no rights had attached to it.

1957. May 6, 7, 8. *Dingle Foot Q.C.*, *Ralph Millner* and *T. O. S. Benson* for the appellants.

B. J. M. MacKenna Q.C. and *Arthur Bagnall* for the respondent.

The following cases, not referred to in the judgment, were cited in argument: *Oduntan Onisiwo* v. *Attorney-General*[1]; *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.*[2]; *Sakariyawo Oshodi* v. *Balogun*[3]; *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering)*.[4]

June 26. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: The contest is therefore between the family of Docemo who claim by grant from the Crown of England, and the defendant Adele who claims by native custom as Oba of Lagos.

Their Lordships find it fully established by the evidence and by the concurrent findings of the courts below that, before the treaty of cession, the Oba of Lagos by native custom had a right to live in the Iga. He had this right by virtue of his office. On his death the Iga did not pass to his heirs or to his family but to his successor in office. It was the traditional home of the Obas where each one of them lived. But the chiefs were also entitled to make proper use of it. For instance, the weekly meeting of chiefs was held there and other ceremonies.

What, then, was the effect of the treaty of cession in 1861? Did it pass the property in the Iga to the British Crown? The treaty was made "in order that the Queen of England may be "the better enabled to assist defend and protect the inhabitants

[1] (1912) 2 Nig.L.R. 77.
[2] [1915] A.C. 599.
[3] [1936] 2 All E.R. 1632.
[4] [1928] A.C. 459; 44 T.L.R. 632.

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"of Lagos and to put an end to the slave trade": by article 1 Docemo King of Lagos on the part of himself and chiefs made this cession: "I do with the consent and advice of my Council "give, transfer and by these presents grant and confirm unto the "Queen of Great Britain her heirs and successors for ever the "port and Island of Lagos with all the rights profits territories "and appurtenances whatsoever thereunto belonging and as well "the profits and revenue as the direct full and absolute dominion "and sovereignty of the said port island and premises with all "the royalties thereof freely fully entirely and absolutely." By article 2 Docemo was allowed the use of the title of King in its usual African signification. By article 3 Docemo was during his lifetime to receive a pension of 1,200 bags of cowries a year.

Their Lordships desire to point out that the treaty of cession was an Act of State by which the British Crown acquired full rights of sovereignty over Lagos. In these circumstances the courts of law will not take it upon themselves to construe the treaty. The effect of the Act of State is to give to the British Crown sovereign power to make laws and to enforce them, and therefore the power to recognize existing rights or extinguish them or to create new ones. In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown. It has been laid down by their Lordships' Board that "Any inhabitant of the territory can make good in the municipal "courts established by the new sovereign only such rights as that "sovereign has, through his officers, recognized. Such rights as "he had under the rule of his predecessors avail him nothing." See *Vajesingji Joravarsingi* v. *Secretary of State for India*,[1] by Lord Dunedin, *Hoani Te Heuheu Tukino* v. *Aotea District Moari Land Board*.[2] In inquiring, however, what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law, see *Amodu Tijani* v. *Secretary, Southern Nigeria*,[3] *Sakariyawo Oshodi* v. *Moriamo Dakolo*.[4] Furthermore, if a dispute arises between the inhabitants as to the right to occupy a piece of land, it will be determined according to native law and custom, without importing English conceptions of property law, see *Sunmonu* v. *Disu Raphael*,[5] *Idewu Inasa* v. *Oshodi*,[6] except,

[1] (1924) L.R. 51 I.A. 357, 360.
[2] [1941] A.C. 308, 324–325; 57 T.L.R. 419; [1941] 2 All E.R. 93.
[3] [1921] 2 A.C. 399.
[4] [1930] A.C. 667; 46 T.L.R. 599.
[5] [1927] A.C. 881.
[6] [1934] A.C. 99; 50 T.L.R. 168.

of course, in those cases, now growing in number, where English conceptions of individual ownership have superseded previous conceptions.

The present case sets their Lordships a new problem. It concerns, not the rights of the inhabitants, but the rights of the previous ruler himself. It concerns his official residence. Did this pass to the British Crown or not? Mr. Dingle Foot says that it did. This is an essential preliminary to his contention that the British Crown afterwards granted it to the family of Docemo. In order to get the title in the British Crown, he relies particularly on a recital in the Crown Grants (Township of Lagos) Ordinance, No. 18 of 1947, which says "the effect of the treaty was that, "while the private rights of property of the inhabitants were to "be fully respected, there passed to the Crown *whatever rights* "*the Oba possessed*, including whatever proprietary rights the "Oba possessed beneficially and free from the usufructuary "qualification of his title in favour of his subjects."

Their Lordships regard that recital as an authoritative statement by the British Crown of the effect of the treaty. It is, however, not easy to interpret. Their Lordships are inclined to think that the only rights of the Oba which passed to the Crown were the rights which he possessed in his official capacity as Oba, and not those which he possessed in his private capacity. Suppose, for instance, he had personal property of his own, such as silks, or bags of cowries which are used as money. Their Lordships do not think that these would pass to the Crown, and this view is supported by the fact that the British Consul on February 11, 1862, received King Docemo and his chiefs and explained to them that far from depriving them of their private property, the "cession will render it more valuable" to them.

Accepting, however, that the only rights which passed to the Crown were the rights which the Oba possessed as Oba, the question is what were those rights? They would clearly comprehend any right which he had to exact tribute and revenue, to issue land certificates, and so forth. But was the right to occupy the Iga a right which he possessed as Oba? Their Lordships are inclined to think that it was. It was his official residence. It was, so to speak, public property occupied by him by virtue of his office. Their Lordships see no valid distinction in law between the official residence of the Oba and any other public property which he possessed in his capacity of Oba. It all passed to the British Crown. It is true that he did not possess the Iga "beneficially and free" from the rights of others. The chiefs had the right to use it for meetings and ceremonies. But that does not mean it did not pass to the Crown. The words "beneficially, etc.," in the Ordinance are taken from the judgment of Viscount Haldane in *Amodu Tijani*,[7] and appear to be inserted so as to protect the rights of the subjects, not to limit the

[7] [1921] 2 A.C. 399, 407.

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nature of the property which passed to the Crown. Their Lordships are therefore disposed to approach the case on the basis that the Iga passed to the British Crown under the treaty of cession.

Even so, it is quite plain that the British authorities did not take possession of the Iga. They allowed the Oba Docemo to occupy it after the cession just as he did before. And in due course in 1870 they made a Crown grant of it to him. This brings their Lordships to the root question in the case. What was the effect of this Crown grant? Did the British Crown transfer the property to the family of Docemo absolutely? Their Lordships draw attention to the very English form of the Crown grant. The administrator grants or assigns "to the said King "Docemo, his heirs, executors, administrators and assigns for "ever the above specified piece of land." Those words are familiar in English law. They would fit well into a society which had the same legal structure as England: but they do not fit at all well into the structure of Lagos. The grant is drawn up according to the English conception whereby one man is able to have the entire ownership of land himself, with power to sell it to another absolutely, power to transfer it by his will to anyone he likes on his death, or, if he leaves it undisposed of on his death, it passed by law to his heir and now to his personal representatives. The inhabitants of Lagos in 1870 approached land in a very different fashion. No one man was entitled to own a piece of land absolutely. It belonged to the family for their use. The chief had charge of it on behalf of the family but he could not sell it. The idea of sale did not come into the scheme of things at all. The chief had control of the land, and any member of the family who wanted to make use of it had to go to him for it, but even the chief could not make any important disposition of it without consulting the elders of the family. On his death the new chief took over the rights and duties of control on behalf of the family. It was family land and always recognized as such. This all appears from the Report on Land Tenure in West Africa made in 1898 by Rayner C.J., and on Land Tenure in Lagos by Mr. Healy, the Land Commissioner.

Many of those Crown grants were made in the English form: and much misunderstanding has arisen on that account. People have claimed rights under the grants in English fashion as though thereby they gained a title superior to the rights of the rest of the family under the local law. Several of these cases have reached their Lordships and it has been uniformly held that these Government grants do not convey English titles or English rights of ownership. The words "his heirs, executors, administrators "and assigns forever" are to be rejected as meaningless and inapplicable in their African setting. The effect of a Government grant is only to ascertain and denote the chief or headman who has charge of the land for the time being. It leaves the interests of the family or occupiers intact, to be determined, as theretofore, by the local law. The cases already cited make this quite clear.

for in all of them Crown grants had been issued. Their Lordships realize that those cases were concerned only with the rights of the family or occupiers: whereas the present case concerns the rights of the Oba. But there is an Ordinance which confirms those decisions and makes them of general application. It is section 3 of the Crown Grants (Township of Lagos) Ordinance, which says that "All grants of land situate within the township of Lagos "... shall be deemed to have been validly made; and each of "such grants shall be deemed to have vested in the grantee an "estate free from competing interests and restrictions, save only "such interests and restrictions, recognized by native law and "custom, as at the date of the grant affected such estate."

Applying the Ordinance, it appears to their Lordships that the Crown grant to King Docemo in 1870 of 26, Upper King Street (on which the Iga stands), vested in him an estate which was subject to "such interests and restrictions, recognized by native law and "custom" as affected it at that date. Their Lordships are clearly of opinion that, whatsoever estate passed to King Docemo, it was subject to the right of his successor to occupy the Iga. This right was an interest and restriction recognized by native law and custom. It was recognized at that time and has been recognized ever since. The grant to King Docemo took effect only subject to that right. Neither he nor his successors took a title to the fee simple or to the freehold (to use English conceptions). He took an estate which was more like the estate of a corporation sole than anything else. It vested in the holder of the office for the time being. It was not an estate like that of a trustee in trust for the holder of an office.

This means that the present Oba is entitled to occupy the Iga; that he was entitled to enter it as he did on October 1, 1949; and that the family of Docemo were wrong to resist him.

It was argued, however, that even if the Oba was entitled to occupy the Iga, nevertheless the legal title was still in the family of Docemo and they were entitled to a declaration to that effect: that the Oba was not entitled to take possession by force; that he had only an equitable interest and ought to have sought his remedy in the courts; and that his action in turning out the legal owner was a trespass. The fallacy in this argument is that it seeks to apply the English concepts of legal owner and equitable beneficiary to cases where they are quite inapplicable. The simple fact is that by native law and custom the duly appointed Oba was entitled to occupy the Iga and did so. It is clear that no cause for action in damages lies on that account, see section 292 of the Criminal Code and *Hemmings* v. *Stoke Poges Golf Club*.[8]

Their Lordships are aware that in several parts of Lagos the native law has been superseded by English conceptions of individual ownership. Nothing their Lordships have said here affects those parts. Suffice it to say that the Iga Idunganran is still

[8] [1920] 1 K.B. 720; 36 T.L.R. 77.

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subject to the native law and custom which gives the Oba of Lagos the right to occupy it during his life.

Accordingly, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of this appeal.

Solicitors: *A. L. Bryden & Williams; Hatchett Jones & Co.*

C. C.

[COURT OF APPEAL.]

C. A.
1957
May 17.
Jenkins, Romer and Sellers L.JJ.

* *In re* WHITRICK, DECD.
SUTCLIFFE *v.* SUTCLIFFE AND OTHERS.

[1956 W. 2456.]

Will—Construction—Omission—Will showing words omitted by accident or mistake—Possibility of literal construction—Missing words supplied by court.

The testatrix by her will left her entire estate to her husband, but provided that "in the event of my husband . . . and myself both "dying at the same time," her estate should be held upon trust for three named persons. The husband predeceased the testatrix, having made a will in similar terms to that made by the testatrix, under which she succeeded to the whole of his estate. On a summons to determine whether the court should read words into the will of the testatrix to enable the trust in favour of the three named persons to take effect:—

Held, that the whole contingency for which the testatrix intended to provide was not expressed by the words "in the event of my "husband . . . and myself both dying at the same time," since it was clear that she had intended to provide for the disposition of her estate if the husband predeceased her, or if both her husband and herself should die at the same time; in these circumstances, the court should supply words giving effect to the testatrix's manifest intention.

In re Smith [1948] Ch. 49; 63 T.L.R. 608; [1947] 2 All E.R. 708 applied.

Decision of Harman J. reversed.

APPEAL from Harman J.

The plaintiff, who was administratrix of the will, appealed against the decision of Harman J. that the testatrix, Amanda Whitrick deceased, died wholly intestate. The facts appear fully in the judgment of Jenkins L.J.

W. S. Wigglesworth for the plaintiff administratrix.

The defendants did not appear and were not represented.

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

The following cases cited in argument were not referred to in the judgment: *Abbott* v. *Middleton* [1]; *In re Cory.* [2]

JENKINS L.J. This is an appeal from an order of Harman J. dated February 7, 1957. The appellant, the plaintiff in the proceedings, is the administratrix, with will annexed, of the estate of the testatrix Amanda Whitrick. The testatrix made a will which, in the events which happened, necessarily resulted in an intestacy as to one-third of her residuary estate owing to the death in her lifetime of one of three named residuary legatees. The matter in dispute is whether the testatrix died intestate as to the whole of her estate and not merely as to one-third of it, on the ground that in the events which happened she made no effective disposition of her estate.

The first defendant is one of the residuary legatees under the will of the testatrix, and his interest would be to present argument limiting the intestacy to one-third. The remaining four defendants (there are five in all) are representative of the next-of-kin of the testatrix, and their interest would be to argue for a total intestacy.

The proceedings have had an unfortunate history. The plaintiff, Beatrice Sutcliffe, as administratix, naturally wanted this question determined. The summons was accordingly issued with the parties I have mentioned as defendants, as being proper parties to argue either side of the question on which a decision was required. Most unfortunately from the court's point of view, none of the defendants have thought fit to take any part in these proceedings. I understand that they did not enter appearances to the summons, and were not represented at the hearing; and they have not been represented at the hearing before us. The notice of appeal has been filed in the offices of the court, and the parties have been notified of the appeal by registered letter; and one can thus say that everything that need or ought to have been done has been done to secure their attendance, without result. The court, therefore, finds itself in the somewhat embarrassing position of having to determine the question in the presence of one side only. Mr. Wigglesworth, for the plaintiff, has presented a most fair and balanced argument, as one would expect, and has given us all the assistance which he possibly could. That, however, is not a satisfactory substitute for having the matter argued in the presence of all parties interested.

The circumstances which give rise to the question are these. The testatrix made a will dated August 9, 1935, and it was, as far as material, in these terms. She revoked all former wills, and provided as follows: " (2) Subject to the payment of all my just " debts funeral and testamentary expenses I give devise and be- " queath the whole of my real and personal estate whatsoever and " wheresoever the same shall be at my decease unto my husband

[1] (1858) 7 H.L.Cas. 68.

[2] [1955] 1 W.L.R. 725; [1955] 2 All E.R. 630.

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"the said Thomas Whitrick absolutely and I appoint my said "husband to be the sole executor of this my will. (3) In the event "of my husband the said Thomas Whitrick and myself both dying "at the same time then and in that case the following provisions "shall apply namely. (4) I appoint my sister Beatrice Sutcliffe "(hereinafter called 'my trustee') to be the sole executrix and "trustee of this my will. (5) I give devise and bequeath the "whole of my real and personal estate whatsoever and wheresoever the same shall be at my decease unto my trustee upon "trust to sell collect call in and convert into money the same or "such part or parts thereof as shall not consist of money," with the usual directions as to payment of debts and so forth; and the clause then continues: "Upon further trust to pay and divide "the residue of such proceeds and of my ready money unto and "equally between my sisters the said Beatrice Sutcliffe and Clara "Scott and my nephew William Sutcliffe for their own use and "benefit absolutely." Clara Scott was the named residuary legatee who, as I have said, died in the lifetime of the testatrix, and on account of her death there must in any event be an intestacy as to one-third of the residuary estate.

The question as to total intestacy arises in this way. It will have been observed that the will begins with an absolute gift to the testatrix's husband. It then goes on in express terms to provide for the event of both the testatrix and her husband dying at the same time. I will read clause 3 again: "In the event of "my husband the said Thomas Whitrick and myself both dying "at the same time then and in that case the following provisions "shall apply, namely." I think it is plain beyond argument that everything in the will which follows clause 3 is governed by clause 3, and consequently, according to the literal meaning of the language, there is only a disposition there in the event of both dying at the same time.

The testatrix's husband made a will of the same date in favour of the testatrix similar in form, so far as clauses 1, 2 and 3 are concerned, to the will of the testatrix herself; that is to say, there is a gift to the testatrix absolutely, followed in clause 3 by the provision: "In the event of my wife the said Amanda Whit-"rick and myself both dying at the same time then and in that "case the following provisions shall apply, namely." The provisions which follow that clause in the husband's will are different from those in the wife's will, but it is unnecessary to go into the details of that.

The husband died on October 20, 1948, leaving the testatrix him surviving. Consequently, so far as his will was concerned, the gift in favour of the testatrix took effect. The testatrix proved his will on December 16, 1948. The testatrix died on March 26, 1954, and as she had survived her husband, the testator, the primary gift in his favour in clause 2 of the will did not take effect. Letters of administration of her estate were granted to the present appellant.

The question which we are asked to decide is whether there should be read into this will by necessary implication provision for the contingency of the husband dying in the testatrix's lifetime, so that the provisions of clauses 4 and 5 of the will take effect, or whether the court is constrained to confine itself to the actual language used in the will, in which case the provisions of clauses 4 and 5 cannot take effect, as on that view they are only limited to take effect in the event of both the testatrix and her husband dying at the same time, which event did not happen.

The reading of words into a will as a matter of necessary implication is a measure which any court of construction should apply with the greatest caution. Many wills contain slips and omissions and fail to provide for contingencies which, to anyone reading the will, might appear contingencies for which any testator would obviously wish to provide. The court cannot rewrite the testamentary provisions in wills which come before it for construction. This type of treatment of an imperfect will is only legitimate where the court can collect from the four corners of the document that something has been omitted and, further, collect with sufficient precision the nature of the omission. Harman J. felt unable to make the necessary implication, and accordingly he decided that there was a total intestacy; and the plaintff now appeals to this court from that decision.

Mr. Wigglesworth has referred us, amongst other cases, to *In re Smith*,[1] where Vaisey J. had to consider a will which, according to the headnote, was to this effect: "A married woman by her "will, having appointed her husband and the plaintiff executors, "and bequeathed specific and pecuniary legacies, including a "legacy of chattels to her husband, provided that in the event "of her husband predeceasing her or if surviving her dying within "one calendar month of the date of her death, the executors were "to hold the residuary estate in trust to be divided among a "number of persons all relatives of the husband and three chari-"ties. The will contained no disposition of the residue in the "event (which happened) of the husband surviving the wife by "more than one calendar month. The wife died in 1945, leaving "no issue. *Held* that it was clear that there was an omission of "certain words from the will, there being no provision for the "event which had happened. It was certain that an alternative "was intended and as a matter of necessary implication the "defect must be supplied by a gift of the residue to the husband "absolutely, he having survived his wife by more than one "calendar month."

Vaisey J. in his judgment referred to a number of authorities, and he quoted[2] this passage from Jarman on Wills: "In Jarman "on Wills, 7th ed., Vol. 1, p. 556, the matter is expressed thus: "'Where it is clear on the face of a will that the testator has not "'accurately or completely expressed his meaning by the words

[1] [1948] Ch. 49; 63 T.L.R. 608; [1947] 2 All E.R. 708.
[2] [1948] Ch. 49, 53.

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" ' he has used, and it is also clear what are the words which he
" ' has omitted, those words may be supplied in order to effectuate
" ' the intention, as collected from the context.' "

He later[3] made this citation from *In re Ridge's Trusts*[4]: " Then there is the case of *In re Ridge's Trusts* where Sir William " James L.J. implied certain cross-limitations which had been " omitted from the will and which he thought the general scheme " of the will required to be inserted. In his judgment, he says " this: ' It is a case in which we are authorized and bound to fill " ' in the will . . . and meaning.' Then referring to the particular " will he mentions that it is easy to carry out the principle because " ' the court is not striking out a single word; it is not contradict- " ' ing anything in the will, but it is giving to every sentence its " ' plain, grammatical, and ordinary meaning. If any of the " ' events provided for happen, then the will takes effect according " ' to its letter. The implication only applies to events for which " ' the testator has not in terms provided, but as to which no per- " ' son applying merely common sense to the will can have any " ' doubt what he intended.' " The judge went on: " It is in the " light of ' common sense ' that I here imply a gift to the husband " in the event which has happened."

He also referred to *Mellor* v. *Daintree*[5] for this statement by North J.: " I decline altogether to decide the case on any " mere conjecture of what the testator intended. It is unneces- " sary for me to refer to any authorities," except two, which he mentions, and from one of those *Key* v. *Key*[6] he quotes the words of Knight Bruce L.J.: " In common with all men I must " acknowledge that there are many cases upon the construction " of documents in which the spirit is strong enough to overcome " the letter; cases in which it is impossible for a reasonable " being, upon a careful perusal of an instrument, not to be " satisfied from its contents that a literal, a strict, or an ordinary " interpretation given to particular passages, would disappoint " and defeat the intention with which the instrument, read as a " whole, persuades and convinces him that it was framed. A " man so convinced is authorised and bound to construe the " writing accordingly."

Vaisey J. concluded that he was prepared to make a declaration in favour of giving the husband an interest in the events which had happened. He prefaced his review of the authorities by dealing with the question as it appeared to him. He said[7]: " I start with this, that it is, in my judgment, very surprising " that a lady who appoints her husband to be an executor and " trustee of her will and bequeaths to him her personal chattels " and was evidently on the best of terms with his relations as " is shown from the alternative gifts to which I have referred— " it is exceedingly surprising to find that she made no disposition

[3] [1948] Ch. 49, 54.
[4] (1872) 7 Ch.App. 665.
[5] (1886) 33 Ch.D. 198.
[6] (1853) 4 De G.M. & G. 73.
[7] [1948] Ch. 49, 52.

" at all of her estate either to him or to his relations in the event " which happened of his surviving her for more than one calendar " month. If I had read this will in draft and been asked whether " I saw anything the matter with it, it would, I think, have " leapt to the eye that there must have been some omission of " a provision operating in the alternative, and I cannot possibly " read this will without forming the conclusion that there has " obviously been some omission, and the question is whether, " having come to that conclusion, I am able to say what that " omission is as a matter of necessity, that is to say, ' not natural " ' necessity, but so strong a probability of intention, that an " ' intention contrary to that which is imputed to the testator " ' cannot be supposed,' " those last words being a quotation from *Wilkinson* v. *Adam*.[8] Then he continues: " I quote those words " from *Wilkinson* v. *Adam*,[8] an old authority which is referred to " in Hawkins on Wills, 3rd ed., at p. 8. I am asked, to speculate, " not only on the question whether there has been an omission, " but on the question whether I can say with reasonable " certainty as a matter of necessary implication what the " omission was."

I think I have read enough of that case and the authorities reviewed in it to indicate the principles to be applied, which, in my view, are correctly stated by the judge.

We were also referred to *In re Follett*,[9] a case in this court where, with reference to provisions of a quite different nature, the court held that, although they were clearly omissions in the clause in question, " the nature and wording of what had been " left out was not sufficiently certain to enable the court to " supply words, and still less to transform what, according to the " letter of the clause, was a general power of appointment into a " special power." This court there indicated the principles to be applied in dealing with a question of this sort, and I think the observations in regard to those principles accord with what was said by Vaisey J. in *In re Smith*.[10]

The question, then, is whether the court can be certain, looking simply at this will, not only that the testatrix omitted something, but also what it was that she omitted. A curious feature of the case is the circumstance, to which I have already alluded, that precisely the same form of words was used in the husband's will.

If the testatrix had simply made a will giving all her property to her husband absolutely and had made no other disposition, it is, of course, absolutely plain beyond possibility of argument that no court could there imply any gift in the event of the husband predeceasing the wife. It would be quite impossible to do that, because one could not say with certainty, if that was the form of the will, that she meant to make any other provision,

[8] (1813) 1 Ves. & B. 422.
[9] [1955] 1 W.L.R. 429; [1955] 2 All E.R. 22.
[10] [1948] Ch. 49.

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nor could one say with certainty or hazard a guess what disposition the testatrix might have made had she made one. But this case is of a different character. The will begins with the absolute gift to the husband. Then the testatrix goes on to provide for a certain contingency, and the contingency provided for is, according to the express language used, that of the testatrix and the husband dying at the same time. Can one possibly believe that in making this alternative provision the testatrix really intended to make it operative only in the event of herself and her husband dying at the same time? That was an event extremely unlikely to happen.

To my mind, it cannot be accepted for a moment that the words used, "in the event of my husband . . . and myself both "dying at the same time," comprise the whole of the contingency for which the testatrix intended to provide. It seems to me reasonably plain from the language and frame of the will that what the testatrix set out to do by clause 3 and the subsequent clauses was to provide for the contingency of her husband not surviving her. The contingency of her husband not surviving her might take the form of the event of the husband dying in her lifetime —if he died in her lifetime obviously he would not survive her— and the event of his failing to survive her by reason of his dying at the same time as the testatrix herself. I think it is reasonably plain that, in setting out to provide for the contingency of the husband not surviving her, the testatrix expressed imperfectly the contingency for which she intended to provide, and I think the court can say with sufficient certainty that the alternatives which she intended to provide for were the event of herself and her husband both dying at the same time or the event of his dying in her lifetime. That makes the will a sensible and complete disposition. In my view, although, as I have said, the court should be very sparing of implying words or reading words into a will, this is one of those rare cases where it is possible to say as a matter of necessary implication that there was an intention to provide for the contingency which I have mentioned, and that through some mischance the necessary words were omitted.

I have been puzzled as to the effect one ought to attribute to the really remarkable circumstance that the husband in his will of the same date fell into the same error. That might be seized upon as suggesting that it was not an error at all, but that the will was drawn in this way advisedly to meet some eccentric whim of the spouses. On the other hand, it might be said that, if it is improbable that the wife should make a disposition to take effect only in the contingency of herself and her husband both dying at the same time, it is doubly improbable that the husband should have had the same capricious notion. On the whole, I think that this matter does not greatly affect the case one way or the other. At some stage in the preparation of one or other of these wills, whichever was prepared first, this error crept in, or this omission was made, and, once an error has crept in or an

omission has been made in a document, it is not improbable that it will find its way into any copies or adaptations of the document which may be prepared.

The point is a short one and admits of no great elaboration, but, for the reasons which I have endeavoured to express, I think that there is sufficient certainty here as to the omission of words, and as to what the words omitted were, to justify the court in taking a different view from the judge and declaring accordingly. I would therefore allow this appeal.

ROMER L.J. I agree. I observe that Lord Evershed M.R. in *In re Follett* [11] said in the course of his judgment: "We have "not been referred to all the cases, and I do not myself think "that cases are of much assistance, except to express or enshrine "a principle." With that observation I respectfully agree. It is the principle that matters, and that, as my Lord has already stated, is set out quite clearly in Jarman as follows: "Where "it is clear on the face of a will that the testator has not accu-"rately or completely"—and I stress the word "completely"—"expressed his meaning by the words he has used, and it is also "clear what are the words which he has omitted, those words "may be supplied in order to effectuate the intention, as collected "from the context."

The first question, then, which we have to consider is whether, taking this will as we find it, we think it clear that the testatrix here has not completely expressed her meaning by the words which she has used. The judge, as I understand it, from the notes which we have of his judgment, has said that it must be admitted that something has been left out of the will, except perhaps on one view of the matter, which in fact is irrelevant, but he decided against the present appellant because he did not feel certain what form the omission in the will should take. Different minds, of course, take different views on a matter of this sort, but such doubt as I have felt on this case lay rather on whether it was clear on the face of the will that there had been an omission. That doubt, I am bound to say, is somewhat emphasized by the fact that the husband's will executed on the same day had, mutatis mutandis, precisely the same clause in it, so if there was an accidental omission from the wife's will, there was a similar omission from the husband's, and that is a rather peculiar feature of this case. It is rather more difficult, I imagine, to assume that something has been omitted by mistake from two wills than from one. Nevertheless, on the whole, I have come to the conclusion that the testatrix has incompletely expressed her meaning in the words which she has used, and that that mistake or omission found its way from one will into the other. The reason why I think it is reasonably clear that there has been an omission is that it would be capricious in the highest extreme

[11] [1955] 1 W.L.R. 429, 434.

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to suppose that the testatrix intended her sisters and her nephew to take if she, the testatrix, and her husband died simultaneously but that they were not to take if the husband predeceased her. One cannot see any shadow of a reason for that. I think, with my Lord, that what her intention was directed to was to make provision for her husband if he survived her, which she did by clause 2, and then to make provision for her sisters and her nephew if her husband did not survive her, and she did that in an incomplete way by merely limiting her disposition to the case of a simultaneous death, which, of all things, is the most highly improbable thing to happen. It does appear to me, therefore, taking the will as a whole, that the intention was to benefit the sisters and the nephew if by any chance the husband, through predeceasing his wife, was himself unable to take. Therefore I think that the first part of the rule as stated in Jarman is satisfied.

I do not think myself that there is any great difficulty about providing the words which this testatrix, ex hypothesi, has omitted. It is not necessary, of course, to know the precise language which the testatrix must be deemed to have had in her mind; it is sufficient if one knows that she did intend to make a particular provision and what that particular provision was. In my judgment, the provision which she did intend to make, but omitted to make, was that the sisters and nephew were to take either in the event of the husband predeceasing the wife or in the event of the husband and the wife both dying simultaneously. I accordingly agree that the rule or principle stated in Jarman applies to this case and that the appeal should be allowed.

Sellers L.J. I agree that the appeal should be allowed. I cannot believe that the testatrix and her husband, in his turn, were both of them so playful, cynical or eccentric that they decided to leave, by clause 5 of their respective wills, to their relatives or friends part of their estate only in the event, most highly improbable, of their both dying at the same time. The will is a simple one and, construing it in accordance with the principles which my Lord has stated and which I think are well summed up for this purpose in what the Master of the Rolls has recently called the happy phrase of Knight-Bruce L.J. in *Key* v. *Key*,[12] I would regard this will as stating on its face in effect that in the event of the husband living at the time of the wife's death he would succeed to the whole of her estate, but in the event of her living beyond him the bequest made in clause 5 should go as there directed. There is an unfortunate omission in both of the wills which have been put before the court. Harman J. was of the opinion that something had been left out. What troubled him was what should be put in. I think that, if one is seeking to find the precise words, it would be difficult to

[12] 4 De G.M. & G. 73.

say that there might not be many alternatives to fulfil the object of the intention of the testatrix, but to my mind the intention was that, if the husband was not to partake of her estate on her death because no longer alive, it should go in accordance with clause 5. Otherwise clause 5—the most detailed clause in the will—would be practically useless and ineffective.

Appeal allowed.

Solicitors: *J. Eaton & Co.*

[QUEEN'S BENCH DIVISION.]

* STATON *v.* NATIONAL COAL BOARD.

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June 18, 19.
Finnemore J.

Vicarious Liability—Master and servant—Negligence—Accident while employee on way to collect wages—Actual manual work completed—In course of employment.

The plaintiff's husband, an employee of the defendants, died following an accident upon the defendants' premises caused by the negligence of T., another employee of the defendants. T. had completed his work for the day and was on his way to collect his wages from the pay office when the accident occurred:—

Held, that in going to the pay office to draw his wages T. was acting in the course of his employment, and the defendants were accordingly liable for his negligence.

Lowry v. *Sheffield Coal Co. Ltd.* (1907) 24 T.L.R. 142 and *Riley* v. *William Holland & Sons Ltd.* [1911] 1 K.B. 1029; 27 T.L.R. 327 considered.

Crook v. *Derbyshire Stone Ltd.* [1956] 1 W.L.R. 432; [1956] 2 All E.R. 447 distinguished.

ACTION adjourned from Nottingham Assizes.

On November 12, 1954, the plaintiff's husband, a miner employed by the defendants at Bilsthorpe Colliery, Nottingham, was crossing a motor-omnibus park which formed part of the colliery premises when he came into collision with a pedal cycle being ridden by one Harold Townsend. As a result of the injuries he received the plaintiff's husband died the following day. Townsend was employed by the defendants as a full-time first aid attendant. He completed his actual work in the morning, returned home, and then in the afternoon went back to the defendants' premises, and at the time of the accident was cycling from the time office, where he had obtained his time sheet, to the general office, to draw his wages. The defendants required their employees to call at the general office at particular times of the week, of which this was one, to draw their wages.

The plaintiff alleged that the accident was caused by the

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

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negligence of Townsend, and claimed damages from the defendants under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934.

G. R. Swanwick Q.C., *W. W. Stabb* and *D. A. Barker* for the plaintiff.

Richard Elwes Q.C., *G. A. J. Smallwood* and *Charles McCullough* for the defendants.

The following cases were cited in argument in addition to those referred to in the judgment: *Whatman* v. *Pearson* *; *Poland* v. *John Parr & Sons* †; *Ormrod* v. *Crosville Motor Services* ‡; *Davidson* v. *Handley Page Ltd.* §; *Ashdown* v. *Samuel Williams Ltd.* ¶

FINNEMORE J. stated the facts, held that the accident was due solely to the negligence of Townsend, and continued: I now come to the question which has been very fully argued before me, and I am indebted to counsel for their argument. Ultimately the issue is a very short one, and it is simply this: Is a man, after he has finished his actual work, still in the course of his employment when he goes to get his wages? I use the words "in the course of his employment" as meaning that he is still acting in such a way that, if he acts negligently and causes damage, he makes his employer responsible for him.

None of the cases, leaving aside for the moment the workmen's compensation cases, covers this point. *Jefferson* v. *Derbyshire Farmers Ltd.*[1]; *Century Insurance Co.* v. *Northern Ireland Transport Board*[2]; *Crook* v. *Derbyshire Stone Company*[3]; *Brydon* v. *Stewart*[4]; *Lloyd* v. *Grace, Smith & Co.*[5]; *Tunney* v. *Midland Railway Co.*,[6] and other cases cited, all add something by way of illustration to the problem which has to be decided; but none of them is quite the present case. Most of them deal with an entirely different position; for example, whether what the workman was doing at the time was work which he was employed to do but which he did in a negligent way, or whether he was doing something which he was not employed to do or something he was merely permitted to do, or something he was doing for his own purpose. The servant, when he commits the tort, must be acting in the course of his employment, and it is on that point that the argument has taken place. The master is not responsible for a wrongful act done by a servant unless it is done in the course of his employment. Most of the cases are dealing

* (1868) L.R. 3 C.P. 422.

† [1927] 1 K.B. 236.

‡ [1953] 1 W.L.R. 1120; [1953] 2 All E.R. 753.

§ 61 T.L.R. 178; [1945] 1 All E.R. 235.

¶ [1957] 1 Q.B. 409; [1956] 3 W.L.R. 1104; [1957] 1 All E.R. 35.

[1] [1921] 2 K.B. 281.

[2] [1942] A.C. 509; [1942] 1 All E.R. 491.

[3] [1956] 1 W.L.R. 432; [1956] 2 All E.R. 447.

[4] (1855) 2 Macq. 30.

[5] [1912] A.C. 716; 28 T.L.R. 547.

[6] (1866) L.R. 1 C.P. 291.

with the point that an act is presumed to be in the course of the workman's employment if it is, first of all, a wrongful act authorized by the master—that does not apply to the present case—or a wrongful, though unauthorized, mode of doing some act which was authorized by the master. Various other tests have been suggested; it is not enough, for example, that the negligence was committed at a time when the servant was engaged on the master's business; it must be committed in the course of that business, so as to form a part of it, and not merely to be coincident with the time.

I think the answer to much of the argument on both sides is that there is no one test which is exhaustive by which this particular problem can be solved. For example, it is argued for the defendants that Townsend was engaged to give first-aid to men who got injured; that was his full-time employment. The defendants say that he cannot have been the first-aid man doing the work he was employed to do when he was going to draw his wages, and they say that collecting his pay is not a mode of doing his work. If that were a final test, that would be a perfectly sound argument; and Mr. Elwes, in developing his case, said that Townsend was not doing what he was employed to do; he was not committing a tort while at work like the driver who drives negligently; it is quite true that he was riding a bicycle on his master's land, but not in the course of his employment, because he was the first-aid man. Mr. Elwes also argued that to go and draw his wages was not something so incidental to his employment—that is, his first-aid work—as to make it indistinguishable, but that it was a distinct and separate act; all he was doing was going to draw his money and that was a matter for himself alone quite apart from his work and could not be said to be in the course of his employment so as to bring his master into responsibility for his negligence.

Mr. Swanwick argued that he was acting in the course of his employment because he was about business which equally concerned the master as the servant; it is in the interest of the master as well as the servant for the servant to draw his wages and the master should pay them; otherwise no work would be done. He says, therefore, that it is in the interest of both of them, although "interest" is not the only test; but he says that it is part of the business of both of them, and it was Townsend's duty to go and collect his wages. It is quite true that the general rule of this country is that the debtor must seek out his creditor to pay him, but it has always been accepted that, so far as the collection of wages is concerned, particularly in a big concern, there is a proper place to which the workman goes. It is in his interest and for his advantage, and also in the interest of the employer and for his advantage. Mr. Swanwick says that it was, at all events, partly the duty of the employee, Townsend, to go to the pay office to draw his money, and it was partly at least the business of the master, who had to pay the wages and who

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found it convenient to pay them at that place. In any event it was something reasonably incidental to the business of the employer and to the employment in which the servant was actually employed.

One has to approach questions of this sort in a common sense and realistic way. I confess that, apart from any authority, I should have said that a man is still in the course of his employment when he goes to collect his wages on his master's premises. It seems to me to be wholly unrealistic to say that a man who has finished the manual work he is employed to do and is walking across his master's premises to collect the wages which the master had contracted to pay him and for which he has done the work, has ceased to be in the course of his employment. There has been nothing to break the course of his employment. He has not gone off on any frolic of his own; he has not begun to do something solely for his own interest, for I think it is in the interest of the employer as well as the employee that a workman should receive his wages and receive them at a convenient place and at a convenient time. In *Lloyd* v. *Grace, Smith & Co.*[7] it was said that the term "course of employment" ought to be liberally construed; and in the much older case of *Brydon* v. *Stewart*[8] Lord Cranworth L.C. said: "I quite adopt the argument of the "Solicitor-General, that a master is only responsible while the "servant is engaged in his employment; but then we must take "a great latitude in the construction of the phrase 'being "'engaged in his employ.'" Then he adds[9]: "But whatever "the man does in the course of his master's employ, according "to the fair interpretation of these words eundo, morando, "redeundo, the master is responsible." It is quite true, as Mr. McCullough has pointed out, that that was a case dealing with the responsibility of the employer to the workman in the workman's interest. On the other hand, it was also a case where the workman was leaving his work wholly for a purpose of his own and not, I think, a permitted purpose either.

In *Crook* v. *Derbyshire Stone Ltd.*[10] the facts are quite different. There a lorry driver, having parked his lorry, was involved in an accident as he crossed a public street to get refreshment at a café. Pilcher J. found that, although it was known to the employer that that sort of thing was done, and it was a perfectly proper thing to do, as soon as the driver had parked his lorry to cross the highway to the café, he had temporarily ceased to be in the course of his employment and was going to the café for his own purposes. That is quite different from the present case, unless it can be held that, when a man goes for his wages, he is doing something which is no longer a part of his employment and in which the master has no interest, and is doing something purely for his own concern.

[7] [1912] A.C. 716, 736; 28 T.L.R. 547.

[8] 2 Macq. 30, 35.

[9] Ibid. 36.

[10] [1956] 1 W.L.R. 432; [1956] 2 All E.R. 447.

To my mind, that argument seems an impossible one, and I find myself quite unable to take the view that an employee on his master's premises going to get his wages ceases to be in the course of employment by his master.

Applying the general principles of the cases cited to this case I think Townsend was acting in the course of his employment. It is a matter of degree and, of course, there has got to be a limit, and when he was off the premises—for example, when he was on the Queen's highway on the way to his place of employment to get his wages—it could be argued, I should think with success, that he was not in the course of his employment; but that is not for me to decide. I think, however, that when he is actually on his employer's premises going to the place which the employer had said was the place to which he was required to go to draw his wages, it would be a very unreal and strange state of affairs if he was no longer in the course of his employment.

Two cases were cited by Mr. Swanwick that were decided under the Workmen's Compensation Acts, 1897 and 1906. I appreciate that cases on "the course of employment" under the Workmen's Compensation Acts might not always be of final and binding authority when one is dealing with the vicarious liability of the master for the tort of his servant; but here are two cases, on the facts almost exactly in point with the present case, where the Court of Appeal had to decide, under the Workmen's Compensation Act, the meaning of the phrase "in the course of his employment" as applied to a man who was going to collect his wages. *Lowry* v. *Sheffield Coal Co. Ltd.*[11] is perfectly plain. If it is a binding authority in the present case, then the whole matter becomes quite unarguable, because the facts are so very similar. It happened to be a coal mine as well, but that does not really matter. The collier in that case was required to go to the pay office to get his wages. He left work at 5 o'clock on the Saturday morning and he went back at 12.30, and he was going along for his wages when he was injured by an engine on a line. Exactly the same arguments were put forward in that case as in the present. As now, he had finished his work; he was not going to resume work until the following Sunday night. Indeed, the county court judge was persuaded by that argument. He said that "the "accident happened on or about the premises" of the employers, "but that it did not arise in the course of and out of his "employment."

Cozens-Hardy M.R., giving a short judgment, said[12]: "It "was admitted that it was part of the contract of employment "that the company should pay this man at their pay office and "that he should go there to get his wages. While going to the "pay office to get his wages he met with an accident on the "company's premises. In these circumstances the court was

[11] (1907) 24 T.L.R. 142. [12] Ibid. 142, 143.

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"asked to say that the accident did not arise in the course of "his employment. In his Lordship's view it was just as much "part of his employment to go to the pay office on that day at "that hour as it was to go down the pit on the following Sunday "night. The appeal must be allowed."

If that is a binding authority on this present case, there is an end of the matter, but whether it is or not I entirely agree with what the Master of the Rolls said (and it was the unanimous judgment of the court), that it was as much part of the employment of the collier to go to the pay office as it was to go down the pit or to do whatever work he was employed to do. In this case I think it was as much Townsend's duty and as much part of his employment to go to collect his wages where his employer said he had to collect them as it was to go and do his first-aid work day by day. It was an act incidental to his employment, and essentially incidental to it.

There is no need to do more than mention *Riley* v. *William Holland & Sons Ltd.*,[13] where that same case was extended to the case where a woman's employment had come to an end on a Wednesday and she went back for her wages on the following Friday in accordance with the practice at that work-place, and it was held that she was still in the course of her employment when she was at the mill at which she had been employed and to which she had gone on the Friday, according to the arrangement, to get her wages due the previous Wednesday when her work had actually come to an end.

In my view, Townsend, going to get his wages on his employer's premises at the place to which they had decided that he should go, was acting in the course of his employment and, therefore, the employers are responsible for the negligent way in which he rode his bicycle.

Judgment for the plaintiff.

Solicitors: *Hopkin & Sons, Mansfield; Lawrence C. Jenkins, Nottingham.*

[13] [1911] 1 K.B. 1029; 27 T.L.R. 327.

[PROBATE, ETC., DIVISION.]

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June 5.

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* HINDLEY *v.* HINDLEY.

Husband and Wife—Divorce—Marriage settlement—Test of—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 24, 25. *Injunction—Marriage settlements.*

A husband claimed that he caused to be paid to a wife, at a time when she was his mistress, a sum of £45,000, hoping that she would marry him and desiring to show that he would make proper provision for her; and that shortly after the marriage the trustees of a

settlement, having an absolute discretion to pay sums of money to persons or classes of persons, one of which was the wife, for their "absolute use or benefit," paid to the wife a sum of £68,000.

The husband commenced divorce proceedings and, invoking the power of the court under sections 24 and 25 of the Matrimonial Causes Act, 1950,[1] with regard to these transactions and a covenant which he had executed in favour of the wife, sought an injunction restraining the wife from disposing of funds representing the "ante-nuptial settlement" of £45,000 and the "post-nuptial "settlement" of £68,000:—

Held, that provision made by one spouse for another which was not in the nature of periodical payments and which resulted from completed transactions, vesting in the other spouse a right to deal absolutely with the subject-matter, were not, prima facie, settlements under sections 24 and 25 of the Act of 1950, and, accordingly, the application for an injunction should be refused.

Bosworthick v. *Bosworthick* [1927] P. 64; 42 T.L.R. 719 and *Parrington* v. *Parrington* [1951] 2 T.L.R. 918; [1951] 2 All E.R. 916 applied.

Per curiam. Had the transactions prima facie amounted to settlements, the court would have had power to issue an injunction.

Scott v. *Scott* [1951] P. 193; 66 T.L.R. (Pt. 2) 823; [1950] 2 All E.R. 1154 distinguished.

SUMMONS for an injunction.

The parties were married on October 14, 1955. The husband was a widower of 67 years of age and the wife was 48 years of age; she had been previously married, but her previous marriage had been dissolved. On April 2, 1957, the husband filed a petition seeking a dissolution of the marriage on the ground of the wife's cruelty, leave having been granted by Collingwood J. on February 26, 1957.

On May 28, 1957, the husband served an application for ancillary relief, namely, for an inquiry as to ante-nuptial and post-nuptial settlements made on the wife, and in particular three, namely: (a) an ante-nuptial settlement consisting of sums totalling about £45,000 paid to the [wife] between 1952 and 1955 the result of certain stock exchange transactions financed by the [husband]; (b) a deed of covenant made May 7, 1954, between the [husband] and the [wife], whereunder the [wife] received the monthly sums of £83 6s. 8d. less income tax; (c) a post-nuptial settlement of £68,000 upon the [wife] made in or about

[1] Matrimonial Causes Act, 1950, s. 24: "(1) If it appears to the "court in any case in which the court "pronounces a decree for divorce or "for judicial separation by reason of "the adultery, desertion or cruelty of "the wife that the wife is entitled to "any property either in possession or "reversion, the court may, if it thinks "fit, order such settlement as it "thinks reasonable to be made of the "property, or any part thereof, for "the benefit of the innocent party, "and of the children of the marriage "or either or any of them. . . ."

S. 25: "The court may after pronouncing a decree for divorce or for "nullity of marriage enquire into the "existence of ante-nuptial or post-"nuptial settlements made on the "parties whose marriage is the subject of the decree, and may make "such orders with reference to the "application of the whole or any part "of the property settled either for "the benefit of the children of the "marriage or of the parties to the "marriage, as the court thinks "fit. . . ."

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December, 1955. He sought the variation of those settlements by striking out all rights, interests and powers of his wife in them, or alternatively, the settlement of the wife's property as contained in the first and the third of the transactions which were alleged to constitute settlements.

On May 28, 1957, the husband took out a summons calling upon the wife to show cause why she should not be restrained by an injunction from disposing of funds representing an ante-nuptial settlement of £45,000 and a post-nuptial settlement of £68,000 pending the determination of the suit, the husband having applied to vary the said settlements.

The way that those sums of money came into existence was set out in an affidavit by the husband to which, at the date of the hearing, the wife had not replied. For the purpose of the application the husband's evidence was, therefore, taken as being substantially accurate. The affidavit read: "I met the respondent in 1951 when I was a widower and the respondent had divorced her husband. I was very much attracted by the respondent and I desired to marry her. I gave the respondent a fur coat and jewellery to the value of about £8,000 and expended money on clothes for her. I also spent substantial sums of money on furnishing and redecorating her flat in London. Between 1952 and 1955 there were a series of Stock Exchange transactions which I financed and which resulted in substantial profits. I directed the stockbroker to pay half the profit from these transactions to the respondent and the respondent received from this source in all about £45,000. When the said payments were made to the respondent, the relationship between us was that she permitted me to have intercourse with her and gave me to understand that she would become my legal wife but she was evasive as to when and she raised objections to living in the North of England. My intention in causing the said payments to be made to the respondent was not to make an absolute gift of the same to her but to make some continuous provision for her on the footing that she would become my wife, to show her that, though I was much older than she, I would make proper provision for her if I predeceased her and to give her some compensation for giving up her London life and friends and living with me in Yorkshire, and I expected that as her husband I would derive some joint benefit from the same. On the 7th day of May, 1954, I executed a covenant to pay the respondent the monthly sum of £86 6s. 8d. less tax. The circumstances in which I executed the said deed were that the respondent had told me that she had received a proposal from another man. I asked the respondent whether if I made the said provision for her it would finally resolve her to marry me and the respondent said that it would. Very shortly after my marriage to the respondent the respondent raised the question of a marriage settlement. I was myself unable to make any further settlement but there was in

"existence a trust fund over which I had no control but whereof "the trustees had power to appoint funds to the respondent as "my wife, and in November, 1955, the said trustees paid to the "respondent the sum of £68,000 with which investments were "purchased for her which have considerably augmented in "value." The affidavit exhibited a copy of the settlement under which the trustees acted, the relevant clause in which read: "Notwithstanding any of the trusts and provisions in these "presents, the trustees may in their absolute discretion at any "time or times hereafter transfer or pay any part or parts of the "trust funds to anyone or more exclusive of the others or other "of the persons mentioned or referred to in clause 3 hereof who "has or have at the time of such transfer or payment attained "the age of 21 years for his or her absolute use or benefit." The wife was included in the category specified in clause 3. The affidavit continued: "I gave her after the marriage jewellery to "the value of about £4,000. The respondent did not bring any "funds into settlement." The husband, by his affidavit, then asked that all three transactions should be varied, the first two as ante-nuptial settlements and the third as a post-nuptial settlement, or, alternatively, if it were found that the wife had a proprietary interest in the funds, that they should be settled on him.

In addition, he filed an affidavit saying, in effect, that the wife had told him that she was proposing to leave England and go to the United States of America and live with her sister there, and that she might be taking steps to remove the funds from the jurisdiction. By a further affidavit he stated that, as a director of British Home Stores Ltd., he knew that the respondent had recently executed transfers of 2,000 ordinary shares and 15,000 A ordinary shares in that company which had been stamped with a nominal duty of ten shillings each.

At the date of the application the wife had entered an appearance but had filed no answer, the time for which had expired. Counsel for the wife, however, intimated in the course of the hearing that it was her intention to contest the suit.

Armstead Fairweather for the husband.
Victor Williams for the wife.

The cases cited in argument were, in addition to those referred to in the judgment: *Waterhouse* v. *Waterhouse*[2]; *Noakes* v. *Noakes and Hill*[3]; *Jagger* v. *Jagger*[4]; *Dormer* (*orse. Ward*) v. *Ward*[5]; *Bown* v. *Bown and Weston.*[6]

DAVIES J. stated the facts, referred to the provisions of sections 24 and 25 of the Matrimonial Causes Act, 1950, remarking that, although orders under sections 24 and 25 of the Matrimonial Causes Act, 1950, could not be effective until after a

[2] [1893] P. 284.
[3] (1877) 4 P.D. 60.
[4] [1926] P. 93; 42 T.L.R. 413.
[5] [1900] P. 130; 16 T.L.R. 220.
[6] [1949] P. 91; 64 T.L.R. 516; [1948] 2 All E.R. 778.

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decree had been pronounced, the application for such orders could be made at any time after the commencement of the suit, and continued: The question I have to decide is really a two-fold one, viz., whether I ought to grant an injunction against the wife from in any way dealing either with this £45,000 or with this £68,000. It is not, of course, suggested that any injunction should be granted in connexion with the covenant to pay the monthly sum of £86 6s. 8d., that is to say, £1,000 a year, less tax.

It is said on behalf of the wife, first, that, whatever view I take about the matter, the court has no power to grant such an injunction. It is said, secondly, as I understand it, that really there is very little evidence in this case of any action, or threatened action, by the wife which would justify the court in granting such an injunction, if it were to come to the conclusion that it has jurisdiction. And it is said, thirdly—really the first point in order of logic—that these are not settlements at all of the kind which the court has power to vary.

With regard to the power of the court to grant an injunction in such a matter as this, rightly or wrongly I have come to a firm conclusion that the court has such power. I need not refer to the general power of the court to grant injunctions; but what is said against the exercise of such a power here is that there is authority for the proposition that the court cannot exercise that power in a case such as the present. That proposition is based on the decision of the Court of Appeal in *Scott* v. *Scott*.[1] I think really it is sufficient for me to read the headnote: "It is "an established principle that the courts will not grant a wife "an injunction to restrain her husband from removing any of "his assets out of the jurisdiction of the courts unless there has "been and remains a subsisting order for the payment of a sum "of money. That principle still applies where an application "has been made to the High Court under section 5 of the Law "Reform (Miscellaneous Provisions) Act, 1949, for maintenance "on the ground that the husband has been guilty of wilful "neglect to provide reasonable maintenance for the wife and "the infant children of the marriage." That, of course, is the present section 23 of the Matrimonial Causes Act, 1950.

As I see it, that decision of the Court of Appeal which is, of course, binding upon me—and there are other authorities to the like effect—really amounts to this: unless and until the order has been made against the husband that he should pay sums of money to his wife, the court will not prevent the husband from dealing with his properties or his assets. That, in my judgment, is an entirely different state of affairs from that which we are dealing with here today. What we are dealing with here today is not an attempt to prevent the wife from dealing with what are admittedly her assets, as in the case of a husband against whom an order for permanent maintenance or alimony, whatever it may

[1] [1951] P. 193; 66 T.L.R. (Pt. 2) 823; [1950] 2 All E.R. 1154.

be, may be made, but a case where it is said, on behalf of the husband, that these two sums of money which have passed into her hands are not in fact her own unfettered property, but are property which is subject to a settlement and property which the court may take away from her. That seems to me to be different from property out of which a party may have to satisfy any order that is made—either altogether or in part. Supposing you had a case where undoubtedly there had been a settlement and there was evidence that one of the parties was making away with some of the assets comprised in the settlement in such a way that the power of the court to deal with it when it did come to deal with it would be interfered with and impaired, it seems to me absurd to suggest that the court would not exercise its summary remedy or power of granting an injunction to prevent its own jurisdiction from being stultified in that way. Therefore, if I were to come to the conclusion that this was a proper case in which to grant an injunction, I should have had no doubt about my power to do so.

But is it a proper case for an injunction? The main question on that, though there is a subsidiary question, seems to me to be whether there is a prima facie case that either or both of these transactions, the successful Stock Exchange speculation and the payment of the share of the profits of the amount said by the husband to be £45,000 (though there appears to be some dispute about the provenance of these funds) and the payment by the trustees of £68,000, are settlements. I want to be a little careful, as I am not now trying the question as to whether or not these are settlements which are capable of being varied. I want to be careful not to be thought to be expressing any decided opinion on the matter at all. I am not. But it is inevitable that I should, in deciding whether to exercise the jurisdiction that I am asked to exercise, consider whether prima facie these strike me as being settlements to such an extent that I ought to interfere, at this stage, to prevent this lady from doing whatever she is doing, or she is about to do, with these sums of money.

I will just say one word or two about the actual transaction before I come to the arguments. The arguments were not one whit too lengthy, and I am very grateful to counsel on both sides for the assistance they have given me in what is not a particularly easy matter. The £45,000 is said by the husband to have been half the profits which he made in speculating on the Stock Exchange between 1952 and 1955, and he says that he told the stockbrokers to pay this £45,000 to the wife when she was his mistress. He says that he was hopeful that she would marry him; there was no agreement to marry; she was evasive about it; and he wanted to make provision for her on the footing that she would become his wife. With regard to the £68,000, as I have already indicated, he says that after the marriage she said: "What about a settlement?" He apparently had not a lot of free capital but he was interested in a very large

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settlement under which the trustees had an absolute discretion to pay sums of money to various specified persons, or class of persons, one class of person being the wife of the petitioning husband. The relevant clause in the deed is this: "Notwithstanding any of the trusts and provisions in these presents the "trustees may in their absolute discretion at any time or times "hereafter transfer or pay any part or parts of the trust funds "to any one or more exclusive of the others or other of the "persons mentioned or referred to in clause 3 hereof who has "or have at the time of such transfer or payment attained the "age of twenty-one years" (and the respondent as the petitioner's wife is included in the specified category) "for his or "her absolute use or benefit." The next part of the clause has nothing to do with this case; it only means that the trustees are not bound to take any such step. Acting under that clause, as is, I gather, not disputed, the trustees paid over to the wife the sum of £68,000, and that payment presumably was in the exercise of their power to pay over for her absolute use or benefit. It is said by Mr. Fairweather that the only capacity in which she could get that money was as the wife of the petitioner, and, as she received that money in the capacity of the wife, it must be treated as a post-nuptial settlement, just as, by the same token, the £45,000 which she received before the marriage was paid to her in her capacity as a wife to be. Therefore, it is said, each of these transactions falls within the section of the Act of Parliament to which I have referred, section 25, as to which there is abundant authority in many cases, quite a number of which have been referred to today, that it must be widely construed and that the power of the court must not be narrowly applied.

I am not going to go through anything like all of the interesting authorities and arguments that have been cited and advanced today. Two cases to which Mr. Victor Williams for the wife referred in particular were a decision of Sir Francis Jeune P. in *Chalmers* v. *Chalmers*,[2] and a subsequent decision of the Court of Appeal in *Hubbard* (*orse. Rogers*) v. *Hubbard*,[3] where the facts were these[4]: "A husband executed a deed by which he assigned "to a trustee a leasehold house and some furniture, upon trust to "assign the same at once to the wife absolutely, and the trustee "assigned the same accordingly. The wife afterwards obtained a "decree of nullity of marriage:—*Held*, reversing the decision "of the President, that the assignment was not a 'settlement' "within section 5 of the Matrimonial Causes Act, 1859," corresponding to our present section, "and that the court had no "jurisdiction to vary its provisions."

Mr. Fairweather, on the other hand, has cited to me a number of authorities of which the principal ones were *Gulbenkian* v.

[2] (1892) 68 L.T. 28.
[3] [1901] P. 157.
[4] Ibid.

Gulbenkian,[5] *Gunner* v. *Gunner and Stirling*,[6] which is a decision of Wallington J., and *Parrington* v. *Parrington*,[7] and also an earlier case, *Melvill* v. *Melvill and Woodward*.[8]

It is difficult indeed to find any real test as to what is a settlement. One almost feels, so difficult is the question, that in some of the cases one is being told there is a settlement when something is settled; but that does not help one very much unless one knows what is the meaning of "settled." I am bound to say that in seeking to follow the authorities that have been cited I was struck particularly by two passages. The first was the observation of Romer J. in *Bosworthick* v. *Bosworthick*,[9] quoted by Wallington J. in *Gunner* v. *Gunner and Stirling*,[10] where Romer J., sitting in the Court of Appeal in that case, said this: "'We have had "'numerous authorities cited to us going as far back as 1861, and "'amongst them an authority which is binding on this court, and "'in my judgment those authorities establish that where a "'husband has made a provision for his wife, or a wife for her "'husband, in the nature of periodical payments, that amounts "'to a settlement within the meaning of the sections. That may "'appear to be a very liberal construction of the sections, but I "'think that it is no more liberal a construction than should be "'given to them having regard to the obvious purposes for which "'they were enacted by the legislature.'" And I suppose it is in accordance with that sort of principle that the insurance policy cases, some of which have been cited today, were decided. But Romer J. was there emphasizing that one of the matters which is relevant in considering whether it is a settlement or not is: is there something in the nature of periodical payments?

Again, in one of the most recent cases on the subject, Pearce J., in *Parrington* v. *Parrington*,[11] after reviewing the authorities, referred[12] to *Hubbard* (*orse. Rogers*) v. *Hubbard*.[13] "In "*Hubbard* v. *Hubbard*,[14]" he said, "the husband had assigned "a house to trustees for the wife and the trustees had assigned "it to her absolutely. But in the case before me the wife will for "some years to come have to make payments under the bond, "and the husband will remain liable as guarantor in respect of the "wife's obligations under the mortgage, if she should make "default. I do not think that it can properly be said that the "transaction was wholly over and done with on either side and "that the original post-nuptial settlement constituted by the "purchase of the hotel has ceased to exist."

In the present case I bear in mind that the last thing I want to do is to be thought to be attempting to decide whether these are settlements, and that I am merely considering whether they strike me as being prima facie settlements which ought in the

[5] [1927] P. 237; 43 T.L.R. 267.
[6] [1949] P. 77; 64 T.L.R. 513; [1948] 2 All E.R. 771.
[7] [1951] 2 T.L.R. 918; [1951] 2 All E.R. 916.
[8] [1930] P. 159; 46 T.L.R. 327.
[9] [1927] P. 64, 72; 42 T.L.R. 719.
[10] [1949] P. 77, 86.
[11] [1951] 2 T.L.R. 918.
[12] Ibid. 922.
[13] [1901] P. 157.
[14] Ibid.

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circumstances to be given the anticipatory protection of an injunction. There is, as I can see it, no element of periodicity either with regard to the £45,000 (which strikes me, I confess, as something more in the nature of a present to a mistress than anything else) nor in the case of the £68,000. And when one asks in regard to each transaction whether anything remains to be done, or whether it is over and done with, the answer, as I think, is that it is over and done with. The wife has had this money and, as I ventured to suggest in the course of argument, I cannot see what wrong she would have done, although she might have been foolish and improvident, if having had the money she had thrown it away or put it on a horse. I am quite unable to see, having given the best consideration to it that I can, that with regard to either of these two transactions, the £45,000 transaction or the £68,000 transaction, there is such a likelihood of them being held to be in the one case an ante-nuptial settlement or in the other case a post-nuptial settlement that I ought to exercise the jurisdiction which is invoked, namely, to prevent this wife from dealing with whatever may be left of either sum of money in whatever form the sum of money may now be. The evidence as to her threat to make away with the money or take it abroad is not perhaps very strong; but I do not base myself on that ground. I base myself on the other ground, namely, that I am not satisfied at this stage that the case is one in which I ought to grant the injunction which is asked for. Accordingly, this summons fails and must be dismissed.

Application dismissed.

Solicitors: *Bernard Taylor & Douglas Mann; Withers & Co.*

E. J.

[COURTS-MARTIAL APPEAL COURT.]

C.-M. A. C.

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June 20, 21.

Lord Goddard C.J., Byrne and Devlin JJ.

* REGINA *v.* GRANT AND OTHERS.

Military Law—Mutiny—Meaning of "mutiny"—Not mere disobedience—Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 7.

The appellants were convicted by a general court-martial of mutiny contrary to section 7 of the Army Act, 1881.[1] During the course of the final speech by one of the appellants' counsel the

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

[1] Army Act, 1881, s. 7: "Every "person subject to military law who "commits any of the following "offences; that is to say, (1) causes "or conspires with any other persons "to cause any mutiny or sedition in "any of His Majesty's military, "naval or air forces . . . (3) joins in, "or being present does not use his "utmost endeavours to suppress, any "mutiny or sedition in any force as "aforesaid . . . shall, on conviction "by court-martial, be liable to suffer "death, or such less punishment as "in this Act mentioned."

judge advocate intervened and said: "I do not want to interrupt "you, but I shall have to direct the court that you cannot, under "the Army Act, charge men with joint insubordination. You can-"not charge men jointly with insubordination because it is mutiny." On appeal against conviction:—

Held, that mutiny was concerned with collective insubordination, defiance or disregard of authority, and a simple act of disobedience by two or more men subject to military law did not of itself amount to mutiny; but that the intervention by the judge advocate did not, in the light of his later summing-up, amount to a misdirection, since it would not lead the court-martial to consider that all joint acts of disobedience would amount to mutiny.

APPEALS against conviction.

The appellants, Corporal Keith Roland Grant, Corporal Peter John Davis, Private Trevor Riley and Private Brian Topley, were among a large number of reservists recalled in the summer of 1956 and sent to Platres, Cyprus. The men were rather unsettled and a particular complaint they had was that grievances allegedly could not be placed before the commanding officer. The events alleged against the appellants all occurred between 9.15 p.m. and 11.15 p.m. on October 1, 1956. It was an off-duty period, and the only specific military duty which had to be performed was a bed check at 10 p.m. At 9.30 p.m. a group of men left the canteen where they had been drinking and walked round the gardens of the hotel at which they were billeted. There was a certain amount of shouting and loitering by the sentry post. The guard commander told them to go away and, upon their not doing so, an officer came and reminded them of the bed check. Davis marshalled the men back to their rooms for the bed check which was quietly and properly carried out. After the bed check a suggestion was made that the men should hold a meeting on the hotel roof, and a large body of men gathered there and expressed their grievances. As a result of another suggestion the men streamed down the stairs into the grounds, pushed over a shed which was used as a barber's shop, and returned to the roof. The guard commander called out the guard and a warrant officer went on to the roof and either ordered or advised the men to go to bed. The men did not do so, but said that they wanted their grievances heard, and when the regimental sergeant-major arrived upon the roof the appellant, Grant, was made their spokesman. The sergeant-major told the men that he would see the commanding officer that evening and promised that anyone wishing to do so could put his grievances to the commanding officer the following morning. The men then retired to bed quietly upon the sergeant-major's order. The next morning after a muster parade 23 men went individually before the commanding officer to state their grievances, but instead of being allowed to do so were charged with failing to report a mutiny. The four appellants were, together with three other men, subsequently charged with mutiny. All the appellants were found guilty and Grant was additionally found

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guilty of common assault, at a general court-martial held at Nicosia, Cyprus, on November 7 to November 12, 1956.

They appealed.

Joseph Dean for the appellants Grant and Davis.

Kenneth Harington for the appellants Riley and Topley.

E. Garth Moore for the Crown.

No cases were cited in argument.

LORD GODDARD C.J. The appellants in this case were convicted by a general court-martial held at Nicosia in Cyprus of the offence of mutiny, and they appeal to this court, their petition having been dismissed by the Army Council, on the ground that there was misdirection, and also on the ground that there was no evidence of joint intention to mutiny. [His Lordship stated the facts, said that there was abundant evidence upon which the court could have convicted, and continued:] The men were charged under the provisions of the Army Act, 1881, because the Army Act, 1955, did not come into force till January 1, 1957. [His Lordship read section 7 of the Army Act, 1881, and continued:]

The first question we have to consider in this case and which has been principally debated here is: what is mutiny? There is no doubt that mutiny is a collective offence, that is to say, it cannot be committed by one man. Whatever may have been thought in the days of the Peninsular war—and there seem to be cases referred to in textbooks of some degree of authority showing that in the Peninsular war people were executed for mutiny though the acts were the acts of individuals and not a combination of individuals—there is no doubt that the modern idea of mutiny is that it is an offence of collective insubordination, collective defiance or disregard of authority or refusal to obey authority. I think that complies with the definition which is given in the Oxford Dictionary and in other works of reference.

In the eighth edition of the Manual of Military Law, which, of course, sets out the practice of courts-martial and directions of judge advocates to courts-martial and the rulings of judge advocates—because until very recently there was no Courts-Martial Appeal Court consisting of non-military judges—the note to section 7 is [1]: "Mutiny implies collective insubordination, or "a combination of two or more persons to resist, or to induce "others to resist, military authority." In point of fact there is no offence of simple insubordination provided for in any section of the Army Act, but everybody knows that insubordination means a refusal to subordinate oneself to authority, and it does not follow that a mere failure to obey an order amounts to insubordination. It would not be said either in military or civilian circles that that was so. A schoolboy might be told he was not to go

[1] At p. 200.

to a certain place to buy sweets at a shop, and if he disobeyed the order it does not at all follow that he is insubordinate or that it would be proper to call him insubordinate. So, if a soldier was told that he was not to go to a place described as out of bounds, and disobeyed the order, he would be guilty of disobedience, but it could hardly be said he was insubordinate merely because he did it, though if he met an officer who said: "Turn back, you "are going where you ought not to," and he said: "I intend to "go on and I will go on," then he is showing he will not subordinate himself to military authority and he becomes insubordinate.

The reason why this matter is of some importance in this case is because, in the course of Mr. Dean's address to the court-martial, the judge advocate said: "You know, Mr. Dean—I do "not want to interrupt you—but I shall have to direct the court "that you cannot, under the Army Act, charge men with joint "insubordination. You cannot charge men jointly with insubor-"dination because it is mutiny." Mr. Dean relies upon that as a serious misdirection. It is not necessary for us to say more than this: we could not regard that as a misdirection unless we thought it would lead the court-martial to consider that every act of disobedience if committed by one or more men would amount to mutiny. It is not one or more acts of disobedience which amount to mutiny. The question whether one or more acts of insubordination can amount to mutiny is quite a different matter. At any rate, we need not say more with regard to the actual passage than that we do not think it could have led the officers who formed this court-martial to believe that a simple act of disobedience by two or more men at the same time could amount to mutiny.

The judge advocate concluded his summing-up with these words: "On that evidence, Sir, you have got to say whether you "are satisfied that the purpose of these men was, as alleged by "the prosecution, to get their grievances heard that night at all "costs, no matter what authority were going to do about it, in "which case you will probably hold that it amounted to a mutiny, "or whether you are satisfied that all it was was a rather dis-"orderly prank done with no intention of defying authority, in "which case you may take the more merciful view and hold that "it was not a mutiny." That, I think, put the matter as fairly as it could possibly be put and, indeed, very favourably to the defence. They were the last words of the judge advocate which the court-martial would hear when they went out to consider their findings, and there are no words of the judge advocate there which would lead the court to think that mere disobedience of an order would amount to mutiny. It was a question of whether there was a defiance of authority.

For the reasons I have endeavoured to state as shortly as I can, the court is of opinion that there is no misdirection here, that although perhaps criticism could be made of the words the judge advocate used when he did make his interlocutory observation, we

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think there was here a perfectly fair direction, and that there was nothing said by the judge advocate which could have misled the court-martial. Therefore, on all these grounds we think that the appeals should be dismissed.

Appeals dismissed.

Solicitors: *Registrar, Courts-Martial Appeal Court; Director, Army Legal Services.*

[QUEEN'S BENCH DIVISION.]

1957
June 20.

Lord Goddard C.J., Byrne and Devlin JJ.

* WILLIAM GWENNAP (AGRICULTURAL) LTD. *v.* AMPHLETT.

Road Traffic—Special type of vehicle—Width—Motor tractor towing land implement on road—Whether one vehicle—Overall width—Motor Vehicles (Construction and Use) Regulations, 1955 (*S.I.* 1955, *No.* 482, *as amended by S.I.* 1956, *No.* 540), *reg.* 33—*Motor Vehicles (Authorisation of Special Types) General Order,* 1955 (*S.I.* 1955, *No.* 1038, *as amended by S.I.* 1956, *No.* 1265), *reg.* 10 (*c*) (*ii*) *and* (*d*).

In September, 1956, an employee of the appellants, who were agricultural engineers, was driving along a road a motor tractor towing a combine harvester. The combine harvester, which was not a mechanically propelled vehicle but which relied on a tractor for its power, was a "land implement" within the meaning of regulation 3 (1) of the Motor Vehicles (Construction and Use) Regulations, 1955,[1] and the appellants were collecting it for repair. The tractor, which was less than 7 feet 6 inches in width, was a "land "tractor" within the meaning of regulations 3 (1) and 10 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955,[2] and the combined width of the two vehicles, which overlapped, was 12 feet 6 inches.

The appellants were convicted by the justices on informations which alleged that they failed to comply with the requirements of regulation 10 (*c*) (ii) and (*d*) of the Motor Vehicles (Authorisation

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[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

[1] Motor Vehicles (Construction and Use) Regulations, 1955, reg. 3: "(1) 'land implement' means any "implement or machinery used with "a land locomotive or a land tractor "in connexion with agriculture, grass "cutting, forestry, land levelling, "dredging or similar operations . . ."

Reg. 33: "The overall width of a "motor tractor shall not exceed seven "feet six inches."

[2] Motor Vehicles (Authorisation of Special Types) General Order, 1955, art. 10: "The Minister authorises "the use on roads of land tractors "constructed for the combined pur-"pose of reaping and threshing not-"withstanding that such vehicles do "not comply with the requirements of "regulations 33 and 34 . . . of the "Construction and Use Regulations, "subject to the following conditions: "—(*c*) Where the overall width of "a vehicle . . . (ii) exceeds eleven "feet, two persons, in addition to the "driver, shall be in attendance . . . "(*d*) before using upon a road for a "journey exceeding five miles a "vehicle the overall width of which "exceeds nine feet six inches the "owner shall give not less than "twenty-four hours' notice to the "Chief Officer of Police [for the "area] . . ."

of Special Types) General Order in that, the vehicle exceeding 11 feet in width, two persons were not in attendance additional to the driver, and that, the vehicle exceeding 9 feet 6 inches in width, the chief constable had not been notified of the proposed journey. There was no separate information preferred alleging that the motor tractor was more than 7 feet 6 inches in width contrary to regulation 33 of the Motor Vehicles (Construction and Use) Regulations, 1955. On appeal against conviction:—

Held, that regulation 10 of the Motor Vehicles (Authorisation of Special Types) General Order afforded a defence to regulation 33 of the Motor Vehicles (Construction and Use) Regulations, 1955, and did not create new offences, but that, in any event, no offence had been committed under regulation 33 because the motor tractor and combine harvester remained two separate vehicles, even though they were coupled together and the tractor could have been used to provide power for the combine harvester.

Rogerson v. *Stephens* [1950] 2 All E.R. 144 applied.

CASE STATED by Stafford justices.

Informations were preferred against the appellants, William Gwennap (Agricultural) Ltd., and Kenneth William Dyde, by the respondent alleging that on September 5, 1956, at Stafford, they used on a road an agricultural tractor towing as a trailer a combine harvester, the overall width of which exceeded 11 feet, to which the requirements of the Motor Vehicles (Construction and Use) Regulations, 1955, did not apply, and failed to comply with the requirements laid down in article 10 (*c*) (ii) and (*d*) of the Motor Vehicles (Authorisation of Special Types) General Order, 1955, as amended by the Motor Vehicles (Authorisation of Special Types) Order, 1956, in that while the vehicle was so used there were not two persons in addition to the driver in attendance, one whenever necessary proceeding at a reasonable distance in front of the vehicle, to give warning to other traffic on the road, and in that they failed to give the chief constable of Staffordshire not less than 24 hours' notice of the proposed journey, contrary to the orders and to sections 3 (1) (*b*) and (3) and 113 of the Road Traffic Act, 1930.

The justices found the following facts: The appellant, Dyde, was employed by the appellants, William Gwennap (Agricultural) Ltd., and on September 5, 1956, in the course of such employment he was driving an agricultural tractor belonging to his employers and was hauling with the tractor a combine harvester on the A. 34 road at Radford Bridge, Stafford. The combine harvester was being towed from a farm to the appellant's premises because it had broken down during the harvesting. The appellants owned the tractor and were in possession of the combine harvester as bailees. The overall width of the combine harvester was 11 feet 4 inches, but, when hauled by the tractor, the overall width of the two vehicles together was 12 feet 6 inches, as the tractor was on the near side of the combine harvester and overlapped it. The tractor was itself less than 7 feet 6 inches in width. There were no attendants with the driver and no notification of the journey had been given to the chief constable, although

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the journey exceeded five miles. The combine harvester was not mechanically propelled, but had to rely for power on an agricultural tractor or other external means, and the agricultural tractor was not constructed of itself to carry any load and it was therefore a motor tractor. The tractor and the combine harvester together were a land tractor constructed for the purpose of reaping and threshing, and the two parts formed a unit for the purpose, which could normally be used for reaping and threshing in that condition.

The appellants contended that article 10 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955, did not create any new offences, but simply furnished a defence to a charge under regulation 33 of the Motor Vehicles (Construction and Use) Regulations, 1955; and further, that in any event the two vehicles retained their separate identity even though coupled together, and did not become one entity for the purposes of considering regulation 33.

The justices convicted the appellants.

W. G. Wingate for the appellants.

K. S. Mellor for the respondent.

The following case was cited in argument in addition to that referred to in the judgment: *Hubbard* v. *Messenger*.[3]

DEVLIN J. Regulation 33 of the Motor Vehicles (Construction and Use) Regulations, 1955, made under the Road Traffic Act, 1930, prescribes that the overall width of a motor tractor shall not exceed 7 feet 6 inches. If the regulation stopped there, a motor tractor might lawfully draw some other vehicle or implement behind it which exceeded 7 feet 6 inches and, therefore, in effect diminish the space available for other traffic on the roads, which, of course, it is the object of the regulation to prevent. Accordingly regulation 54 provides as follows for the situation when the motor tractor is drawing another vehicle: "Save as provided in "paragraph (2) of this regulation the overall width of a trailer "shall not exceed seven feet six inches." Then it gives certain exceptions to that in the case of certain particular sorts of trailers, and a general exemption to what is called a land implement is contained in paragraph (2) which states: "This regulation shall "not apply to a land implement." A land implement is defined in regulation 3 (1) as "any implement or machinery used "with a land locomotive or a land tractor in connexion with agri-"culture, grass cutting, forestry, . . . etc." Everybody knows the sort of agricultural vehicles that are commonly used, hay rakes, and so on, that come within that definition of a land implement.

Therefore, the position under the regulations is that if a tractor is drawing a land implement there is no limit at all on the width of the land implement. That would prima facie apply to and

[3] [1938] 1 K.B. 300; 54 T.L.R. 1; [1937] 4 All E.R. 48.

cover certain types of combine harvesters. Broadly speaking, they appear to be of two types. There is one type which is in itself a mechanically propelled vehicle, and there is another type which is drawn behind a tractor and derives its power, in some cases at any rate, from the tractor. The exemption in favour of land implements does not apply to the first type; for a self-propelled combined harvester is not a trailer; it is one vehicle and falls within the definition of a motor tractor, and if it exceeded 7 feet 6 inches as, of course, it always does, it could not be taken on the roads. It was to provide for that situation that the Motor Vehicles (Authorisation of Special Types) General Order, 1955, was made to cover what are described as land tractors used for reaping and threshing. In form and substance it is by way of an exception to regulation 33 of the earlier order, and permits "the use on roads of land tractors constructed for the combined "purpose of reaping and threshing notwithstanding that such "vehicles do not comply with the requirements of regulations 33 "and 34 of the Construction and Use Regulations . . ." but it is subject to certain restrictions, especially on width.

On the facts in this case a farmer owned one of these combine harvesters which are drawn behind tractors and derive their power from tractors. It broke down in the course of the harvest, and he sent urgently for the appellants, who are agricultural engineers, to come and repair it, and the appellants' servant towed the combine harvester away for repair. The combined width of the tractor and the combine harvester was greater than the width of either one of them separately because the near side overlapped, and in consequence it exceeded the widths prescribed in article 10 (*c*) (ii) and (*d*) of the Order of 1955.

Two informations were preferred against the agricultural engineers and their employee, which in form alleged that they failed to comply with regulation 10. But article 10 does not lay down any requirements. What it does is to enable somebody who would otherwise be committing an offence against regulation 33 to provide a defence: it gives material on which they can set up a defence.

However, this case need not be decided on the form of the summons. It is sufficient to say that no offence can be proved in this case—and that is conceded by the respondent—unless there is an offence against regulation 33, that is to say, unless the overall width of the motor tractor exceeded 7 feet 6 inches. Therefore, for the purpose of sustaining the charge the respondent submits and the justices found, that this combination of the motor tractor with the combine harvester behind it was a single vehicle which was properly described as a motor tractor. That would appear to lead to this conclusion, that if a combine harvester, which is one form of land implement—there can be no dispute about that—is to be regarded when it is drawn by a motor tractor as one unit and as a motor tractor within the meaning of regulation 33, any other sort of land implement must be

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so regarded. The result would be that the regulation which expressly, as it were, exempts from the width provisions land implements in general, would be no use at all; the prosecution could always avoid it by alleging that the land implement and the motor tractor were one vehicle within regulation 33. Not only would it produce that result but it would be contrary, if this court were to hold that two vehicles united together in such circumstances constituted one motor tractor, to the reasoning in *Rogerson* v. *Stephens*.[1]

The way in which counsel for the respondent sought to get round these two difficulties has been to submit that this is one motor tractor because of the finding the justices have made that this was a combine harvester which had to rely for power on the agricultural tractor. He submits that a distinction can be drawn between a motor vehicle or tractor which is drawing a land implement and has no other connexion with it, so to speak, and one which is drawing a land implement but which could if necessary—it was not necessary on this occasion because it were merely being drawn along the road—supply the power which could make the combined threshing and reaping part of the combine harvester work. In my judgment, that is not a true ground of distinction. They remain two vehicles notwithstanding that when they are coupled together one may be used to provide power for the other. That is really, I think, the essential basis of the argument that has been submitted to us, that we can draw a distinction on that ground, but, in my judgment, we cannot. Accordingly, the conviction was wrong and ought to be quashed.

Lord Goddard C.J. I agree. I think this case might well be brought to the attention of the Minister because, of course, the object of these regulations which have been cited to us is to prevent these very unwieldy objects being carried along the road except under stringent conditions. In one sense, that is exactly what has happened but, for the reasons my brother has given, it is impossible to hold that the regulations apply to it, and therefore this appeal must be allowed.

Byrne J. I agree.

Appeal allowed.

Solicitors: *Gregory Rowcliffe & Co. for Pickering & Pickering, Stafford; Smiles & Co. for P. T. W. Butters, Stafford.*

[1] [1950] 2 All E.R. 144.

[CHANCERY DIVISION.]

* PRACTICE DIRECTION (COMPANIES COURT).

1957
July 9.

Company — Winding up — Petition — Oppression — Advertisement — Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 210—*Companies (Winding Up) Rules,* 1947 (*S.I.* 1949, *No.* 330 (*L.* 4)), *r.* 28.

The advertisement pursuant to rule 28 of the Companies (Winding Up) Rules, 1949,[1] of a petition for an order under section 210 of the Companies Act, 1948,[2] shall state that the petition is for an order under that section but need not contain any further particulars of the relief sought; but where an order for winding up of the company is sought in the alternative to relief under section 210 the advertisement shall so state.

By direction of the judge
MAURICE BERKELEY,
Registrar.

July 9, 1957.

[1] Companies (Winding Up) Rules, 1949, r. 28: "Every petition shall be "advertised seven clear days before "the hearing. . . ."

[2] Companies Act, 1948, s. 210: "(1) Any member of a company who "complains that the affairs of the "company are being conducted in a "manner oppressive to some part of "the members . . . may make an "application to the court by petition "for an order under this section."

[COURT OF APPEAL.]

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[1955 E. No. 1835.]

1957
July 6, 8.

Hodson, Parker and Ormerod L.JJ.

Catering Wages—Minimum wage—Night watchman—Worker engaged to remain on premises of unlicensed place of refreshment 93 *hours weekly—Active employment not in excess of normal* 47-*hour week—Claim for statutory remuneration for overtime and special time—Catering Wages Act,* 1943 (6 *&* 7 *Geo.* 6, *c.* 24), *ss.* 1 (2), 4—*Wages Regulation (Unlicensed Place of Refreshment) Order,* 1949 (*S.I.* 1949, *No.* 433), *regs.* 24, 26.

A worker who was employed at an unlicensed place of refreshment was required by the terms of his contract to remain on the premises for 93 hours weekly from 7 p.m. until 8 a.m. on weekdays, and until 10 a.m. on Sundays. His active duties, which were not directly concerned with the supply of food or drink, occupied some three hours each night, after which he could sleep or do as he chose, subject only to the restriction on his movements. He received wages in excess of the statutory minimum for the normal 47-hour working week as laid down by regulations made from time to time under the

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Catering Wages Act, 1943.[1] In an action for a declaration that his employment was subject to the Act of 1943 and the regulations made thereunder, and that he was entitled to the statutory minimum remuneration laid down in the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949,[2] as amended, and for arrears of wages, including overtime and special time, due to him thereunder:—

Held (1) that the plaintiff was a "worker" within section 1 (2) of the Act, and was within the scope of paragraph 24 (1) (*g*) of the regulation of 1949 as being employed on work for the purposes of activities carried on at an unlicensed place of refreshment; but (2) that he was not entitled to remuneration on the statutory scale for all the hours during which he merely submitted to a restriction on his movements but was not engaged on definite duties; for it would be absurd if the regulations required that a man who was allowed to sleep should during his sleeping hours earn not only overtime but special time as well.

Decision of Stable J. affirmed.

Appeal from Stable J.

The plaintiff, Albert Baxter English, was employed by the defendants, Gunter & Co. Ltd., caterers and catering contractors, at their premises, an unlicensed place of refreshment, at Stanhope Gate, W., from 1945 to 1955. He claimed in these proceedings that he had been employed as night watchman and general handyman for 13 hours a day for six days a week, and 15 hours on Sundays, and asked for a declaration that his employ-

[1] Catering Wages Act, 1943, s. 1 (2): "The workers to whom this Act applies are all persons employed in any undertaking, or any part of an undertaking, which consists wholly or mainly in the carrying on (whether for profit or not) of one or more of the following activities, that is to say, the supply of food or drink for immediate consumption, the provision of living accommodation for guests or lodgers or for persons employed in the undertaking and any other activity so far as it is incidental or ancillary to any such activity as aforesaid of the undertaking."

S. 4 (3): "Where the Minister receives a wages board recommendation, he may, if he thinks fit, by order provide for the establishment of a wages board in respect of such workers and such employers as may be described in the order."

[2] Wages Regulation (Unlicensed Place of Refreshment) Order (S.R. & O., 1949, No. 433), reg. 24: "Subject to the provisions of paragraph 25 the workers to whom this Schedule applies are all workers employed in Great Britain in a catering undertaking who are employed by the person or body of persons carrying on that undertaking and who are so employed . . . (1) for the purposes of such of the activities of the undertaking as are carried on at an unlicensed place of refreshment or in the course of a catering contracting business . . . and who are engaged on any of the following work, that is to say:—(*a*) the preparation of food or drink; (*b*) the service of food or drink; (*c*) work incidental to such preparation or service; (*d*) work connected with the provision of living accommodation for workers . . . ; (*e*) transport work; (*f*) work performed at any office or at any store or warehouse or similar place or at any garage or stable or similar place; (*g*) any work other than that specified in sub-paragraphs (*a*) to (*f*) hereof performed on or about the premises or place where food or drink is prepared or served including work in connexion with any service or amenity provided on or about such premises or place."

Reg. 26: ". . . 'catering undertaking' means any undertaking or any part of an undertaking which consists wholly or mainly in the carrying on (whether for profit or not) of one or more of the following activities, that is to say, the supply of food or drink for immediate consumption. . . ."

ment was subject to the provisions of the Catering Wages Act, 1943, and the Wages Regulation (Unlicensed Place of Refreshment) Order (S.R. & O. 1949, No. 433), and that he was entitled to receive from his employers a statutory minimum remuneration in accordance with those regulations and arrears of wages due to him by reason of those provisions, including overtime and special time (under the provisions of amending regulations of 1951, 1952, 1954 and 1955), amounting in all to £2,051 19s. 7d., for the period ending on October 24, 1955.

The defendants by their defence denied that the plaintiff was employed as a night watchman. They claimed that the terms of the plaintiff's employment were as follows: He was required to attend at their premises daily at 7 p.m. and to pass the night there; he was provided with blankets and a couch on which to sleep, and also with supper and breakfast. After his arrival at the premises, his duties were to see that on the departure of the employers' staff lights and gas fires were turned off and windows and doors closed; he was further required to draw solid fuel fires and to lay two boilers ready for relighting the following morning, and to hose down two urinals. When he had done that, he had nothing further to do until the following morning, except that on occasion he was required to admit to the premises the employers' van returning with surplus food from an evening function held elsewhere. On the following morning, except on Sundays, he was required to light two boilers so that hot water would be available when the staff arrived at 8 a.m.; on Sunday mornings he had to light the boilers, but at a later hour.

The defendants denied that the plaintiff's employment was subject to the Act or the regulations; they claimed that they had paid him up to April, 1955, £6 7s. 6d. and thereafter £7 8s. weekly; and that the hours worked by him had not at any material time exceeded 36 hours per week. Further, they claimed that so far as his claim related to any period prior to October 24, 1949, it was barred by the Limitation Act, 1939.

Stable J., on January 18, 1957, found that though the plaintiff was required to be on duty for 93 hours a week, and had been reprimanded for leaving the premises during those hours of duty, he had never worked a week in excess of 47 hours; nor was he required to patrol the premises nor keep awake during the night. He held that though the plaintiff was within the provisions of section 1 (2) of the Act of 1943, he was not within the provisions of the regulations of 1949, because what he was really employed to do had no direct or indirect connexion with the provision of food or drink to anybody, and, accordingly, he was not employed for the purposes of the activities of a catering establishment. But he gave judgment for the defendants on the ground that the plaintiff had never worked a working week in excess of 47 hours and, therefore, even if he were within the regulation, he was entitled to no more than he had received by way of wages, which sum

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exceeded the amount prescribed by the regulation for the normal week.

The plaintiff appealed.

J. E. Artro Morris for the plaintiff.
R. I. Threlfall for the defendants.

Hodson L.J. This is an appeal by the plaintiff from the judgment of Stable J. given on January 18, 1957. The plaintiff's claim was for remuneration under the Catering Wages Act, 1943. He was employed by the defendants at 5 and 6, Stanhope Gate, where the defendants had an unlicensed place of refreshment. Part of the plaintiff's claim was barred by the Limitation Act, 1939, but the effective claim is from October 24, 1949, to October 24, 1955, which is not so barred. The basis of the plaintiff's claim is that he was employed for 13 hours a day for seven days a week and latterly for 15 hours a day on Sundays. The Minister has power to make regulations fixing the wages of workers to whom the Act applies. [His Lordship read section 1 (2) and section 4 (3) of the Catering Wages Act and continued:] The Minister made the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949, which has been followed by subsequent orders, with the result that, if the plaintiff is entitled to the benefit of those orders, on the hours of work stated by him, he is prima facie entitled to £2,051 19s. 7d. over and above the wages actually paid to him, which latterly amounted to £7 8s. per week.

It is difficult to describe the plaintiff's actual job. The judge in substance accepted what the defendants said in their defence. [His Lordship set out the duties required of the plaintiff, as stated above, and continued:] The judge found that, whatever the real working hours of the plaintiff were, they were never in excess of 47 hours in a week, so that, whether the plaintiff came within the Catering Wages Act, 1943, or not, he was entitled to nothing. It appears, although the calculation is not an exact one, that he was in fact working, in the ordinary sense of the word, about three hours a night.

The first question is whether the plaintiff was within the regulations. He was clearly within section 1 (2) of the Act, and the judge so held. It was, however, submitted that by virtue of the combined effect of paragraphs 24 and 26 of the Order of 1949 the activities, if they can be so called, of the plaintiff were not within the scope of the regulations at all. I have had great difficulty in understanding this argument, which was accepted by the judge.

Regulation 24 provides: "Subject to the provisions of paragraph 25 the workers to whom this Schedule applies are all "workers employed in Great Britain in a catering undertaking "who are employed by the person or body of persons carrying "on that undertaking and who are so employed . . . (1) for the

"purposes of such of the activities of the undertaking as are "carried on at an unlicensed place of refreshment or in the course "of a catering contracting business . . . and who are engaged on "any of the following work, that is to say: (*a*) the preparation "of food or drink; (*b*) the service of food or drink; (*c*) work "incidental to such preparation or service; (*d*) work connected "with the provision of living accommodation for workers; "(*e*) transport work; (*f*) work performed at any office or at any "store or warehouse or similar place or at any garage or stable "or similar place; (*g*) any work other than that specified in sub-"paragraphs (*a*) to (*f*) hereof performed on or about the premises "or place where food or drink is prepared or served including "work in connexion with any service or amenity provided on or "about such premises or place."

It is to be observed that subparagraph (*g*) might be expected to cut down the scope of the introductory paragraph (1), but, as I see it, it does nothing of the kind. The suggested limitation put forward in this case on behalf of the defendants is contained in regulation 26, which defines, among other things, the "catering "undertaking" which is mentioned at the beginning of regulation 24. The definition, so far as it is material, is as follows: "'Catering undertaking' means any undertaking or any part of "an undertaking which consists wholly or mainly in the carrying "on (whether for profit or not) of one or more of the following "activities, that is to say, the supply of food or drink for imme-"diate consumption. . . ." That is said to have the effect of limiting the scope of the regulation to persons directly concerned with the supply of food or drink for immediate consumption, which it is said the plaintiff was not.

I confess that I see no justification for that contention. It seems to me indeed to be directly contrary to the other regulations which in other cases provide for the remuneration of persons who might be said not to be directly concerned with the provision of food, etc. Looking at the regulations dealing with licensed residential establishments and licensed restaurants, one finds barmen, cloakroom attendants, telephone operators and valets included. The plaintiff, therefore, in my opinion clearly had brought himself within the scope of the regulations.

But in my view his claim fails for the second reason which the judge gave, namely, that he did not work any period in excess of the 47 hours I have mentioned. It is true that the plaintiff was required to remain on the premises during the number of hours stated by him, but for most of the time he was doing no work at all and was either asleep or indulging in such recreation as he thought fit. It cannot therefore be said that he was, for the purposes of this Act or these regulations, entitled to be paid for the time when he was doing no work at all. It would be a remarkable result of the Act if we were driven to such a conclusion. A man may, as a term of his employment, be required to be at certain hours within a particular radius so that he may be called for duty

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if required. A seaman on a ship is always liable to be so called; but I do not think that it necessarily follows from this that, because the terms and circumstances dictate the presence of the worker and cause him to be in a certain place during certain hours, he is within the scope of regulations such as these, and accordingly entitled to be paid for those hours of restriction as if they were hours of work. For those reasons I would dismiss this appeal.

Parker L.J. I agree. I, too, find it impossible to say that the plaintiff does not come within the provisions of the relevant regulations. Workers to whom the regulations apply have to fulfil two conditions: First, they must be employed for the purpose of such of the activities of the undertaking as are carried on at an unlicensed place of refreshment, and, secondly, they must also be engaged in certain work set out in subparagraphs (*a*) to (*g*). That the plaintiff was engaged on work within subparagraph (*g*) is, I think, perfectly clear. But it is said that he was not employed for the purposes of one of the activities of the undertaking, treating "activities" there in the same sense as it is used when it determines whether an undertaking is to be treated as a catering undertaking.

I think that the proper approach to the question is to ascertain, first, whether the undertaking in question, namely, Gunter & Co. Ltd., was a catering undertaking, as it clearly was, and then to see whether the plaintiff was employed for the purposes of such of its activities as were carried out at the place of refreshment, in this case Stanhope Gate; in other words, the employment being defined by the first condition is employment at a place, namely, in this case, an unlicensed place of refreshment. Accordingly, I think it is clear that the plaintiff comes not only within subparagraph (*g*), but also within paragraph (1).

That being the position, the next question is whether the plaintiff was employed for more than 47 hours a week. He certainly did not do work for more than 47 hours a week, and the judge has so found. But it is contended on his behalf that he was employed on weekdays from 7 p.m. until 8 a.m. the next morning and on Sundays from 7 p.m. until 10 a.m. the next morning, something like 93 hours a week. It is said that he was not during that time his own master in that he was required to stay on the premises all the time and therefore he was, so it is said, on duty all the time. The hours for which a servant is employed must depend on the exact terms of the contract of employment. He may be required to work for certain definite hours, in which event there is no difficulty; he is employed for those hours whether or not there is work for him to do all the time. On the other hand, the servant may be merely required to carry out certain defined jobs, in which case his hours of work would normally be those actually and reasonably occupied in carrying out those jobs. In either of those cases no difficulty

arises. The difficulty arises, however, when, though the employment is merely to do definite jobs, a restriction is placed on him so that, when the jobs are done, he is nevertheless not his own master. In such cases it seems to me that it must be a question of degree, and therefore one of fact, as to whether the contract is not then one for a definite number of hours.

To take an example, a servant may be required to live within five miles of his place of work so that, if called upon, he is quickly available for work. It could not then be said that he was employed to work for 24 hours, even though to some extent he has submitted to a restriction on his movements. He would be merely holding himself available for work if and when required.

In the present case it is true that the plaintiff had to stay on the premises, but the jobs he was employed to do would be finished by about 10 p.m., and thereafter he would have nothing to do until about 5.30 a.m., except about once a week when he would have to let a van in and out. He was not required to patrol the premises or to stay awake.

In those circumstances, I think that the judge was right in drawing the inference that the plaintiff was not employed to work for 13 hours a day and 15 hours on Sunday, but that he was employed to do definite jobs, merely submitting to a restriction on his movements in order that he might be available to work if and when any work was required of him.

I might add that I am gratified that such an inference can be drawn, because it seems on the face of it absurd that a man who is allowed to sleep should during his sleeping hours not only earn overtime but what is called special time as well. I would dismiss this appeal.

ORMEROD L.J. I agree, in the first place, that this man's employment comes within the relevant regulations; I agree with the remarks of my Lords Hodson and Parker L.JJ. on that side of the case and would wish to say nothing further about it.

The only matter on which I would like to add a few words is on the further question whether in fact the hours which, by the terms of his contract, this man remained on the premises are hours in respect of which he was entitled to be remunerated because of the regulations made under the Catering Wages Act, 1943.

The judge found that, week in and week out, the plaintiff never worked a working week in excess of 47 hours. As I see it, the question as to what hours the employee is engaged on duties which entitle him to be remunerated under the regulations is a question of fact. It may be true to say, using the term in its widest sense, that the plaintiff was on duty during the hours in respect of which he claims, that is to say, the hours which he spent on the premises, because it was a term of his contract with his employers that he should remain on those premises during the night. But to say that during those hours (when, as the

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judge found, he was expected to do not more than about three hours work per night) he was employed in the sense of being entitled to remuneration is, in my view, to give an entirely unrealistic meaning to the word "employment."

The real position, as Parker L.J. has already said, is that this man submitted to a restriction of his freedom, so that he would be available to perform certain duties which it might fall to him to perform from time to time. In respect of those duties and in respect of the time he spent on those duties he was, of course, entitled to be remunerated. But the judge has found that such time never exceeded 47 hours per week, and for the rest of the time he was simply holding himself available to work if necessary, but otherwise was entitled to sleep or to amuse himself in any way he found appropriate, provided he remained on the premises. That, as I see it, cannot in any ordinary meaning of the term imply that he was employed during those hours and therefore entitled to remuneration. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Kearton & Co.; Lawrance, Messer & Co.*

M. M. H.

[CHANCERY DIVISION.]

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June 26; *July* 12.
Vaisey J.

* *In re* DAVIES. DAVIES *v.* MACKINTOSH.

[1957 D. 333.]

Will—Construction—Acceleration—Gift of part of residue to stepdaughter for life and then to be divided equally between her issue—Effect of disclaimer by stepdaughter of all interest in testatrix's residue—Members of class, how determined.

Will—Construction—Cumulative gifts—Bequest of £350 by will—Bequest to same legatee of £1,000 by codicil "thus increasing the "sum of £350 . . . in appreciation of his valuable services . . ." —Whether legatee entitled to both bequests.

A testatrix by her will, dated November 13, 1930, after bequeathing (inter alia) a legacy of £350 to W., gave and bequeathed her residuary estate equally between her two sons and her stepdaughter, and directed that the share of the stepdaughter should be "hers for life and then to be divided equally between "her issue."

By a codicil dated December 10, 1954, the testatrix bequeathed to W. £1,000 "thus increasing the sum of £350 as mentioned in "my said will in appreciation of his valuable services and advice "over a period of over 20 years."

The testatrix died in 1955 and by a deed dated October 5, 1956, the stepdaughter (who was married once and who had three children issue of the marriage, none of whom, at the date of the

commencement of these proceedings, had had any issue) wholly, absolutely and irrevocably disclaimed all the life or other interest purported to have been conferred on her by the will:—

Held, (1) that the word "then" in the expression "then to "be divided" was equivalent to "at her death" or "after her "death" or, perhaps, "subject to her life interest" and that the principle of acceleration fell to be so applied as to give the fund to those three children of the stepdaughter to the total exclusion of the other at present non-existent members of the class; namely, her grandchildren and remoter issue.

In re Johnson (1893) 68 L.T. 20 and *Jull* v. *Jacobs* (1876) 3 Ch.D. 703 applied.

(2) That on the true construction of the will and codicil, there was nothing to displace the presumption that legacies given by different instruments were prima facie cumulative and that, accordingly, W. was entitled to both his legacies.

ADJOURNED SUMMONS.

By her will, dated November 13, 1939, the testatrix, Mary Davies, after making certain specific gifts and bequeathing a number of pecuniary legacies, including one of £350 to David John Williams, gave and bequeathed the remainder of her estate "to be divided equally between the before-mentioned David "William Davies and John Walters Davies and Mrs. Primrose "Mackintosh, Mrs. Primrose Mackintosh's portion to be hers "for life and then to be divided equally between her issue." The testatrix appointed David William Davies, John Walters Davies and David John Williams executors of her will.

The testatrix died a widow on March 22, 1955, leaving issue the executors David William Davies and John Walters Davies.

By a deed dated October 5, 1956, Mrs. Primrose Mackintosh, after reciting that she had never accepted any benefit under the gift to her, wholly, absolutely and irrevocably renounced and disclaimed all the life or other interest in the residuary estate of the testatrix as attempted or purported to have been conferred on her by the will. At the time of the issue of the present summons she was 58 years of age, had been married once only, in 1928, to Donald Stephen Powell Mackintosh (since deceased), and had had issue three children, namely, David Donald Mackintosh and Alastair Mackintosh, who were respectively of full age, and Mary Elizabeth Arbell Mackintosh, who was born on September 29, 1936. None of these three children had as yet had any issue.

Doubts having arisen as to the manner in which the one-third share of the residuary estate bequeathed for the benefit of Mrs. Primrose Mackintosh and her issue ought to be dealt with, two of the executors took out a summons to determine (inter alia) whether, in consequence of the disclaimer, the one-third share of the residuary estate bequeathed for the benefit of Mrs. Primrose Mackintosh "(a) now belongs to the defendants David Donald "Mackintosh, Alastair Mackintosh and Mary Elizabeth Arbell "Mackintosh in equal shares absolutely, or (b) ought to be "retained by the executors until the death of Mrs. Primrose

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"Mackintosh or for some other and what period, or (c) ought to "be dealt with in some other and what manner."

A further question for determination was whether the sum of £1,000 bequeathed to David John Williams by the codicil "thus "increasing the sum of £350 as mentioned in my said will in "appreciation of his valuable services and advice over a period "of over 20 years" was payable "in addition to the £350 or in "substitution for that £350."

E. I. Goulding appeared for the plaintiffs.

J. L. Knox and *H. E. Francis* for various defendants.

Cases cited in argument not referred to in the judgment: *In re Flower's Settlement Trusts* [1]; *In re Hill* [2]; *Lambe* v. *Eames* [3]; *Blakeney* v. *Blakeney* [4]; *Hurst* v. *Beach* [5]; *Lainson* v. *Lainson.* [6]

Cur. adv. vult.

July 12. Vaisey J. read the following judgment: This summons deals with two quite distinct questions. They arise on the will and codicil of a testatrix, Mary Davies, who died on March 22, 1955. She was a widow and left issue two children only, the plaintiffs, David William Davies and John Walters Davies, who are accordingly entitled in equal shares to any estate of the testatrix as to which she died intestate. Her will is dated November 13, 1939, and, after making certain specific gifts and bequeathing a number of pecuniary legacies, including one of £350 to the defendant David John Williams, she gave and bequeathed the remainder of her estate to be divided equally between her two sons, the plaintiffs, and her stepdaughter Primrose Mackintosh. There follows a direction in the words following, namely: "Mrs. Primrose Mackintosh's portion to be "hers for life and then to be divided equally between her issue." The testatrix appointed the plaintiffs and the defendant D. J. Williams to be executors of her will. By a codicil dated December 10, 1954, the testatrix bequeathed to the defendant D. J. Williams the sum of £1,000, "thus" (quoting the words of the codicil) "increasing the sum of £350 as mentioned in my "said will in appreciation of his valuable services and advice "over a period of over 20 years." On July 18, 1956, the will and codicil were proved by the plaintiffs and the defendant D. J. Williams at Carmarthen. By a deed dated October 5, 1956, Mrs. Primrose Mackintosh absolutely and irrevocably renounced and disclaimed all the life or other interest in the residuary estate of the testatrix as attempted or purported to have been given to or conferred on her by the will of the testatrix.

[1] [1957] 1 W.L.R. 401; [1957] 1 All E.R. 462.
[2] [1923] 2 Ch. 259.
[3] (1871) L.R. 6 Ch. 597.
[4] (1833) 6 Sim. 52.
[5] (1820) 5 Madd. 351.
[6] (1854) 5 De G.M. & G. 754.

[After stating the age of Mrs. Mackintosh and the facts relating to her issue as above set out, his Lordship continued:] The trust funds representing the one-third share bequeathed for the benefit of Mrs. Mackintosh and her issue are now of the approximate value of £3,500 and they produce an annual income of about £140.

The first question to be decided is how the said one-third share ought to be dealt with in consequence of the said deed of disclaimer. The other question is quite small, namely, whether the £1,000 bequeathed to the defendant D. J. Williams by the said codicil is payable in addition to the sum of £350 bequeathed by the said will or in substitution for that £350. I can deal with that point quite briefly. The rule is that legacies given by different instruments are prima facie cumulative. I find nothing to displace that presumption, and I will declare that the defendant D. J. Williams is entitled to both the legacies.

Turning to the main question, which is in my judgment a difficult one, I think that the word "then" in the expression "then to be divided" is equivalent to "at her death" or "after her death" or perhaps "subject to her life interest." Now, but for the disclaimer, the funds would at the death of Mrs. Mackintosh have been divisible in equal shares between a class of persons comprising all her descendants of whatever degree (children and remoter issue) who had been in existence at any time between the death of the testatrix and the death of Mrs. Mackintosh. Each such person's interest would be an absolute vested interest, so that the class might include not only persons living at the death of Mrs. Mackintosh but also the legal personal representatives of persons who had predeceased her. At present the class consists only of the three children of Mrs. Mackintosh. One view, which I will call the first view, is that the principle of acceleration now falls to be so applied as to give the fund to those three children to the total and final exclusion of all the other at present non-existent members of the class, that is to say, Mrs. Mackintosh's grandchildren and remoter issue. It seems rather surprising that the purely gratuitous act (that is, the disclaimer) of one of the beneficiaries, Mrs. Mackintosh, should operate to deprive and dispossess a number of other beneficiaries, namely Mrs. Mackintosh's grandchildren and remoter issue, of the interest which she, the testatrix, had given them by her will. It is clear, however, that acceleration may and does sometimes alter the constitution of a class of beneficiaries from what it would have been if the gift had not been accelerated: see *In re Johnson.*[1] Another view, which I will call the second view, is that, as the disclaimed life interest must be treated as struck out of the will and as not having been thereby effectively disposed of, the obvious consequence is a partial intestacy, in which case the income of the fund

[1] (1893) 68 L.T. 20.

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during the residue of the life of Mrs. Mackintosh is divisible equally between the two sons of the testatrix, leaving the capital of the fund to be divided strictly in accordance with the plain terms of the will. I have mentioned two possible views, but a third one is that the three children of Mrs. Mackintosh should be treated as possessing vested interests liable to be divested by the birth of further issue of Mrs. Mackintosh during her life. Between those three views, I am bound to say that the choice is to my mind difficult, as it is, in my view, not supported by any clear authority.

On the whole, I decide this case in favour of the first view, which treats the class of Mrs. Mackintosh's issue as now finally closed, this view being, in my judgment, supported by *Jull* v. *Jacobs*.[2] In that case there was a gift to a testator's daughter of real and personal estate during her lifetime, and after her decease the property was to be equally divided between her children on their coming of age. It was held that, the gift to the daughter being void on account of her having witnessed the will, the gift to her children was accelerated and took effect immediately. The report seems to make it clear that it was possible for the daughter to have had further children. In the course of his judgment, Malins V.-C. said[3]: "I am clearly of "opinion that the remainder is accelerated, and the children "take just as if the mother had died immediately after the "testator."

To the same effect, I think, is *In re Townsend's Estate*,[4] of which the headnote reads: "Gift by will of real and personal "estate upon trust to convert and pay the income of the proceeds "to A. for life, and after A.'s death to pay the capital and "income thereof unto the child or children of A. in equal shares, "with gifts over in case A. should die without leaving issue "living at his death. The will had been attested by A.'s wife, "so that the gift of a life interest to him was void under section "15 of the Wills Act. There were no children of A.'s marriage. "The personal estate was exhausted and the trust funds repre-"sented real estate only:—*Held*, that until A. had a child the "gifts upon the determination of A.'s life estate could not be "accelerated, and that during the life of A., and so long as he "had no children, the income of the trust funds was undisposed "of, and belonged to the heir-at-law, and could not be accumu-"lated for the benefit of the persons contingently entitled in "remainder." *Jull* v. *Jacobs*[5] was distinguished and other cases were explained. And see also *In re Johnson*.[6]

What I have called the second view, which is that there is no acceleration, and an intestacy as regards the income during Mrs. Mackintosh's life, may have some support from *In re*

[2] (1876) 3 Ch.D. 703.
[3] Ibid. 712.
[4] (1886) 34 Ch.D. 357; 3 T.L.R. 204.
[5] 3 Ch.D. 703.
[6] 68 L.T. 20.

Vernon[7]; but this is far from being conclusive. For the third view, which seems logical, though it might be awkward to work out in practice, I can find no authority at all.

I will declare that the fund now belongs to the three children of Mrs. Mackintosh in equal shares absolutely and I will also declare that Mr. Williams is entitled to both his legacies.

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Declaration accordingly.

Solicitors: *Theodore Goddard & Co. for D. W. Peter Williams & Co., Swansea; Farrer & Co.; Walker, Martineau & Co.*

J. L. D.

[7] (1906) 95 L.T. 48.

[PROBATE, ETC., DIVISION.]

* MEYER *v.* MEYER.

1957 *May* 17.

Lord Merriman P. and Wallington J.

Husband and Wife — Maintenance — Justices — Power to antedate order.

On a reference back to justices to fix the amount of a maintenance order, their dismissal of a wife's complaint having been reversed by the Divisional Court, the justices have power to antedate the order.

Starkey v. *Starkey* [1954] P. 449; [1954] 2 W.L.R. 907; [1954] 1 All E.R. 1036 followed.

Semble, that the justices have power in such circumstances or upon the original hearing to antedate the order to the date of the wife's complaint.

McLellan v. *McLellan* [1954] P. 138; [1953] 3 W.L.R. 1139; [1954] 1 All E.R. 1 considered.

On May 18, 1956, a wife complained to justices on the ground of her husband's desertion and wilful neglect to provide reasonable maintenance, which complaint was dismissed on July 23, 1956. The wife appealed to the Divisional Court which, on October 18, 1956, reversed the justices' decision, and that reversal was upheld by the Court of Appeal on February 27, 1957.

Upon remission for the fixing of the amount of the order the justices, stating that they had no power to antedate the order, made an order for £5 a week as from the date of remission. On appeal:—

Held, that, both the justices' court and the Divisional Court had power to antedate an order for maintenance, and that in the circumstances the date from which the order should run was that of the reversal by the Divisional Court of the justices' decision.

APPEAL from justices.

On May 18, 1956, a wife complained to the Chelsea Domestic Proceedings Court on the ground of her husband's desertion and

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wilful neglect to provide reasonable maintenance, which complaint was dismissed on July 23, 1956. The wife appealed to the Divisional Court which on October 18, 1956, after a four-day hearing, reversed the justices' decision as to both grounds, holding that the husband was guilty of wilful neglect to provide reasonable maintenance as from April, 1956. That decision was upheld at the end of a three-day hearing by the Court of Appeal on February 27, 1957.

The matter was remitted to the Chelsea Domestic Proceedings Court for the justices to fix the amount of the order. At the hearing on April 18, 1957, counsel for the wife sought to have the order antedated to April, 1956. The justices refused to antedate the order holding that they had no power to do so and that any direction as to antedating the order should be given by the Divisional Court. The wife appealed.

At the hearing of the appeal counsel for the wife did not seek to maintain that the order should be dated back as far as April, 1956, which was a date prior to that of the complaint.

C. W. G. Ross-Monroe for the wife.
Ian Warren for the husband.

The cases cited in argument are referred to in the judgment of Lord Merriman P.

Lord Merriman P. referred to the facts and continued: It is quite true that the date to which the justices were asked to antedate the order was not merely antecedent to the date of the original hearing, but antecedent to the date of the complaint. Although it is not necessary to express any final opinion about that, I should be inclined to think that it is possible to go back to the date of complaint. In any case April, 1956, is a date further back than that of the complaint, and Mr. Monroe has not sought to argue, as things stand now on the authorities, that any earlier date than the date of the complaint should be chosen. To show what variety we have to choose from I must call attention to some other dates. May 18, 1956, was the date of the complaint; July 23, 1956, was the date when the Chelsea court dismissed the summonses, wrongly, as we held on October 18, 1956, when we sent the case back but gave leave to go to the Court of Appeal. That hearing did not come on until February 27, 1957, when the appeal was dismissed, and then the matter went back to the Chelsea court.

From that catalogue of dates—and I now confine myself solely to the question whether we should make any order as from when the assessment of £5 should run—it follows that the possible dates are May 18, 1956, July 23, 1956, October 18, 1956, February 27, 1957, or today, and I feel no doubt that we have jurisdiction to order some other date than today for the order to start from, and in my opinion the sole question is: What date should we choose?

It is true that no authority was cited to the Chelsea court, but our attention has been called to a case in this court when I was sitting with Sachs J., *Starkey* v. *Starkey*.[1] There is a mistake in the headnote which I will correct. It is clear that in that case the justices had refused to antedate the order, and I am reported as saying[2]: "The matter went back to the justices "[after the dismissal of the husband's appeal to the Court of "Appeal] and came on before them on August 18, 1953. They "did not yield to Mr. Draycott's persuasion that they should "make the order, which they assessed at the maximum of £5 a "week, operative either from the date of the original dismissal "by that petty sessional division in April, 1952, or from the date "of our order finding the wilful neglect proved, but they made "the order run from August 18, 1953." That was the date when they actually finally dealt with it. "The object of the present "appeal is to invite us to make the order retrospective either "to April 23, 1952, or February 11, 1953." Those two dates are respectively the date when they wrongfully dismissed the wife's summons in the first instance and the date when we allowed the appeal and sent the matter back; in other words, mutatis mutandis, identically this case, with this exception, that only two dates were put before the court on that occasion, one the date of their own mistaken dismissal and the other the date of their correction by this court. It is here that the slip has crept into the first paragraph of the headnote, because what is said is[3]: "Justices have power on the rehearing to date the "order for payments back to the date of the decision of the "Divisional Court allowing the appeal, and possibly to the date "of the original complaint." The words should be "to the date "of the dismissal of the original complaint."

I do not think it is necessary to consider going back to the date of the original complaint. In my opinion the two rival dates between which the selection ought to be made are the date when the justices dismissed the complaint—(and I am speaking only of the circumstances of this case; I am not laying down any general rule)—and the date when this court reversed them. Those are, in the circumstances, I think, the two important dates, and I am not, of course, speaking with any disrespect to the Court of Appeal when I say that really there is no particular reason for taking the date when they upheld our order any more than there is for the date on which we made our order.

[His Lordship then rejected the argument of counsel for the husband that an antedating of the order by the Divisional Court would amount to an interference with the question of quantum and continued:] I am quite satisfied with, and am prepared to follow, the authority of *Starkey* v. *Starkey*.[4]

I do not propose to go back to the date of the summons, but

[1] [1954] P. 449; [1954] 2 W.L.R. 907; [1954] 1 All E.R. 1036.
[2] [1954] P. 449, 451.
[3] [1954] P. 449.
[4] [1954] P. 449.

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perhaps in passing I ought to say that there is some authority even for that, because Karminski J. in *McLellan* v. *McLellan*,[5] in dealing with the corresponding question under section 23 of the Matrimonial Causes Act, 1950, which gives power to make orders in respect of wilful neglect to maintain in the High Court, held[6] that he could antedate the order, and properly should do so in that particular case, to the date of the originating summons on which the proceedings were based. By analogy it might be argued that it would be possible in any given case to go back to the date of the complaint and summons. However, I do not think it necessary to pursue that further. But that case is another authority for the proposition that it is quite proper to antedate an order of this sort to some earlier date than the actual date on which the decision is finally made.

I think that in the circumstances the fairest order would be to make the order run from October 18, 1956, when we sent this case back with directions that the amount should be fixed. I say that for this reason. It was not a simple case. We had to go into a great deal of detail: We differed from the justices in a case where there was a good deal to be said on both sides, and it was not really until we had assumed the responsibility of making our own finding that the wife was justified in leaving, and therefore that she was entitled to succeed both on desertion and on wilful neglect to maintain, that the question of making any order for any amount at all became effective, and a practical proposition. Though I think that it would be perfectly proper to antedate this order to July 23, 1956, when the magistrates dismissed the complaint, on the whole the fair thing is to date it from October 18 of that year, and that is the order that I propose to make.

WALLINGTON J. I agree entirely with the conclusion reached by my Lord, and will add only a few words of my own.

It is true that this court and the Court of Appeal have both held that the justices, on July 23, 1956, ought to have found the charges proved; if they had done that they would then have assessed the maintenance and the wife would have been entitled to have it from that date.

But, having regard to the character of the case, and the many matters of difficulty involved in it, I am quite satisfied that the justices cannot be blamed for not having done that. On the view which they took of the case they were perfectly entitled to dismiss the proceedings, although they were afterwards found to be wrong.

On October 18, 1956, this court found that the charges on which the wife relied were proved, and that, in the circumstances, was the first date on which it could be said without any question, that the wife had made out her charges. In my opinion, therefore, that is the date which it is right to regard as

[5] [1954] P. 138; [1953] 3 W.L.R. 1139; [1954] 1 All E.R. 1.

[6] [1954] P. 138, 140.

the basis of the husband's liability; it was by the order made on that date that the justices were invited to assess the amount.

Some delay occurred in their doing so because of the appeal to the Court of Appeal, which, of course, delayed the ascertainment of the rights of each party to this litigation. It tended, possibly, to increase the amount ultimately to be payable by the husband; it certainly had the effect of depriving the wife of the right to recover anything at all by way of maintenance.

Now, however, it has been disposed of, and the only question before us arises on the justices' reasons; their decision at the end of them is in these terms: "We held that any direction as to "antedating the order should be given on application to the "Divisional Court": the application before us is for that direction.

In my view, there being a possible choice between today's date and that of October 18, 1956, when the order was made finding the charges proved, I agree that the proper date in this case will be October 18, 1956, when that order was made by this court.

Appeal allowed.

Solicitors: *Holland & Co.; Summer & Co.*

E. J.

[RESTRICTIVE PRACTICES COURT.]

* PRACTICE DIRECTION (RESTRICTIVE PRACTICES).

1957
July 18.

Restrictive Practice—Practice—Application for representation order—To be made to clerk of court—Restrictive Practices Court Rules, 1957 (*S.I.* 1957, *No.* 603), *r.* 49.

By virtue of the power conferred upon me by rule 49 of the Restrictive Practices Court Rules, 1957,[1] I HEREBY give the following general direction:—

All applications in England and Wales for representation orders that the members of a trade association shall be represented by the association shall until further order be dealt with by the clerk of the court who may at his discretion either dispose of the same or adjourn them to the judge.

PATRICK DEVLIN,
President.
JULY 18, 1957.

[1] Restrictive Practices Court Rules, 1957, r. 49: "Except where the "president of the court or a judge, "whether generally or in any par-"ticular case, otherwise directs, "every interlocutory application . . . "shall be made to a judge, who may "(*a*) dispose of it himself, or (*b*) "refer it in whole or in part to a "court consisting of a presiding "judge and at least two other mem-"bers, or (*c*) . . . refer it in whole "or in part to the clerk of the court ". . . and references in these rules "to the court shall be construed "accordingly."

[QUEEN'S BENCH DIVISION.]

1957
February
1, 4, 15.

Barry J.

* WILLIAM LACEY (HOUNSLOW) LTD. *v.* DAVIS.

[1953 W. 370.]

Building — Contract — Quantum meruit — No contract concluded — Whether right to remuneration for works done.

Quantum Meruit—Building—No contract concluded—Contractor's right to remuneration for work done.

The defendant was the owner of premises which had been damaged during the war and which he proposed to rebuild. The plaintiffs, a firm of builders, submitted their estimate for the work of reconstruction and although no binding contract was concluded between them and the defendant, they were led to believe that they would receive the contract. In this belief and at the request of the defendant's surveyors, between January, 1951, and June, 1952, the plaintiffs prepared calculations for timber and steel requirements; prepared an estimate for a notional reconstruction of the premises for negotiating a "permissible amount" with the War Damage Commission; and prepared and submitted a revised estimate in accordance with new specifications for which they prepared their own bills of quantities. Further, the plaintiffs later prepared and submitted a new estimate following amendments made to the plans by the defendant and varied this estimate from time to time as further alterations were proposed by the defendant.

In July, 1952, the defendant sold the premises instead of proceeding with the reconstruction. In an action by the plaintiffs claiming, inter alia, remuneration as on a quantum meruit for the work done by them:—

Held, that the work carried out by the plaintiffs at the defendant's request fell outside the normal work which a builder performed gratuitously when asked to submit a tender, and had been done in a belief, mutual to both sides, that the plaintiffs would receive the contract for rebuilding the premises: the court would, therefore, imply a promise by the defendant to pay reasonable remuneration to the plaintiffs in respect of such work.

Craven-Ellis v. *Canons Ltd.* [1936] 2 K.B. 403; 52 T.L.R. 657; [1936] 2 All E.R. 1066 applied.

ACTION.

The plaintiffs were a firm of builders. The defendant, A. B. Davis, was the owner of premises known as 47, Vanston Place, Fulham, which he had bought with the benefit of a cost of works' claim under the War Damage Act, 1943, and which he proposed to rebuild with shop and office accommodation on the ground floor and residential flats above. The defendant employed a firm of surveyors, Portal, Hyatt & Day, to supervise the work, and they obtained tenders from three firms of builders, including the plaintiffs. The plaintiffs' first tender, which was made on January 15, 1951, and based on prepared drawings and bills of quantities, was considerably lower than those of other builders. The plaintiffs were told of this and were, they alleged, led to believe that they would receive the contract.

Subsequently, they were requested to and did in fact finish estimates of the steel and timber requirements for the work for the purpose of obtaining the necessary licences. They were also asked to submit an estimate for a reconstruction of the premises as they were before the war damage and their schedule of basic prices on which their original tender was based so as to enable the defendant to negotiate a "permissible amount" with the War Damage Commission in respect of the war damage claim.

On April 6, 1951, the plaintiffs submitted their estimate, amounting to £7,650, which had no connexion with any scheme of reconstruction then contemplated by the defendant. In November, 1951, a licence for the original scheme having been refused, the plaintiffs were asked to submit a revised estimate. This involved a considerable amount of work on the part of the plaintiffs, including taking their own quantities. They were then asked to make further alterations with a view to reducing the price of the building, and on December 7, 1951, they submitted their estimate of £6,996 and provided additional particulars which were required from the defendant by the War Damage Commission.

In or about April, 1952, the defendant suggested a further alteration in the plans for the ground floor of the premises and the plaintiffs submitted a new estimate for £7,277. Amendments to this estimate were made from time to time as the result of different proposals made by the defendant concerning the alterations. In June, 1952, the surveyors having written to the plaintiffs to the effect that they were hoping "to prepare contracts "for the work really to commence," the plaintiffs ordered the bricks required for the work. In July, 1952, the plaintiffs were informed by the defendant that he proposed to employ another firm of builders but he in fact sold the premises. Throughout, the plaintiffs had been acting in the belief that they would receive the contract.

All negotiations and instructions had been carried out and given through one Day, a member of the firm of surveyors employed by the defendant, who, the court found, had been acting throughout within the scope of his authority.

The plaintiffs claimed damages for breach of contract and alternatively remuneration as on a quantum meruit for the work done by them in connexion with the scheme for rebuilding the premises. The original defendant Davis died after the issue of the writ and his personal representatives were substituted as defendants. Barry J. dismissed the plaintiffs' first claim and held that no binding contract for the reconstruction of the premises had ever been concluded.

As regards the second claim, the plaintiffs alleged that at the request of the defendant or the surveyors, they had carried out work concerning the alterations of the scheme for rebuilding the premises and had made calculations and estimates in that behalf; further, that the requests were made and the work done

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on the assumption that the plaintiffs would receive the contract for rebuilding; and that in those circumstances there was an implied contract that if the defendant did not employ the plaintiffs, then the defendant would pay the plaintiffs a reasonable remuneration for the work done in pursuance of the defendant's requests. The sum they claimed amounted to £350 13s. 5d. The work for which the plaintiffs claimed remuneration was itemised and scheduled to the statement of claim and included calculations for timber and steel requirements; work connected with the notional reconstruction needed for negotiating a "permissible amount" with the War Damage Commission; work done for revising the estimate and preparing a reduced estimate; supplying further information for the commission and preparing further amended estimates.

J. S. Daniel for the plaintiffs.
Charles Lawson for the defendants.

Cur. adv. vult.

February 15. Barry J., reading his judgment, stated the facts, dismissed the first claim for breach of contract and continued: In elaborating his argument [on the alternative claim] Mr. Daniel rightly conceded that if a builder is invited to tender for certain work, either in competition or otherwise, there is no implication that he will be paid for the work—sometimes the very considerable amount of work—involved in arriving at his price: he undertakes this work as a gamble, and its cost is part of the overhead expenses of his business which he hopes will be met out of the profits of such contracts as are made as a result of tenders which prove to be successful. This generally accepted usage may also—and I think does also—apply to amendments of the original tender necessitated by bona fide alterations in the specification and plans. If no contract ensues, the builder is, therefore, without a remedy. Mr. Daniel, however, contends that no such principle applies if the builder's tender is sought and used not to ascertain the cost of erecting or reconstructing some genuinely contemplated building project, but for some extraneous or collateral purpose for which the building owner may require it. In such circumstances, Mr. Daniel suggests that the builder is entitled to recover a reasonable payment for his work. It may also happen—as it certainly did happen in the present case—that when a builder is told that his tender is the lowest and led to believe that the building contract is to be given to him, he, the builder, is prepared to perform other incidental services at the request of the building owner without any intention of charging for them as such. He is not—Mr. Daniel suggests—rendering these services gratuitously, but is content to be recompensed for them out of the profit which he will make under the contract. If, without default on the builder's part, no contract supervenes, then, says Mr. Daniel, the law will imply a contract to pay a

reasonable sum for these services. His contention is that, for one or other of these two reasons, the defendants are under a legal obligation to pay for all the work itemised in the schedule.

Mr. Lawson's answer can be put quite shortly. He does not deny that a considerable amount of work was done by the plaintiffs, but he says that it was all done—on [the plaintiffs'] own admission—in the expectation and hope that they would receive the building contract. They did not do so and, although the consequences to them are, of course, unfortunate, there can be no room for an implication that they were to be paid for services for which they never intended to charge. As an alternative, Mr. Lawson somewhat tentatively questioned the plaintiffs' allegation that their services were rendered at the defendant's request and, further, he suggested that even if requests for these services were in fact made by Day, the latter had no authority from the defendant to make any such requests.

[His Lordship examined the facts in detail and continued:] Now, on this evidence, I am quite satisfied that the whole of the work covered by the schedule fell right outside the normal work which a builder, by custom and usage, normally performs gratuitously, when invited to tender for the erection of a building. In the absence of any evidence called by the defendants, I can only find that the earlier estimates were given for work which it was never intended to execute. It is possible that, in the very latest stages, the defendant was intending to erect the type of building for which the plaintiffs were giving their quotation, but having obtained, without charge, an initial estimate for a purely notional building, Mr. Davis could hardly expect the builders to go on giving free estimates when a state of reality was at last approached. The earlier estimates, as the correspondence shows, were in fact used, and used for some purpose, in the defendant's negotiations with the War Damage Commission and, as an apparent result of the plaintiffs' efforts, not only were the reconstruction plans approved, but a much higher "permissible amount" was also agreed with the War Damage Commission. It is perhaps justifiable to surmise that these facts, especially the reconstruction plans and the increase in the permissible amount, had at least some influence upon the price of the damaged building which the defendant obtained when it was ultimately sold by him. The work itemised in the schedule which does not relate to estimation, as I think, falls even more clearly outside the type of work which any builder would be expected to do without charge when tendering for a building contract.

The plaintiffs are carrying on a business and, in normal circumstances, if asked to render services of this kind, the obvious inference would be that they ought to be paid for so doing. No one could expect a business firm to do this sort of work for nothing, and again, in normal circumstances, the law would imply a promise to pay on the part of the person who requested the services to be performed. Mr. Lawson, however, submits that no

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such promise can be implied in the circumstances of the present case. The existence, he submits, of a common expectation that a contract would ultimately come into being and that the plaintiffs' services would be rewarded by the profits of that contract leaves no room, in his submission, and, indeed, wholly negatives any suggestion, that the parties impliedly agreed that these services would be paid for in any other way.

This, at first sight, is a somewhat formidable argument which, if well founded, would wholly defeat the plaintiffs' alternative claim. If such were the law it would, I think, amount to a denial of justice to the plaintiffs in the present case, and legal propositions which have that apparent effect must always be scrutinised with some care. In truth, I think that Mr. Lawson's proposition is founded upon too narrow a view of the modern action for quantum meruit. In its early history it was no doubt a genuine action in contract, based upon a real promise to pay, although that promise had not been expressed in words, and the amount of the payment had not been agreed. Subsequent developments have, however, considerably widened the scope of this form of action, and in many cases the action is now founded upon what is known as quasi-contract, similar, in some ways, to the action for money had and received. In these quasi-contractual cases the court will look at the true facts and ascertain from them whether or not a promise to pay should be implied, irrespective of the actual views or intentions of the parties at the time when the work was done or the services rendered.

The authority which perhaps best illustrates this modern view is a case cited by Mr. Lawson for another purpose, *Craven-Ellis* v. *Canons Ltd.*,[1] where, according to the head-note, "The plaintiff "was appointed managing director of a company by an agreement "under the company's seal which also provided for his remunera-"tion. By the articles of association of the company each "director was required to obtain his qualification shares within "two months after his appointment. Neither the plaintiff nor "the other directors obtained their qualification shares within two "months or at all. The plaintiff having done work for the "company claimed to recover the remuneration provided for in "the agreement, or, alternatively, on the basis of a quantum "meruit:—*Held*, that the fact that the plaintiff did the work "under an agreement which was in fact void did not disentitle "him from recovering on a quantum meruit. *Per* Greer L.J.: "The obligation to pay reasonable remuneration for work done "when there is no binding contract between the parties is "imposed by a rule of law and not by an inference of fact from "acceptance of the services."

Before referring to the judgment of Greer L.J. it is perhaps advisable to refer in a little greater detail to the facts. The plaintiff in that case was an estate agent who did certain work

[1] [1936] 2 K.B. 403; 52 T.L.R. 657; [1936] 2 All E.R. 1066.

for the defendant company in connexion with the building of an estate. He later became a director of the company. On April 14, 1931, an agreement was executed under the seal of the company, purporting to be between the company and the plaintiff, stating the terms under which he was to act as managing director of the company. Thereafter the plaintiff's services were thought to be performed under the provisions of that agreement and for the remuneration specified in the agreement. In fact, the directors who affixed the seal of the company to the agreement, and, indeed, the plaintiff himself, were at the material time unqualified and were unable to bind the company. The agreement was, therefore, wholly void.

In dealing with the facts, Greer L.J. refers to the services rendered by the plaintiff after the date of the supposed agreement, namely, April 14, 1931, and says [2]: "As regards the plaintiff's "services after the date of the contract, I think the plaintiff is "also entitled to succeed. The contract, having been made by "directors who had no authority to make it with one of themselves who had notice of their want of authority, was not binding "on either party. It was, in fact, a nullity, and presents no "obstacle to the implied promise to pay on a quantum meruit "basis which arises from the performance of the services and the "implied acceptance of the same by the company. It was "contended by Mr. Croom-Johnson on behalf of the respondents "that, inasmuch as the services relied on were purported to be "done by the plaintiff under what he and the directors thought "was a binding contract, there could be no legal obligation on "the defendants on a quantum meruit claim. The only one of "the numerous authorities cited by Mr. Croom-Johnson that "appears to support his contention is the judgment of a Divisional "Court in *In re Allison, Johnson & Foster Ltd.; ex parte Birkenshaw.*" [3] Greer L.J. refers to certain passages in that case and goes on to say in relation to one passage [4]: "This passage "appears to involve the proposition that in all cases where parties "suppose there is an agreement in existence and one of them has "performed services, or delivered goods in pursuance of the "supposititious agreement there cannot be any inference of any "promise by the person accepting the services or the goods to "pay on the basis of a quantum meruit. This would certainly "be strictly logical if the inference of a promise to pay on a "quantum meruit basis were an inference of fact based on the "acceptance of the services or of the goods delivered under what "was supposed to be an existing contract; but in my judgment "the inference is not one of fact, but is an inference which a rule "of law imposes on the parties where work has been done or "goods have been delivered under what purports to be a binding "contract."

[2] [1936] 2 K.B. 403, 409.

[3] [1904] 2 K.B. 327; 20 T.L.R. 493.

[4] [1936] 2 K.B. 403, 410.

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In a further passage Greer L.J. says[5]: "In my judgment, "the obligation to pay reasonable remuneration for the work "done when there is no binding contract between the parties "is imposed by a rule of law, and not by an inference of fact "arising from the acceptance of services or goods. It is one of "the cases referred to in books on contracts as obligations arising "quasi ex contractu, of which a well-known instance is a "claim based on money had and received. Although I do not "hold that the decision of the court in *Ex parte Birkenshaw*[6] "was wrong, I think that the passage I read from the judgment "is not a correct statement of the law. I accordingly think that "the defendants must pay on the basis of a quantum meruit not "only for the services rendered after December 31, 1930, and "before the date of the invalid agreement, but also for the "services after that date. I think the appeal should be allowed, "and judgment given for such a sum as shall be found to be "due on the basis of a quantum meruit in respect of all services "rendered by the plaintiff to the company until he was dis-"missed. The defendants seem to me to be in a dilemma. If "the contract was an effective contract by the company, they "would be bound to pay the remuneration provided for in the "contract. If, on the other hand, the contract was a nullity "and not binding either on the plaintiff or the defendants, there "would be nothing to prevent the inference which the law draws "from the performance by the plaintiff of services to the "company, and the company's acceptance of such services, "which, if they had not been performed by the plaintiff, they "would have had to get some other agent to carry out."

Then there is the fairly recent case of *Upton-on-Severn Rural District Council* v. *Powell.*[7] I need only read the headnote: "The appellant's farm was in the Upton police district, but in "the Pershore, and not the Upton, fire district. A fire broke out "on the farm, and the appellant telephoned to the police "inspector at Upton and asked for the fire brigade to be sent. "The Upton fire brigade was informed, and it went to the farm "at once. The appellant was entitled to the services of the "Pershore fire brigade without charge, but the Upton brigade, "if it went to a fire outside its own area, was entitled to contract "for payment for its services. At the time when the brigade "was summoned, all the parties concerned were under the "impression that the farm was in the Upton fire district. For "the Upton fire brigade it was contended that a contract had "been created by implication, under which it was entitled to be "remunerated for its services:—*Held*, the appellant must be "treated as having asked for the Upton fire brigade to be sent "to his farm, and the fact that at the time the parties thought "that the fire was in its area did not prevent there being a "contractual relationship. The appellant was, therefore, liable

[5] [1936] 2 K.B. 412.
[6] [1904] 2 K.B. 327.
[7] [1942] 1 All E.R. 220.

"under an implied contract to pay for the brigade's services." This is a decision of the Court of Appeal, and Lord Greene M.R. pointed out [8]: "The sole question here is whether or not any "contract was made by which the Upton Fire Brigade rendered "services on an implied promise to pay for them made by or on "behalf of the appellant." Lord Greene made it perfectly clear that the appellant did not know that he was in fact asking for the services of a fire brigade outside his own area, for which he would have to pay, and at the same time the Upton fire brigade thought that they were performing a gratuitous service within their own area. Nonetheless, when the true facts were known, the law implied a contract to pay regardless of the actual intention of the parties at the time.

I am unable to see any valid distinction between work done which was to be paid for under the terms of a contract erroneously believed to be in existence, and work done which was to be paid for out of the proceeds of a contract which both parties erroneously believed was about to be made. In neither case was the work to be done gratuitously, and in both cases the party from whom payment was sought requested the work and obtained the benefit of it. In neither case did the parties actually intend to pay for the work otherwise than under the supposed contract, or as part of the total price which would become payable when the expected contract was made. In both cases, when the beliefs of the parties were falsified, the law implied an obligation—and, in this case, I think the law should imply an obligation—to pay a reasonable price for the services which had been obtained. I am, of course, fully aware that in different circumstances it might be held that work was done gratuitously merely in the hope that the building scheme would be carried out and that the person who did the work would obtain the contract. That, I am satisfied, is not the position here. In my judgment, the proper inference from the facts proved in this case is not that this work was done in the hope that this building might possibly be reconstructed and that the plaintiff company might obtain the contract, but that it was done under a mutual belief and understanding that this building was being reconstructed and that the plaintiff company was obtaining the contract.

I do not derive very much assistance from the Scottish case of *Landless* v. *Wilson*,[9] and, indeed, I am not really satisfied that all the statements of the law enunciated in that case correctly represent the law of this country as opposed to the law of Scotland. Some assistance, perhaps, is obtained from a short passage in the judgment of Lord Shand [10] which, I think, lends some support to the view which I have already expressed as to the use of plans, or estimates, for extraneous purposes.

In view of the detailed references which I have made to the

[8] [1942] 1 All E.R. 220.
[9] (1880) 8 R. (Ct. of Sess.) 289.
[10] Ibid. 293.

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correspondence I do not propose to occupy time in considering Mr. Lawson's alternative submission. It is abundantly plain from the correspondence that Mr. Day requested the plaintiffs to do all this work. He never disguised the position from the defendant and I am perfectly satisfied that throughout the whole of his dealings with the plaintiffs he was acting within the scope of his authority.

I have, therefore, come to the conclusion that the defence to the alternative claim fails and that the court should imply a condition or imply a promise that the defendant should pay a reasonable sum to the plaintiffs for the whole of these services which were rendered by them. As to amount, I have considered the plaintiffs' charges as set out in the schedule with some care. On the rather scanty information available to me, I have come to the conclusion that while some of the items may well be undercharged, certain of the larger items cannot be fully justified. The plaintiffs are entitled to a fair remuneration for the work which they have done, but they cannot, in my view, quantify their charges by reference to professional scales. Doing the best I can, I think the plaintiffs would be fairly recompensed if I deducted £100 from the amount claimed, leaving a balance of £250 13s. 5d.

I might perhaps add one last word to this judgment. Mr. Lawson suggested that if I found for the plaintiffs in the present case, I would be granting a new charter to builders for which no authority can be found in the books. As to the lack of authority, it must be borne in mind that until a comparatively short time ago, builder's estimates were useful for one purpose only, namely, to ascertain what a proposed building would cost. When licences are required for a variety of purposes and when war damage claims require to be settled, this is no longer the case. The old-fashioned purpose of an estimate may become an almost subsidiary one, and builders may be called upon to perform all kinds of services and provide all kinds of information quite unconnected with the submission of a tender. I find it difficult to think that any injustice will result if building owners, who obtain the benefit of all these services upon the understanding that a contract is to be given, should be required to make some payment for them, if they subsequently decide that the contract should be withheld.

In the result, there will be judgment for the plaintiffs for the sum of £250 13s. 5d.

Judgment for the plaintiffs.

Solicitors: *Owen White & Catlin, Hounslow; Oscar Mason & Co.*

P. P.

[CHANCERY DIVISION.]

* GENERAL NURSING COUNCIL FOR ENGLAND AND WALES *v.* ST. MARYLEBONE BOROUGH COUNCIL.

1957
June 27.

Danckwerts J.

[1957 G. 629.]

Rates and Rating — Social welfare — Health — Council authorized by statute to maintain register of nurses—Claim for rating relief—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.

An organization regulated by the Nurses Act, 1957, which was required by that Act (inter alia) to maintain a register of nurses established in pursuance of the Nurses Registration Act, 1919, took out a summons to determine whether on the true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (*a*), it formed an organization within the meaning of that subsection:—

Held, that the organization having been established to ensure that the general public should receive the services of competent nurses, that organization was one for the benefit of the public and therefore for a purpose of social welfare, within the meaning of section 8 (1) (*a*) of the Act.

ADJOURNED SUMMONS.

The General Nursing Council for England and Wales took out a summons against the rating authority in whose borough they occupied certain premises to determine whether on the true construction of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, they formed an organization mentioned in that subsection.

G. D. Squibb Q.C. and *W. L. Roots* for the plaintiffs.
Geoffrey Cross Q.C. and *J. L. Arnold* for the defendants.

All the cases cited in argument were referred to in the judgment.

DANCKWERTS J. stated the question raised by the summons and continued: The matter depends upon the true construction of the section to which I have referred. This section allows a certain amount of relief from the full weight of rates in the case of bodies to which the section applies. The section provides by subsection (1): "This section applies to the following heredita-"ments, that is to say—(*a*) any hereditament occupied for the "purposes of an organization (whether corporate or unincor-"porate) which is not established or conducted for profit and "whose main objects are charitable or are otherwise concerned "with the advancement of religion, education or social welfare." It is common ground that the council is not established or

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

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conducted for profit, and the question arises on the subsequent words. It is not contended that the organization represented by the council is charitable, and no reliance is placed on the words referring to religion or education; but it is contended that the council is one whose main objects are concerned with the advancement of social welfare, whatever that may mean.

The first thing to do is to look and see what are the main objects of the council. They depend upon the statutes which regulate the council's existence. It was formed under a statute of 1919, and there were some amending statutes, but at the present time it is regulated by a consolidating Act called the Nurses Act, 1957. It is, I think, accepted by both parties that it is sufficient to refer to that statute for the purpose of ascertaining the objects of the plaintiff council.

Under section 1 of the Nurses Act, 1957, the body is established, and the composition of the council is settled by the terms of the First Schedule. I need not go into the constitution of the council; it does not seem to be material for the purpose of the question that I have to decide.

I turn to section 2, which seems to me to provide the purpose of the creation of this body: "It shall be the duty of the "council—(*a*) to maintain, in accordance with rules in that "behalf made by them, the register of nurses established in "pursuance of the Nurses Registration Act, 1919, which shall "consist of—(i) a general part containing the names of all nurses "who satisfy the conditions of admission thereto; (ii) a part "containing the names of nurses trained in the nursing and care "of persons suffering from mental diseases; (iii) a part containing the names of nurses trained in the nursing of sick children; "and (iv) such other parts as may be prescribed; (*b*) to maintain, "in accordance with rules in that behalf made by them, the roll "of assistant nurses established in pursuance of Part I of the "Nurses Act, 1943." Subsection (2) provides: "Where a "person satisfies the conditions of admission to a part of the "register other than the general part, his name may be included "in that other part notwithstanding that it is also included in "the general part." Then under subsection (3): "A certificate "under the seal of the council duly authenticated stating that "a person is, or was at any date, or is not, or was not at any "date, duly registered or enrolled shall be evidence in all courts "of law of the facts stated in the certificate."

Under section 3 the council is to "make rules for regulating "the conditions of admission to the register and to the roll "respectively and the conduct of any examinations which may "be prescribed as a condition of admission thereto and any "matters ancillary to or connected with any such examinations, "and any such rules shall contain provisions" relating to certain things.

Then in section 4 there is provision for the registration of nurses trained abroad, and in section 5 there is provision for a

list of persons neither registered nor enrolled. Section 6 is not important for present purposes. Section 7 provides for the council making rules concerning removal from, and restoration to, the register, roll and list. Section 8 concerns closing of parts of the register. Section 9 concerns information to be obtained. Under section 10: "The council shall make rules providing for "the issue of certificates to persons registered or enrolled and "with respect to the uniform or badge which may be worn by "persons registered and persons enrolled respectively."

In section 11 there is provision for the training of nurses by area nurse-training committees which are appointed by the Minister of Health. The expenses incurred by the area nurse-training committees with the approval of the council are to be defrayed by the council under section 15. But in the end it appears from a later section, section 26, that "All expenses "incurred by the council with the approval of the Minister which "are attributable to defraying expenditure incurred by area "nurse-training committees (other than expenditure incurred by "such committees in conducting examinations on behalf of the "council) shall be defrayed by the Minister out of moneys pro-"vided by Parliament, and all other expenses incurred by the "council under this Act shall be defrayed by the council." So that as regards committees training nurses, in the end the expenses come on the public funds, and they merely pass through the council as a temporary matter.

Section 27 is of some importance, because it provides for penalties for false assumption of the title of registered or enrolled nurse, and therefore, of course, is intended to discourage people passing themselves off as nurses who are not subject to the qualifications for which the Act provides.

Section 28 provides for restriction on the use of the title of nurse and assistant nurse, and there are certain other provisions in the Act which I think are not material, except section 30, which perhaps I should mention, because that confers on the council power to "make rules for prescribing anything which by "this Act is required or authorized to be prescribed and generally "for making provision with respect to any matters with respect "to which the council think that provision should be made for "the purpose of carrying this Act into effect." Rules have in fact been made under the provisions of that section.

It is contended on behalf of the plaintiff council that the main purpose of the council is the formation of this register, and that anything else which the council is entrusted with under the Act, in effect, is merely a subsidiary object. It is said that the object of the register is to provide for the nurses concerned who appear on the register being qualified persons so that the public will be protected from being nursed by persons who are not properly qualified, and that being so, the object of the whole system created by the Act is the welfare of the public, or that part of the public who are suffering from sickness and require nursing for

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any purpose. It is said that that is a matter of social welfare, and, therefore, the council comes within the terms of the section because it is a body whose main objects are the advancement of social welfare.

On the other hand, it has been argued on behalf of the borough council that the plaintiffs are not entitled to the benefit of the section, because the council is concerned at least as much with the benefit of the nursing profession by seeking to raise the standards of nurses and, therefore, their status generally; and also that it cannot be said that the benefit to the public is at all direct, but is merely incidental, whereas in order to comply with the terms of the section there must be some direct relation with what has been called in one or two cases the beneficiary, the beneficiary being, as I understand it to be argued in the present case, the public, or a portion of the public.

Now, it is to be observed that the organization in the present case, the council, is, it appears, at any rate for purposes of income tax, not a charitable body. It was held in *General Medical Council* v. *Inland Revenue Commissioners*[1] that the General Medical Council was not a body which could claim exemption from taxation of a certain character conferred by the Income Tax Acts upon certain income of charitable bodies. Of course under those statutes the body seeking exemption must exist solely for charitable purposes, and the income must be applied solely for charitable purposes. Apparently the difficulty of the General Medical Council was that the medical profession, by virtue of the registration provided for under the relevant provisions, conferred benefits upon the medical profession, because they were able to obtain their fees if they were registered, and not otherwise. Nothing of that sort, it is to be observed, exists in the present case.

The body in Scotland corresponding to the council with which I am concerned has also been before the courts in regard to the question of income tax. As I understand it, the General Nursing Council for Scotland has, in substance, the same constitution as the body which is before me in the present case. The Scottish case is *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*.[2] I shall refer to a passage in that case later in my judgment.

There have been several cases on this particular section of the Rating and Valuation Act, 1955, before the courts, and while I have studied them with interest, I do not find that any of them decide the point which I have now to decide. Each of them, it seems to me, dealt with different bodies, with different constitutions and different objects. Accordingly, I have to decide this case having regard to the particular facts and to the terms of the Act and without obtaining much assistance from the previous decisions on this subsection. I have to decide whether

[1] (1928) 44 T.L.R. 439; 13 T.C. 819.

[2] (1929) 14 T.C. 645.

this is a case in which the objects of the organization are concerned with the advancement of "social welfare." There seems to be unanimity among the judges who have had to construe those words that it is impossible to give a definition of social welfare, though certain special definitions are to be found in certain Acts, such as the Miners Welfare Act of 1952, which I did not find was of much assistance to me. It seems to me that social welfare must be connected with society in some way —the welfare of society—which I take to mean the welfare of the public, or a certain portion of the public. The only assistance which I get from any of the cases which have been cited is that it appears fairly clearly from the decision in *Derbyshire Miners Welfare Committee* v. *Skegness Urban District Council*[3] that it is not an objection to the application of the section that a portion of the public are benefited by the activity in question and not the whole of the nation, or anything of that sort. In the present case the persons who are benefited are persons who require nursing assistance, and persons who require nursing assistance are necessarily persons who are sick or otherwise in need of nursing because of their condition. I find nothing in the section which compels me to hold that only poor persons are to be regarded as a subject of social welfare. It seems to me that any class of person who is in need of nursing may be the subject of welfare in the present case, but that that does not prevent the welfare being social welfare.

It is also to be observed that it is not a case where, like the charitable cases, the objects must be wholly charitable, or wholly for any particular purpose, and where the income must be strictly applicable to a charitable purpose and nothing else. It concerns "main objects," and therefore it is claimed that one could have regard to the main purpose of the body which is under consideration, and any subsidiary or less important purposes may be disregarded, as it seems to me, in reaching a conclusion whether the body comes within the terms of the section.

Though it is perfectly true, as has been argued on behalf of the borough council, that the section does not say "any organiza- "tion which provides benefit of welfare to the public," on the other hand, it is to be observed that the words of the subsection are not "whose objects are for the advancement of religion, "education or social welfare," but merely "whose main objects ". . . are . . . concerned with the advancement of religion, "education or social welfare." Therefore, it seems to me that it is not essential that it should be formed ostensibly for the purpose of advancing social welfare, and it is sufficient if the body concerned is formed with objects the result of which is the advancement of social welfare.

It seems to me that the conclusion which I have reached has been put very well in the words of Lord Sands in the *General*

[3] [1957] 1 W.L.R. 764; [1957] 2 All E.R. 405.

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Nursing Council for Scotland case,[4] where Lord Sands said: "Here again, as it appears to me, the council is stamped as "established for a charitable purpose. But again the problem "of the 'only' presents itself." It must be remembered, of course, that this was a case under the taxing Act for income tax which requires the body to be set up only for charitable purposes. Lord Sands continued: "Can the council be said to be estab-"lished for any additional purpose to the two I have indicated? "Upon this question I have felt great difficulty, and I confess "my mind has wavered. Admission to the register of nurses "does not, as in the case of the Medical Register, confer any "statutory privilege or advantage. But it is undoubtedly a "*cachet* which is to the professional advantage of the nurses "who obtain it. Accordingly, if this were the case of a profes-"sional corporation which, either by charter obtained on its "application, or legislation promoted by itself, had obtained a "monopoly of the right to a certain professional *cachet*, then "even though the corporation had as objects the improvement "of professional education and the increased efficiency of the "profession generally in the interests of the sick, the corporation "could not claim exemption as being a body established for "charitable purposes only. But this is not the present situation. "So far as appears the legislation by which the council was "established was not the crown of a movement promoted by the "nursing profession or a certain body among them, but was the "creating of a statutory body and the imposition of a system "upon the profession by Parliament on its own initiative. In "this view, as it appears to me, there is cogency in the conten-"tion that Parliament must be conceived as having established "this body in the general public interest, and not in the interest "of any section of the profession. Professional advantage there "may be to the section who qualify, but it may be urged that "this is incidental and not a purpose for which the council was "established. The commissioners use the expression 'serves "'the interests.' But this does not appear to be necessarily "commensurate with 'established for the purpose.' The "existence of the office of Commissioners of Inland Revenue "subserves the interests of those who adorn that office. But "the office was not established for that purpose."

That, in my view, expresses the real purpose of the establishment of the Nursing Council in the present case. It was not established, as it seems to me, for the purpose of raising the professional status of the nurses, but for the purpose of creating a system of registration so as to prevent incompetent nurses being able to victimize the public, and for making sure that the public should receive the services only of competent nurses. That seems to me to be the establishment of a body for the purpose of benefiting the public, and, therefore, for a purpose.

[4] 14 T.C. 645, 652.

as it seems to me, of social welfare. Accordingly, I reach the conclusion that in the present case the claim of the Nursing Council to be an organization within the terms of the subsection is established.

Declaration accordingly.

Solicitors: *Pontifex Pitt & Co.; Sharpe, Pritchard & Co.*

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[COURT OF APPEAL.]

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[1955 C. No. 2201.]

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1957 *July*, 11, 12, 15.

Hodson, Parker and Ormerod L.JJ.

Railway—Statutory duty—Permanent way men—Man killed on line—"Repairing the permanent way"—Tightening loose fishplate nuts—Whether work of "repairing"—Whether danger . . . likely to arise—Railway Employment (Prevention of Accidents) Act, 1900 (63 *&* 64 *Vict. c.* 27), *s.* 1; *Prevention of Accidents Rules,* 1902 (1902, *No.* 616), *r.* 9.

The plaintiff's husband, a lengthman in the employment of the defendants, the British Transport Commission, was struck and killed by one or other of two passing goods trains while engaged in tightening-up, or being about to tighten-up, loose fishplate nuts on a railway line of the defendants. It was daylight at the time and there was clear visibility up or down the lines for about a quarter of a mile. The trains were travelling at about 15 miles per hour and the number of trains going each way was about four an hour. Rule 9 of the Prevention of Accidents Rules, 1902, provides: "With the object of protecting men working singly or "in gangs on or near lines of railway in use for traffic for the "purpose of relaying or repairing the permanent way of such "lines, the railway companies shall, after the coming into opera-"tion of these rules, in all cases where any danger is likely to arise, "provide persons or apparatus for the purpose of maintaining a "good look-out or for giving warning against any train or engine "approaching such men so working."

On the occasion in question the deceased was working alone and no lookout had been provided. The widow sued the defendants for damages under the Fatal Accidents Acts, 1846–1908, alleging a breach of statutory duty. Barry J. dismissed the action. On appeal:—

Held, (1) that the work on which the deceased was engaged was "repairing the permanent way," within rule 9 of the rules of 1902.

Dicta of Lords Porter and Simonds, and Viscount Jowitt L.C. in *Berriman* v. *London & North Eastern Railway Co.* [1946] A.C. 278, 307, 315, 291; 62 T.L.R. 170; [1946] 2 All E.R. 255 applied.

Dictum of Donovan J. in *Reilly* v. *British Transport Commission* [1957] 1 W.L.R. 76, 79; [1956] 3 All E.R. 857 approved.

(2) That the court was entitled to look at the circumstances of the case, and that having regard to such salient facts as the character and speed of the traffic on the line, the visibility and the method and nature of the work which was being done by the deceased, which did not prevent him from keeping a lookout for

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himself, it was not a case where any danger was likely to arise; therefore rule 9 did not apply and the appeal failed.

Dicta of Lord Sumner in *Vincent* v. *Southern Railway Co.* [1927] A.C. 430, 440, and of Denning L.J. in *Smithwick* v. *National Coal Board* [1950] 2 K.B. 335, 351; 66 T.L.R. (Pt. 2) 173 applied.

Dictum of Donovan J. in *Reilly* v. *British Transport Commission* (supra) at p. 80 approved.

Hutchinson v. *London & North Eastern Railway Co.* [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330 considered.

Decision of Barry J. affirmed.

APPEAL from Barry J.

The following facts are taken from the judgment of Hodson L.J. On the morning of November 12, 1953, Laurence Cade, the husband of the plaintiff, who was a lengthman with some four years' experience, was, under the orders of one Winfield the foreman ganger, working on a railway line at Kingston-upon-Hull belonging to the defendants. Winfield's length of line included a length running between Ella Street and a lengthman's hut in the Willerby-Hull direction. The line was called a main line and there were two lines on a curve. It was used by goods trains and was what was called a permissive block, i.e., a number of trains up to seven might enter the block at the same time. The trains travelled slowly.

The gang started at Ella Street and Cade was instructed to walk the line while the main body of the gang went off with the foreman to do work down the line. Cade followed after them and was subsequently seen near the lengthmen's hut at the Willerby end of the length, having emerged from the hut with a long spanner in his hand. Cade told Winfield that he had found a fishplate nut loose and he was going to tighten it.

The duties of a lengthman walking the line were to inspect the line to see if anything was wrong, and by regulation he carries with him a key hammer with which he knocks in any keys in the chairs which might be found to be loose. If he noticed a fishplate nut requiring adjustment he had to go to the nearest lengthmen's hut to get a long spanner to tighten the nut. If only one nut was loose he carried on and did not attend to it at once, coming back to it when convenient; but if two nuts were found to be loose he did the job at once. On the day in question there were two trains on the track, travelling at about 15 miles per hour, tender first, one on the down line and one on the up line. It was a clear day, with good visibility and Cade must have been aware of one train and was apparently standing in the six-foot way between the two lines when he was struck by the other train and killed.

His widow brought the present action as administratrix claiming damages under the Fatal Accidents Acts, 1846–1908.

On January 17, 1957, Barry J. dismissed the action. The plaintiff appealed.

F. W. Beney Q.C. and *Felix Denny* for the plaintiff.

G. S. Waller Q.C. and *Alastair Sharp* for the Commission.

The following cases were cited in argument in addition to those referred to in the judgments: *Griffin* v. *London Transport Executive* [1]; *Greg* v. *Planque*.[2]

Cur. adv. vult.

HODSON L.J. This is an appeal from a judgment of Barry J. given on January 17, 1957. The claim was made under the Fatal Accidents Act, 1846–1908, by the widow of Laurence Cade, who was killed on November 12, 1953, near Settings Dyke Bridge, on a railway near Kingston-upon-Hull. He was killed, in the course of his employment by the British Transport Commission, when he was either tightening-up, or about to tighten-up, loose fishplate nuts on the railway and he was struck by one or other of two trains. [His Lordship stated the facts as set out above and continued:] On the day in question there is no doubt that what happened was that there were two trains, one on the down line and one on the up line, and the deceased man must have been aware of the approach of one train and was standing in the six-foot way between the two lines when he was struck by the other train and killed. This situation is envisaged by regulation. Rule 234 (*a*) of the British Railway's Rules provides: "When a train is approaching, men working on or near to "the line must not remain on any running lines, nor between "them if the space is less than eight feet, but must at once "move clear of all lines unless they can distinctly see that they "are in a position of safety, and in no danger from another train "approaching them unobserved," and so on.

Various questions were raised and various allegations of negligence were made against the British Transport Commission and their servants, including Winfield, the foreman ganger, and the drivers of the respective trains. The only question which now survives arises under rule 9 of the Prevention of Accidents Rules, 1902, made by the Board of Trade pursuant to the Railway Employment (Prevention of Accidents) Act, 1900. The rule reads: "With the object of protecting men working singly or in "gangs on or near lines of railway in use for traffic for the "purpose of relaying or repairing the permanent way of such "lines, the railway company shall, after the coming into operation "of these rules, in all cases where any danger is likely to arise, "provide persons or apparatus for the purpose of maintaining "a good look-out or for giving warning against any train or "engine approaching such men so working, and the persons "employed for such purpose shall be expressly instructed to act "for such purpose, and shall be provided with all appliances "necessary to give effect to such look-out." The deceased man was alone and no look-out was provided.

Two questions arise on this appeal. The first is whether the deceased man was doing work of repair, and the second is

[1] [1950] W.N. 152; [1950] 1 All E.R. 716.

[2] [1936] 1 K.B. 669.

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whether he should have been provided with a look-out to warn him of the approach of any trains, because his work was one in which danger was likely to arise. As to the first point, on first impression it might be thought that the work of a lengthman inspecting the track and knocking in keys with a hammer where they had worked loose and tightening up nuts on the fishplates where necessary with a spanner was work of maintenance, not coming under the head of "repair." The particular work in which this man was engaged was, of course, the latter; and, in my judgment, the judge was right in coming to the conclusion that the work involved was work of repair. The material words are "relaying and repairing," and the word "repair" has to be construed in its natural and not in any special railway sense.

The conclusion which the judge reached follows from the speeches given in the House of Lords in *Berriman* v. *London and North Eastern Railway Co.*[1] where, by a majority of three to two, their Lordships held that the routine work of oiling signal apparatus was not a work of repair. I think the obvious inference from the speeches, particularly the speeches of the majority, is that the House would have held that the work in question in the present case was work of repair, and that we should follow the guidance of that majority. Lord Porter said[2]: "The exact "meaning of repair is perhaps not easy to define, but it contains, "I think, some suggestion of putting right that which has gone "wrong." Lord Simonds accepted the dictionary definition of "repair"—"to restore to good condition by renewal or replace-"ment of decayed or damaged parts or by refixing what has "given way; to mend."[3]

The type of case we are now considering was, indeed, mentioned by Lord Jowitt L.C. who was one of the minority. He said[4]: "It would, I suppose, be conceded that, if a nut had "worked loose and required to be tightened the work involved "would be a work of 'repair,' even although the actual work "occupied only a few seconds of time."

In *Reilly* v. *British Transport Commission*,[5] the tightening of crossing bolt nuts was held by Donovan J. to be work of repair. He said: "The function of crossing bolts and nose bolts is to "hold tightly together the component parts of the points at that "spot. If by working loose they do not do this, then the bolts "cease to perform their full duty even though they have worked "loose only a little. For their function is not to work loose at "all. Accordingly, when the bolts are tightened up again the "result is that something which has not been doing its full duty "before is now restored to full duty. I see no difficulty in "describing an operation which has that effect as a repair. "Looked at in another way, a crossing bolt or nose bolt which is

[1] [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255.
[2] Ibid. 307.
[3] Ibid. 314.
[4] Ibid. 291.
[5] [1957] 1 W.L.R. 76, 79; [1956] 3 All E.R. 857.

"loose is a defective unit, even though it is only a little loose, "for it should be tight, and if the defect is not made good, it may "become more pronounced, and serious results, for example, a "derailment of a train, might ensue. To put right such a defect "is, I think, reasonably and properly called a repair."

I think that this analysis of the operation of tightening bolts applies to the operation in question in the present case, and I respectfully agree with the way in which Donovan J. dealt with the matter. Indeed, I think that the conclusion is reinforced by the point which Mr. Denny made, that the instructions are that a lengthman, finding two bolts loose, must as a matter of urgency deal with the matter at once. I entirely agree with the view reached by Barry J. on the first question.

On the second matter, the judge held that this was a case in which no danger was likely to arise and, therefore, the claim failed. It was contended that his decision was wrong because of what had been said in this court in *Hutchinson* v. *London and North Eastern Railway Co.*[6] The court was there at pains to point out the fallacy of the argument presented to it that the words in question did not cover the ordinary case of men working on railway lines which are in use, because in such cases there must always be some danger. Lord Greene M.R. said[7]: "I "think that the phrase 'in all cases where any danger is likely "'to arise' means what it says, and I do not see how it can be "disputed that danger is likely to arise to any men who are "working on a main railway line, quite apart from any special "circumstances, and that the rule is directed to making provision "to guard against that danger. It is said by Mr. Paley Scott, on "behalf of the railway company, that some limitation must be "put on the words 'in all cases where any danger is likely to "'arise.' He contends that, if they are held to cover the "ordinary, normal case of work on a railway line which is in "ordinary use, there would be no need for them because where-"ever men are working on a line which is being used for traffic "there must be some danger. I do not agree. It is manifest, to "my mind, that there may be no danger to men working on the "line in many cases where work is being done on a railway in use "for traffic, which means a railway which is not closed or aban-"doned." Then he gave this instance: "It is clear that, if there "were a branch line with only two or three trains a day at long "intervals, during those intervals no danger would be likely to "arise, and, had the words under consideration not been inserted "in the rule, it would have been obligatory on the company to "provide a look-out even on such a line during such intervals, "which would be absurd." The Master of the Rolls then went on to deal with the situation where work was being done not on the lines but near the lines.

[6] [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330.

[7] Ibid. 481, 483.

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Goddard L.J. was also dealing with the same argument when he said[8]: "With regard to the construction of r. 9 I am bound "to say that, but for the learned judge having taken another "view, I should have thought that the question was unarguable. "The rule is unambiguous. It is made in pursuance of a statute "which contemplates rules being made for 'reducing or removing "'the dangers and risks incidental to railway service,' and one "of the purposes for which rules may be made is 'protection to "'permanent way men when relaying or repairing the permanent "'way.' The danger which is incident to the service of such "men is that of being run down by a train. Therefore, when a "rule, made in pursuance of that statute, lays down that the "company shall provide a look-out 'in all cases where any danger "'is likely to arise' there is no ground for saying that that rule "is to be construed as meaning any unlikely danger. The words "are: 'Where any danger is likely to arise.' An abnormal or "unusual danger is not 'likely to arise.'"

I do not, however, read the judgments as laying down that there are no other instances than those mentioned by Lord Greene M.R. where danger is not likely to arise. To do so would, indeed, be to read into the judgments more than they say; and that they so intended to hold is exceedingly unlikely, in view of the fact that *Vincent* v. *Southern Railway Co.*[9] was cited to them, in which Lord Sumner, in his speech, dealt with the construction of these very words. He said[10]: "The words 'in "'all cases' (that is, of relaying or repairing the permanent ways "in use for traffic) 'when any danger is likely "to arise"' (that "is, from that traffic) are essentially relative to the condition of "the permanent way and of that traffic from time to time, and, "unless the rule requires the provision of a look-out man not "from time to time but throughout the day, which it neither "says nor implies, the only person who can judge such danger "is the man who is on the spot, authorized to detail and instruct "the look-out man, and that person is almost inevitably the fore-"man of the gang. True, the words are 'in all cases where' "not 'whenever,' but also the words are in all 'cases' not in all "'places.' I think 'case' includes the place, the time and the "method of carrying out the repair."

It appears to me to be clear that the court is accordingly entitled to look at the circumstances of the case and also to make up its mind whether danger is likely to arise. This involves considering the method and the nature of the work which is being done. I again agree entirely with the approach of Donovan J. to this question in *Reilly's* case.[11] He said: "It"—that is, the danger—"is constituted, or 'arises,' only when trains and work-"men are brought into close proximity one to the other, and "the surrounding circumstances are such as to constitute a real

[8] Ibid. 488.
[9] [1927] A.C. 430.
[10] Ibid. 440.
[11] [1957] 1 W.L.R. 76, 80.

"risk of accident. I use the expression 'real risk' in contra-"distinction to a remote risk, for the words in rule 9 are 'danger "'is likely to arise'; and the word 'likely' is important in this "context. So that, if a linesman is sent off alone to inspect a "length of line and tighten up, for example, fishplates, this is "work which he can do with a long spanner provided for the "purpose, and at the same time keep his eyes and ears open. "If no special danger like fog is present, there is no reason to "expect that he will be struck by some passing train, the "approach of which he could both see and hear, and to avoid "which he has ample time and space. Such, I think, would be "a case where danger was not likely to arise."

Mr. Beney, for the plaintiff, has, however, argued that this approach is wrong and that the words "where any danger is likely "to arise" in the rule are equivalent to the word "dangerous" where it appears, for example, in Part 2 of the Factories Act, 1937. He relies for his contention on the observations of Du Parcq J. which are quoted by Tucker L.J. in *Smithwick* v. *National Coal Board.*[12] Du Parcq J.'s words are taken from *Walker* v. *Bletchley Flettons Ltd.*[13] He said[14]: "a part of "machinery is dangerous if it is a possible cause of injury to any-"body acting in a way in which a human may reasonably be "expected to act in circumstances which may be reasonably "expected to occur." I draw attention to the use of the word "possible."

Denning L.J. said,[15] dealing with the word "dangerous" in the Factories Act, 1937: "It is 'dangerous' if it is such that it "may reasonably be foreseen to be a source of injury to people "who may be in the vicinity, taking them with all the ordinary "infirmities to which human nature is prone. The occupier must "realize that not everybody is careful: many are hasty, careless "or inadvertent; some are unreasonable, or even disobedient. "It may be unlikely that they will act in such a way, but it is "not only the likely but also the unlikely accident against which "the occupier must guard. He must guard against all conduct "which he can reasonably foresee. The limit of his responsibility "is only reached when the machinery is safe for all except the "incalculable individual against whom no reasonable foresight "can provide—the individual who does not merely do what is "unlikely, but also what is unforeseeable, or, at least, not to be "foreseen by any ordinary man"; and then Denning L.J. referred to Du Parcq J.'s judgment, to which Tucker L.J. had previously referred.

I think that that passage which I have read from Denning L.J.'s judgment provides the answer to the argument here presented, drawing, as it does, the distinction between things

[12] [1950] 2 K.B. 335, 347.
[13] [1937] 1 All E.R. 170.
[14] Ibid. 175.
[15] [1950] 2 K.B. 335, 351.

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dangerous in the sense that danger can possibly arise and cases in which danger is likely to arise.

The remaining question, therefore, is whether on the facts of this case the judge was right in holding that danger was not likely to arise. It is true that the position in which the deceased stood was on a curve, but he could see a quarter of a mile each way. The trains were travelling at the slow speed of about fifteen miles per hour, and the number of trains going each way was probably about four in the hour. It is true that the moment of arrival of any particular train could not be anticipated, because they were not timed in any way; the permissive block system enabled several trains to be in the same section at the same time; and it is also true that the engines were travelling tender first and, therefore, the drivers' view was more obscured than if the boiler had been in front; but in any event the possibility of the driver of the train being able to avoid running down anyone on the track must necessarily be very remote.

The salient feature of the case is, however, that the work which the man was doing with a long spanner provided for the purpose can be done quickly and without relaxing his look-out for more than a moment or two at a time. That appears quite plainly from the evidence in this case. The man, as a matter of practice, if a nut appears to be loose, will stoop down and, if it can be tightened with the fingers, he will tighten it with his hand as far as it will go, and then he will stand up and use the long-handled spanner; but there is nothing in that operation, which is the operation with which we are concerned in this case, which will prevent him, except for a very brief moment, from keeping a look-out ahead and looking after himself. I think that that is the matter which is of salient importance and decisive in this case.

The conclusion of Barry J. upon this matter was, in my judgment, right, and the appeal, therefore, should be dismissed.

PARKER L.J. I have come to the same conclusion. The first question is whether the deceased was working for the purpose of repairing the permanent way. It is true that he was merely about to tighten up two nuts, so that it might well be said that he was doing a job of maintenance or adjustment as opposed to a job of mending or replacement, which everyone, I imagine, would concede to be repair. In the context, however, I do not think that any such distinction can be drawn. Repair is, I think, used in its ordinary sense as the putting right of something which has gone wrong. Winfield, the deceased's foreman, was asked what the deceased's job of track walking involved, and he replied: "It involves examining the track. (Q) For what purpose? (A) For any defects or putting in keys, tightening up bolts or anything that has gone wrong." Add to that the fact that the working instructions were that, if two nuts were found loose, the ganger had to fetch a spanner and tighten up the nuts at

once, and I think it becomes clear that the work was a work of repair in the ordinary sense. I think this follows largely from the speeches of the majority in the House of Lords in *Berriman's* case,[16] and I can find no grounds for saying that a job of repair in the ordinary sense is not within the rule if the length of time involved is short. I entirely agree with the reasoning of Donovan J. on this point in his very careful judgment in *Reilly* v. *British Transport Commission*.[17]

It was, however, argued by Mr. Waller for the commission that the court should look at the deceased's job as a whole and not merely at that part of it which entailed the tightening up of the nuts. I doubt whether this is the correct approach, since the moment he broke off from his track walking and fetched the spanner he was engaged on work of repair; but in any event I should have thought that his job as a whole, included the knocking in of loose keys, was itself work of repair.

The next question is whether this was a case where any danger was likely to arise. Undoubtedly the regulation was made to protect men, in part at any rate, against their own carelessness or inadvertence. See *Hutchinson* v. *London and North Eastern Railway Co.*,[18] *per* Lord Greene M.R. and Goddard L.J.. Accordingly, it is said that the test is the same as in considering, for instance, whether a part of machinery is dangerous for the purposes of section 14 of the Factories Act, 1937. Applying the test laid down by Du Parcq J. in *Walker* v. *Bletchley Flettons Ltd.*,[19] it is said, and I think correctly, that the operation on which the deceased was engaged was a dangerous operation; but the question is whether that is the correct test. I think it is not. It gives no effect to the word "likely," but merely assimilates it to "possible." My Lord has referred to the passage in Denning L.J.'s judgment in *Smithwick* v. *National Coal Board*,[20] where, to quote merely a sentence, he said: "It "may be unlikely that they will act in such a way, but it is "not only the likely but also the unlikely accident against which "the occupier must guard"; but in this regulation the word "likely" appears and likelihood is made the test, and that, as I think, must depend on the exact circumstances.

Support for this is to be gained from a passage in Lord Sumner's speech in *Vincent* v. *Southern Railway Co.*[21] I need only read a very short passage. Lord Sumner said: "True, the "words are 'in all cases where,' not 'whenever'; but also the "words are in all 'cases,' not in all 'places.' I think 'cases' "includes the place, the time and the method of carrying out the "repair." It is, however, said that *Hutchinson* v. *London and North Eastern Railway Co.*[22] is authority to the contrary and that, wherever a man is working on a railway line on which trains

[16] [1946] A.C. 278.
[17] [1957] 1 W.L.R. 76.
[18] [1942] 1 K.B. 481, 486, 490.
[19] [1937] 1 All E.R. 170.
[20] [1950] 2 K.B. 351.
[21] [1927] A.C. 441.
[22] [1942] 1 K.B. 481.

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are running, danger is likely to result, regardless of the exact circumstances. While there are passages in the judgment which at first sight appear to bear this out, I am satisfied that this is not their true effect. It must be borne in mind that in that case men were engaged in adjusting the level of the rails, jacking them up and putting in new ballast, a job which required all their attention. It was the main line between York and Newcastle, with express trains passing every eight to ten minutes, and there was no look-out. In those circumstances, though danger was clearly likely to arise, it was argued that the rule was not intended to apply to normal working, and it only applied in the case of abnormal danger. The judgments, as I read them, do no more than controvert that argument. Finally, the dictum of Lord Sumner in *Vincent's* case,[23] to which I have already referred, was before the court and no dissent was expressed from it.

Turning to the facts of the present case, the salient facts are as follows. The line on which the deceased was working was used only for goods traffic. True, trains passed comparatively frequently, but they were slow-moving. Visibility was good, some quarter of a mile in each direction. The tightening up of the nuts was a matter of one to one and a half minutes and, whether he used his fingers or the long-handled spanner, the deceased could keep a look-out all the time he was working. Finally, he was a very experienced man who had worked on this section for a number of years. In all those circumstances, I agree with the learned judge that it cannot be said that danger was likely to arise. Accordingly I would dismiss this appeal.

ORMEROD L.J. I agree. The judge found that the deceased at the time he met with his accident was engaged in repairing the permanent way, but held that the case was not one where danger was likely to arise. With regard to the first point, as to whether the deceased was engaged in repairing the permanent way, I agree with what had been said, and there is nothing that I wish to add to the remarks which have already been made.

With regard to the second question, of whether this was a case where danger was likely to arise, the facts which the learned judge took into account in coming to this decision were that the operation upon which the deceased was engaged, or about to engage, whichever is the fact, was of the simplest character. In order to tighten the nut on the fishplate, he would first turn it as far as possible with his hand, and then make a final turn with the long spanner provided for the purpose. To place the spanner on the nut required only a momentary glance; and, as the learned judge put it, he was in the very same position to keep a look-out as any man sent there to act specifically as a look-out man. It was proved that there was good visibility for a quarter of a mile either side of the place where the work was being performed, that a number of trains up to about six

[23] [1927] A.C. 430.

in the hour passed the spot at a speed of about fifteen miles per hour, and that the whole of the traffic on this line was slow goods traffic.

Mr. Beney's main criticism of the judgment was that the judge applied the wrong test in asking himself whether the deceased could with reasonable care have seen the train coming. He submitted that the words of the regulation should be equated with the words of section 14 of the Factories Act, 1937, and referred to the classic passage, to which there has already been reference, in the judgment of Du Parcq J. in *Walker* v. *Bletchley Flettons Ltd.*[24] But, in considering this question, attention must be paid to the difference in the wording of the rule and the section respectively. The rule refers to "all cases where any danger "is likely to arise," and the section provides that "every "dangerous part of any machinery . . . shall be securely "fenced." The passage from Denning L.J.'s judgment from *Smithwick* v. *National Coal Board*[25] has already been read. That was a case which was not, of course, dealing with section 14 of the Factories Act, 1937, but with section 55 of the Coal Mines Act, 1911, but the words "dangerous parts of the "machinery" were, of course, similar to the operative words in section 14 of the Factories Act. It is only necessary for me to point out that Denning L.J. said that the limit of the employer's responsibility was "only reached when the machinery "is safe for all except the incalculable individual against whom "no reasonable foresight can provide"; but the wording of rule 9, in my judgment, calls for a different test. It is not the unlikely, albeit foreseeable, act against which the British Transport Commission has to provide protection; they must provide protection against the danger which is "likely to arise." The test here is not that of foreseeability; it is likelihood; and to apply this test requires consideration of the whole of the circumstances of the case.

This is borne out by the dictum of Lord Sumner in *Vincent* v. *Southern Railway Co.*[26]

Mr. Beney placed a good deal of reliance on the judgments of Lord Greene M.R. and of Goddard L.J. in *Hutchinson* v. *London and North Eastern Railway Co.*,[27] but it must be remembered that the facts in that case were very different from the facts in the case at present under consideration. There the men were engaged in the work of putting new ballast under the rails, a task which no doubt required all their concentration and made it difficult, if not impossible, for them to keep any kind of look-out for approaching trains. The work too, as has been pointed out, was being carried out on a main line, where fast trains were passing with considerable frequency and regularity.

The distinction between work of the kind that was being done in *Hutchinson's* case[27] and the sort of task upon which the

[24] [1937] 1 All E.R. 170.
[25] [1950] 2 K.B. 351.
[26] [1927] A.C. 430, 440.
[27] [1942] 1 K.B. 481.

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deceased was engaged is pointed out by Lord Porter in *Berriman's* case [28] where he said: "If reason for the limitation of protection "to men relaying or repairing the permanent way be required, it "is, I think, to be found in the consideration that such men will "for extended periods be concentrated on their work and unable "to watch for oncoming trains whilst so engaged, whereas men "cleaning, oiling or changing points by hand are only momentarily "engaged and can ensure their own safety by looking to see the "state of the line or lines before they undertake their job."

It is true that in that case the question was being considered whether oiling came within the word "repair," but it does show the approach which Lord Porter made to the question. The evidence in the present case is that the work which was being done—the operation of tightening this nut—was even a simpler matter, requiring probably less time and less concentration than that of oiling; and, under those circumstances, it does seem reasonable to say that this was not work which of itself constituted a case in which danger was likely to arise within the meaning of the regulations.

In my judgment, the judge in coming to his decision applied the right test and gave proper consideration to the work which the deceased was required to do and the circumstances under which he was required to do it. I think he was right and I agree that this appeal should be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Smith & Hudson, for Williamson, Stephenson & Repton, Hull; M. H. B. Gilmour.*

A. W. G.

[28] [1946] A.C. 278, 308.

[COURT OF APPEAL.]

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PAVER (VALUATION OFFICER) *v.* STANDARD MOTOR CO. LTD.

Rates and Rating—Industrial hereditament—Motor company's service depot—Whether retail shop, or "premises of similar character "where retail trade or business . . . carried on"—Work done on insurance companies' instructions—Whether insurers middlemen with independent trade interest in repair work—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3.

Part of the work done at a hereditament used as a motor service depot consisted of repairs carried out on the instructions of insurance companies. The company dealt directly with the

insurers in agreeing the extent of the work to be done and the price to be paid, but the owner was required to sign instruments of discharge and satisfaction both of the company and the insurers before the vehicle was delivered back to him after repair:—

Held, that, on the facts, the business done on the instructions of the insurers was properly attributable to the use of the hereditament as a "retail shop" as defined in section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928 [1]; the insurers were not interposed between the owners and the company as independent principals having a distinct trade interest in doing the repair work.

Turpin v. *Middlesbrough Assessment Committee* [1931] A.C. 446, 451; 47 T.L.R. 308 applied.

British Electrical Repairs Ltd. v. *Assessor for Glasgow*, 1933 S.C. 321 distinguished.

Observation of Lord Hill Watson in *Assessor for Perth* v. *Shields Motor Car Co. Ltd.*, 1956 S.C. 186, 197 disapproved.

CASE STATED by Lands Tribunal (Sir William Fitzgerald Q.C.).

The Meriden Rural District Council (hereinafter called the rating authority) and H. W. Paver, the valuation officer for the Meriden Rural Rating Area, appealed against a decision of the local valuation court for Warwickshire given on October 7, 1954, who determined that a hereditament owned and occupied by the Standard Motor Co. Ltd. (hereinafter called "the company"), described in Part I of the valuation list as "service depot, offices "and premises" situated at Peerless Works, Birmingham Road, Allesley, within the said rating area, ought to be treated as an industrial hereditament and the entry in respect thereof ought to be transferred to Part II of the valuation list.

At the hearing before the tribunal the following facts were proved or admitted: (a) The hereditament is situated beside the main Birmingham–Coventry–London road a little distance outside the Coventry City boundary. There is a notice in big letters running across the front of the main building which is lit up at night saying "Standard Triumph Service Division." (b) The public are clearly invited to go to the hereditament to have their cars serviced. There is a notice directing them to the gate by which they may enter. There is a reception lounge to receive them, where their orders are taken when they are handing the car in, and where they can wait to receive their car when repairs have been completed. Any owner of a Standard or Triumph car can bring his car into these premises to have it repaired or overhauled. (c) The greater part of the work done on the hereditament is repair work (including some maintenance work), and from

[1] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In "this Act the expression 'industrial "'hereditament' means a hereditament . . . occupied and used . . . "subject as hereinafter provided, as "a factory or workshop: Provided "that the expression industrial "hereditament does not include a "hereditament occupied and used as "a factory or workshop if it is "primarily occupied and used for the "following purposes or for any combination of such purposes, . . . "(b) the purposes of a retail shop. ". . . 'Retail shop' includes any "premises of a similar character "where retail trade or business (including repair work) is carried on."

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the company's point of view the main purpose of the premises is to do repair work of one sort or another. Except for certain experimental work (which is not included in the figures of turnover hereinafter referred to) all work done on the hereditament is of types similar to the work which would be done at any large garage which was an agent for cars of the company's manufacture, although the proportions between the various types of work would be different. (d) When a car is brought to the hereditament by or on behalf of its owner, it is taken to the reception building. An official of the company interviews the driver and takes a note of particulars of the vehicle and of the attention it requires. The car is then taken by an employee of the company to the car park, where it remains until there is accommodation for it in the appropriate workshop. Cars ready for collection are handed over at the reception building to the drivers who have come to collect them. (e) The analysis of turnover shows the various categories of work carried out on the hereditament. [The analysis was summarized by Lord Evershed M.R. as follows:

Category (1): "Work done for sales division preparing cars "for sale, and repair and maintenance of company's cars." In terms of turnover that work constituted 27·3 per cent. of the total; and for the purposes of the appeal it was conceded that it could not be described as "retail" work or work appropriate to a "retail shop" within the meaning of section 3 (1).

Category (2): "Work done under company's guarantee"—that is, the company's guarantee to the owners and their motor-cars. That work constituted 10·6 per cent., in terms of turnover; and for the purposes of the appeal it was conceded that it was of a nature properly attributable to a retail shop.

Category (3) (with which the appeal was concerned): "Work "done under instructions of dealers and insurance companies"; and that constituted 34·7 per cent. in terms of turnover.

Category (4): "Work done for the public" (i.e. work done to motor-cars brought to the depot by members of the public calling in the ordinary way as casual customers), 22·7 per cent. That work admittedly fell on the "retail shop" side of the line.

Category (5): "Work done for motor-car dealers, garages and "other members of the motor trade acting as middlemen and, "therefore, subject to trade discount: 4·7 per cent." That category was on the non-retail side of the line.] . . .

The normal procedure in respect of work in this category is as follows. An official of the company, called the chief receptionist, receives from a garage, an insurance company or, in many cases, the owner of a car a telephone message, a letter or a personal visit asking whether a car which has been involved in an accident can be accepted for repair. In many cases the choice of the company as the person to do the repairs is made by the owner of the car. If the car can be accepted by the company for repair, a date for delivery is arranged. The majority of the cars which are repaired at the hereditament after being involved

in accidents can be and are driven there by or on behalf of their owners; the remainder are towed in or delivered by British Railways or British Road Services. The cost of towing or delivery to the hereditament is originally paid by the insurance company concerned (pursuant to a provision commonly contained in policies), but in some cases the owner of the car pays a proportion of such charges. When a car arrives at the hereditament for accident repairs it is always seen by the chief receptionist. The owner often instructs the company to proceed with the repairs, but the company never commences work on accident repairs without first obtaining the instructions of the insurance company concerned. The chief receptionist informs the insurance company and obtains its confirmation that the car in question is covered; until he has been in touch with the insurance company he does not know whether the work to be done will fall into this category or into the category of "work done for the public." If the insurance company confirms that it is responsible for the work, the chief receptionist calls in the engineer acting for the insurance company in question; if the insurance company is not responsible, the chief receptionist hands the work over to other members of the company's staff. The engineer may be an employee of the insurance company but is more often an agent; one such engineer may be agent for many insurance companies. The engineer on behalf of the insurance company visits the hereditament, inspects the car, agrees a rough estimate with the company and gives instructions for the work to be carried out. About 90 per cent. of the oral instructions given by the engineers are confirmed in writing by the insurance company. The name appearing on the documents prepared by the company for its own internal use is that of the owner of the car. After the car has been stripped and the repairs carried out, a final figure of cost is agreed between the company and the engineer acting for the insurance company; after completion of accident repairs about 60 per cent. in numbers of the cars are collected from the hereditament by their owners and the rest by dealers and delivery companies acting on the same basis as in the case of deliveries to the hereditament. When the car is ready for collection the company insists upon receiving from the owner or his agent a "satisfaction note" or "repairs discharge form" which is sent with the final invoice to the insurance company. Insurance companies require this document to be sent to them before paying the final invoice. A "repairs release" form . . . has also to be signed by the owner of the car or his agent; this constitutes an authority to the gatekeeper to let the car out of the works. The company regards the owner of the car as the person who has to be satisfied with the work, which, failing such satisfaction, it would expect to do again at its own expense. In some accident cases the owner of the car orders extra work not covered by the insurance to be done, for which he pays; an example of this is where one panel has to be repaired and resprayed and the owner

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requires the whole car to be resprayed; in the analysis of turnover such extra work is included in category (4). In some accident cases also where half-worn parts have to be replaced, for example, tyres, the insurance company may require the owner to pay half of the cost of new replacements. In a fair number of accident cases the terms of the insurance policy require the insured to bear some portion, say the first £5 or £10, but it may be as little as £2 10s. 0d. or as much as £100 of the claim. The amount for which the insured is liable is collected from him in cash when he collects the car. With the above exceptions, the insurance company pays direct to the company the cost of the work done, upon receipt from the company of the final invoice and the "repairs discharge form" signed by the owner. The heavier accident cases are dealt with in the heavy accident repairs shop and for the remaining accident cases a dozen car spaces are set aside in the main repair shop . . . which contains about 70 car spaces. The paint shop . . . is also used to some extent for accident cases. The cost per job in the accident cases and the man-hours expended thereon are higher than the cost of and man-hours expended on other categories of repair work undertaken at the hereditament.

A list of the staff employed at the hereditament was annexed to the case. The chief receptionist deals mainly with insurance work, and the work of the other receptionists includes the interviewing of people delivering cars for repair.

It was admitted on behalf of the valuation officer and the rating authority that the hereditament is a factory or workshop for the purposes of section 3 of the Rating and Valuation (Apportionment) Act, 1928.

It was contended on behalf of the valuation officer and the rating authority: (a) That the hereditament was primarily occupied and used as a retail service depot for Standard and Triumph motor-cars to which members of the public were invited to resort and could and did resort in order to obtain the goods and services obtainable therein; (b) that accommodation . . . described . . . as "service reception, offices and customers' lounge" was provided at the hereditament for members of the public who did so resort; (c) that the hereditament was occupied and used for the carrying out of retail repair work, including work done to motor-cars under the company's guarantee, namely, the repair, maintenance, overhaul and servicing of motor-cars brought or sent there by members of the public, and that the said work was mainly done to the order of the owners of the said motor-cars and/or of persons otherwise interested therein, including insurance companies with which such owners were respectively insured; (d) that the hereditament was primarily occupied and used for the purposes of a retail shop or alternatively for a combination of the purposes of a retail shop and the purposes of offices which were not those of a factory or workshop and therefore was not an industrial hereditament within the meaning of section 3 of the Act of 1928.

It was contended on behalf of the company: (a) That the work done on behalf of insurance companies (not being the owners of the motor-cars concerned) was not retail trade or business; (b) that the hereditament was not primarily occupied and used for the purposes of a retail shop; (c) that the hereditament was not primarily occupied and used for other purposes not those of a factory or workshop; (d) that the hereditament was not primarily occupied and used for a combination of the purposes of a retail shop and other purposes not those of a factory or workshop; (e) that the hereditament was an industrial hereditament within the meaning of section 3 of the Act of 1928.

The tribunal concluded that the insurance company was not a middleman within the meaning of the term in the cases that have been cited by me and therefore placed item 3, i.e., work done under instructions of insurance companies, in the analysis of turnover, in the category of retail trade, and that so tipped the balance in favour of retail trade. Accordingly, the hereditament was primarily occupied and used for the purposes of a retail shop within the meaning of the proviso to section 3 of the Act of 1928.

The appeals were, therefore, allowed, and the company appealed.

Michael Rowe Q.C., *Eric Blain* and *Frederick Mattar* for the company.

Sir Harry Hylton-Foster Q.C., S.-G., M.P. and *Patrick Browne* for the valuation officer.

Patrick Browne for the council.

In addition to the cases referred to in the judgments, the following were cited in argument: *Assessor for Glasgow* v. *James Henderson & Co.*[2]; *William M'Whirter & Sons Ltd.* v. *Assessor for Glasgow*[3]; *M. & F. Frawley Ltd.* v. *Ve-Ri-Best Manufacturing Co. Ltd.*[4]; *Shell-Mex and B.P.* v. *Clayton*[5]; *Daimler Co. Ltd.* v. *Leeds Rating Authority.*[6]

Cur. adv. vult.

July 16. LORD EVERSHED M.R. The question in this appeal is whether certain hereditaments belonging to the Standard Motor Co. Ltd., described as "service depot, offices and premises" and situate at Peerless Works, Birmingham Road, Allesley, within the rating area of the Rural District Council of Meriden, are used primarily as a "retail shop" within the meaning of section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928.

According to the photographs of the premises and the description given of them, one would at first sight say, without much

[2] 1932 S.C. 337.
[3] Ibid. 407.
[4] [1953] 1 Q.B. 318; [1953] 1 W.L.R. 165; [1953] 1 All E.R. 50.
[5] [1955] 1 W.L.R. 982; [1955] 3 All E.R. 102; affirmed [1956] 1 W.L.R. 1198; [1956] 3 All E.R. 185.
[6] (1933) 4 D.R.A. 73.

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hesitation, that nothing less like a retail shop could well be imagined. But it has to be borne in mind that at the end of section 3 the words "retail shop" are given an expanded significance. It there provides that "'Retail shop' includes any "premises of a similar character where retail trade or business "(including repair work) is carried on." Moreover, the question with which we are concerned is, in form, not greatly dissimilar from the subject-matter of a number of cases, including cases in the House of Lords, of which *Turpin* v. *Middlesbrough Assessment Committee* [1] is an example. I will cite two short paragraphs from the speech of Lord Dunedin in that case [2]: "My Lords, "the matter seems to me simply a question of attributing an "every-day meaning to the words used in the definition." The second is: "Upon the facts found this hereditament is primarily "occupied and used for the purposes of repair work, done to cars "and other objects brought or sent there by the owners, without "the intervention of any middleman."

In the present case we have been supplied with a table in which the work done at this hereditament is divided under five heads. [A summary of this table is set out above.] The relative importance of the work is indicated in the table by a percentage of the total turnover in each of the five cases. Although it may be, or it might be, in some circumstances, that that method of evaluation would not be conclusive, for the purposes of this appeal and of this judgment, it will admittedly suffice.

[His Lordship referred to the analysis of turnover as set out above and continued:] If the non-retail and the retail categories are respectively added up, it appears that 32 per cent. of the work done can (for the purposes of this appeal) be treated as not retail—that is, work not properly attributable to a retail shop; and 33.3 per cent. can be regarded as properly attributable to a retail shop. It follows, therefore, that the answer to the question, is category (3), "Work done under instructions of "dealers and insurance companies," retail or not retail, will be decisive of the question whether these premises as a whole are used primarily as a retail shop or not. For the purposes of this appeal, moreover, we have confined our attention to work done in category (3), "under instructions of insurance companies"; for that, we are informed, constitutes the bulk of the 34.7 per cent.

The case stated contains a full statement of what in fact does occur when in the normal course a motor-car, having suffered injuries through accident—which is covered by a policy of insurance—is sent to the company's premises at Meriden for repair. Among the documents attached to the case are certain files, and these well illustrate the course of business in the normal case where the work is being done (if one may so describe it) under

[1] [1931] A.C. 446, 451; 47 T.L.R. 308.

[2] [1931] A.C. 446, 473.

cover of an insurance policy. I shall not take time by attempting an adequate summary of all these facts.[3] It is sufficient to say that the documents and the findings show that the insurers responsible under the policy for indemnifying the assured for the injuries suffered by his motor-car deal in fact directly with the company—that is to say, the work which has to be done on the injured motor-car and the price which will be charged by the company for doing it are agreed between the insurer and the company.

I am prepared to assume—certainly for the purposes of this appeal—that the company would regard themselves as only bound to take directions (in the kind of case which I have regarded as typical) from the insurers and only to do the work as directed by the insurers. It is, however, necessary to observe that the company know full well what is the position of the person or firm who on behalf of the insurers give them directions—that is to say, they know that they are dealing with insurers whose liability arises to the car owner under policies of insurance, and that they are not dealing with a trader in the motor trade in the ordinary sense of that phrase. Moreover, the case itself shows that the owner of the motor-car (who, of course, remains the owner throughout the whole proceeding) is required to sign instruments of discharge and satisfaction in favour both of the company and of the insurers before the motor-car is delivered back to him after repair.

On these facts it is said by the company that the insurer is a "middleman," as that word was used in the short passage which I read from Lord Dunedin's speech; and, by way of definition, it is said that the word "middleman" covers anyone who stands in a separate legal relationship from the owner of the article, on the one hand, and the car manufacturer or repairer on the other. That is, no doubt, a fair definition of the word "middleman," at least in some contexts; and if the language of Lord Dunedin which I have cited had formed part of the statute which we have to construe, it might well be conclusive in favour of the company. But in my judgment Lord Dunedin was not intending to lay it down as a matter of construction of the Act that use for the purposes of a retail shop was excluded by the presence of any middleman—that is, any middleman in the sense in which the word is used in the definition that I have cited. I think that he was only saying, for the purposes of dealing with the case before the House, that in fact there was no middleman interposed between the owners of the motor-cars and other objects, on the one hand, and, on the other, the garage which was doing repair work upon them.

I have come to the conclusion that, however the legal position of the insurers ought to be expressed and defined, vis-à-vis both

[3] The normal procedure, as outlined in the case stated, is set out above.

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the car owner on the one hand and the company on the other, the position of an insurer differs essentially, for the purposes in hand, from that of a car dealer—the kind of trader whose work upon motor-cars constitutes, for example, category (5) in the table which I have read; for the car dealer is one who is directly concerned in the motor trade, and, as such, is interposed between the car manufacturer or repairer (namely, the company) and the consuming member of the public (namely, the car owner), and is so interposed as a trader in the trade, having a distinct trade interest in the doing of the repair.

The phrase "retail shop," as expanded by the definition at the end of the section, must, I think, be construed in the ordinary common sense of those words. I refer again to the first passage from Lord Dunedin's speech earlier cited—"The matter seems "to me," he said, "simply a question of attributing an every-"day meaning to the words used." In an ordinary context, the words "retail shop," with its expanded definition, import a distinction in a real sense from what is commonly called the wholesale trade and the wholesaler—that is to say, from one who, trading in the ordinary sense in the relevant articles, is interposed as such and as an independent principal between the manufacturer or importer of the article at one end and the consuming public at the other.

During the course of the argument some examples were taken to illustrate the point. It was thus, for example, supposed that a number of car owners combined to form a kind of co-operative agency, whose duty and purpose would be, in the event of any injury to any of the owners' cars, to take over the cars and see to their repair. It may well be that, if such were the case, the co-operative agency, sending a given motor-car to the company, would be a "middleman" in the sense of a wholesale dealer, or someone analogous thereto, so as to break the link between the company and the consumer and having a distinct trade interest from both, and would exclude the work that was being done from being properly attributable to that of the retail trade. Another instance at the other end of the scale was that of a man who might take his friend's watch to a watch repairer, making it clear that the watch belonged to the friend but stating also that he and not the owner was responsible for the repair and would pay the bill. In one sense, no doubt, the man so taking the friend's watch might be called a "middleman," since he was "inter-"posed" between the watch repairer and the watch owner. But it was conceded by the company that in that case the man taking the watch to the repairer would be, for present purposes, a member of the public still, and that his intervention would not prevent the work of the watch repairer from being that properly appropriate to a retail shop.

I have taken these instances to indicate that (as so often happens) a line cannot perhaps be drawn precisely by definition, and that each case must be looked at upon its own facts and a

decision reached (once more I quote Lord Dunedin's language) by applying an everyday meaning to the words in the light of the facts which call for their application. I earlier said that the motor-car owner remains, throughout the transaction of repair, the owner of the car. He could, I apprehend, say that he made no claim upon the insurers, requiring the motor-car, before any work was done, to be handed back to him; and so far as I can see, the insurers could in no way prevent him, if he did not wish to make a claim, from saying that he did not wish the motor-car repaired. They would have, as business men, no separate interest which would be affected by the cancellation of any repair order. Moreover (as was pointed out to the tribunal), although the case which I have tried to summarize may be taken as typical, the instances show a degree of variation. In some cases—numerically in more cases than not—the owner himself apparently takes the car to the company's works. Sometimes it is taken there by some third party—for example, the vehicles of British Road Services. In other instances the policies of insurance provide (as is well known) that the car owner himself pays for the first £5 (or some other figure) of any damage done.

In the light of these variations and other facts it seems to me that there was great force in the contention of the Solicitor-General that the tribunal here was entitled to find as a fact, in the light of all the circumstances, that this is a retail business. But in any case I am, for my part, satisfied, applying myself independently to the problem and to the nature of the facts proved or admitted, and construing the Act of Parliament as best I can, that the business being done in regard to cars repaired on the instructions of insurers falls within the class or category which I have called "retail"—that is, work properly attributable to use of the premises as a retail shop.

That, of course, is the conclusion of the matter; but to one other part of the argument I think it desirable that I should make a more than passing reference, for our attention was called to certain Scottish cases and it was contended, with force, for the company that since this Act is equally applicable in Scotland and England it was desirable that the law as expounded by the courts of Scotland and England should be the same. The particular case which forms the foundation for the argument is that of *British Electrical Repairs Ltd.* v. *Assessor for Glasgow.*[4] The case came before the Lands Valuation Appeal Court in Scotland, consisting of three members of the Court of Session, Lord Hunter, Lord Sands and Lord Fleming. The facts may be observed from the headnote, which, so far as relevant, reads: "A company"—that is, the British Electrical Repairs Ltd.—"whose principal "business was the repair of electrical machines, occupied premises "consisting of a large engineering shop and the ordinary adjuncts. "The premises bore no resemblance, either internally or extern-"ally, to a retail shop. No provision was made for the reception

[4] 1933 S.C. 321.

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"of customers, and the bulk of the company's business was done "to the orders of an insurance company, one of the conditions "of whose policies was that, in the event of the breakdown of "machinery insured, the insurance company could either repair "the machinery or pay for its repair at their option." The view of the Lands Valuation Appeal Court was "that the insurance "company occupied a position analogous to that of a middleman, "and that, in the whole circumstances, the subjects did not fall "within the exception of a 'retail shop,' but fell to be entered "in the roll as 'industrial lands and heritages.'"

It may be taken that the form of the policy as it is recited in the headnote was, for present purposes, not distinguishable from that of the policies of the car owners with which we are concerned in this case. It was, therefore, contended that this was authority to show that in Scotland the circumstances of the present case would produce the result that the works of the company with which we are concerned would be held to be an industrial hereditament and not a retail shop. If I were satisfied that that were so, then, although I had myself been inclined to form a different view, I should be strongly inclined to follow the Scottish courts, on the principle that it was desirable that the law arising from the same section of this Act should be the same both in Scotland and in England. But on the whole I am not satisfied that if this case were now before the Lands Valuation Appeal Court in Scotland it would be held to be other than primarily used for the purposes of a retail shop.

It seems to me that the vital facts in the *British Electrical Repairs* case [5] are summarized in the sentence that I have already read—"No provision was made for the reception of customers." That sentence is expanded in the following paragraph in Lord Hunter's opinion [6]: "Points to which I would draw attention are "that the premises themselves have no features which make "them like a retail shop; that the proprietors and occupiers do "not invite the public to go to the premises; that they provide "no accommodation for individual customers who might happen "to go to the premises; that, in fact, the people whose goods are "required on the premises are not able to go to the premises, "and, indeed, are not entitled to trade directly with the appel-"lants at all." Except for the initial sentence (namely, that the premises themselves do not look like a retail shop), all the rest of what Lord Hunter states is quite inapplicable to the present case. There is no prohibition against the ordinary member of the public going to the company's depot. On the contrary, considerable numbers of the public, as I have already said, do so. Moreover, the company provide accommodation for individual customers, and, as I follow it, encourage them to resort to this depot. It may be true that those facts from the *British Electrical Repairs Co.* case [7] which I have recited emanate from the terms

[5] Ibid.
[6] Ibid. 328.
[7] 1933 S.C. 321.

of the policies themselves, but in that respect none the less the present case differs essentially from the *British Electrical Repairs Co.* case.[7] Although the car owner is bound, having regard to the terms of the policy, to allow the insurers to deal with his motor-car in the way they do, there is nothing in the policies or in the other facts as found or proved which so prevents the customer resorting to the company's works as to deprive the latter of all the essential characteristics of a retail shop. I should, however, state that the last sentence of Lord Fleming's opinion is as follows: "The fact that the insurance company is "not a member of the trade does not seem to me to affect the "principle." I do not find in the speeches either of Lord Hunter or Lord Sands any comparable generalization. I do not, therefore, think that Lord Fleming's final sentence should be regarded as constituting the ratio of the decision, and for my part, with all respect, I do not agree that the fact that the insurance company is not a member of the trade is irrelevant—if that is what Lord Fleming meant.

That case was decided in 1933. It is a matter of interest to observe that in 1931, in another case before the same court in Scotland, *Scottish Motor Traction Co.* v. *Assessor for Edinburgh*[8] (and the report in fact comprises the arguments and judgments in a number of similar cases) it appears that in one of the cases, called *A. & D. Fraser*, the work being done at the repair establishment on private motor-cars included work done for insurance companies—in the same way, in fact, as in the present case. In the 1931 Scottish case there was, however, no special exclusion of the public, as in the *British Electrical Repairs Ltd.* case,[9] and the members of the court (who were the same—Lord Hunter, Lord Sands and Lord Fleming) did not there take the view that the interposition of the motor insurers produced the result that the business with which they were then dealing was not that of a retail shop.

However that may be, in a recent case—*Assessor for Perth* v. *Shields Motor Car Co. Ltd.*[10]—the same court, the Lands Valuation Appeal Court, had to deal with the case of a garage which was open to the general public but which had a contract with the Ministry of Supply for overhauling and repairing service vehicles belonging to Government departments. The conclusion of the court was that the premises were there being used for the purposes of a retail shop, and the case was distinguished from the *British Electrical Repairs Ltd.* case[11] on the ground (which formed the main ratio of the decision) that the Ministry of Supply, or its officers, were mere agents for the Crown and therefore could not in any case be regarded as middlemen. The members of the court then consisted of Lord Patrick, Lord Sorn and Lord Hill Watson. It is true to say (as Mr. Rowe observed)

[7] 1933 S.C. 321.
[8] 1931 S.C. 416.
[9] 1933 S.C. 321.
[10] 1956 S.C. 186.
[11] 1933 S.C. 321.

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that Lord Hill Watson said [12]: "To prevent the work of repair "being 'retail business' there must be interposed between the "person who intends to make use of the vehicle when repaired "and the company executing the repairs someone who has an "independent interest in the work being done, which interest is "separate and distinct from the interest of the person who will "make use of the vehicle after the repairs have been executed. "An example of such a person is one who is in the trade and with "whom the person who desires the car to be repaired has con-"tracted, or an insurance company which under the terms of "the policy is entitled to instruct the repairs."

It was urged, on the basis of that passage in Lord Hill Watson's judgment, that the Scottish courts should now be taken as ready to lay down the law in a case such as the present in favour of the view for which the company contend. But with all respect to Lord Hill Watson, I am unable to agree. There is no comparable statement of principle in Lord Patrick's judgment. The highest Lord Patrick puts it is thus [13]: "A 'middleman' "is a person intervening between supplier and consumer with an "interest independent of both, be it only to secure a commission "on the formation or carrying out of the contract between "them"; and with that statement I do not in any way find myself at variance. I will not take time to read from the judgment of Lord Sorn, but he refers [14] to the *British Electrical Repairs Ltd.* case [15] and seems to indicate his own doubt whether the principle in that case would apply to the case of repairs of motor-cars on instructions of insurance companies. I venture to express my own dissent from the view of Lord Hill Watson (if he intended so to express it) that an insurance company is to be treated, in such a case as the present, as in pari materia with a person who is in the trade and who has a separate trade interest in the work of repair that is being done. With all respect to Lord Hill Watson, I do not think it true that, for the purposes under consideration, the insurer has an interest separate and distinct from that of his assured.

I have taken time to examine the Scottish cases in order to state my conclusion, which is that I am not satisfied that, if the present case came before the Lands Valuation Appeal Court in Scotland, that court would, by an application of the *British Electrical Repairs Ltd.* case,[15] hold the present work (that is, the work which we are now debating) to be work not appropriate to a retail shop.

I would only add that in one of the other cases which was before the House of Lords at the same time as the *Turpin* case,[16] namely, *Kaye* v. *Eyre Bros. Ltd.*,[17] it appeared from the facts that there certain repair work was done (as in the present case) upon the instructions of the insurers; but the speech of Lord

[12] 1956 S.C. 186, 197.
[13] Ibid. 193.
[14] Ibid. 195.
[15] 1933 S.C. 321.
[16] [1931] A.C. 446, 451.
[17] Ibid. 477.

Dunedin takes no note of any apparent distinction based on that fact. No doubt it is true to say that the point was not then taken, but, still, there is nothing in the language which Lord Dunedin uses in his speech in that case, or in the *Turpin* case,[18] which in any way qualifies (as I think) the conclusion which I reach in the present case, namely, that on the facts the tribunal rightly held that what I call the category (3) ought to fall on the retail side of the line—in other words, that the work of doing these repairs was work appropriate to the use of the premises for a retail shop within the meaning of the section.

For those reasons I would dismiss the appeal.

MORRIS L.J. It is not in dispute that the hereditament which is in question is occupied and used as a factory. But it will not rank as an industrial hereditament if by reason of the facts which have been found it can be said to be primarily occupied and used for the purposes of a retail shop. By definition, "retail shop" includes any premises of a similar character where retail trade or business (including repair work) is carried on. It is not disputed that the hereditament is in part used for the purposes of a retail shop. Having regard to the authoritative guidance given by Lord Dunedin in his speech in *Turpin* v. *Middlesbrough Assessment Committee*,[19] this could not be disputed. The public are invited to the hereditament, accommodation for them is provided, and arrangements to receive them are made. Work of repair which is done for and on the instructions of members of the public and which is done in the hereditament is admitted to have the stamp and the features of retail trade or business. But the question which arises is whether the hereditament is or is not primarily occupied and used for the purposes of a retail shop or for a combination of such a purpose and some other purpose which is not that of a factory or workshop. In his speech both in that case and in *Kaye* v. *Eyre Brothers Ltd.*[20] Lord Dunedin said that "retail" repair work is repair work which is "done to the "order of the owner of the object which is repaired and without "the intervention of a middleman." In the present case, if repair work which is done on the instructions of insurers can be regarded as "retail" repair work, then it is clear that the hereditament is primarily occupied and used for the purposes of a retail shop.

The point of law raised in the case stated is expressed as being whether the Lands Tribunal came to a correct decision in law; but, as the case stated records, the issue raised is in effect whether the part played by insurers in the transactions described in the case should be regarded as being the intervention of middlemen.

The notion of trade or business being retail suggests to my mind that it takes place with members of the public who may have direct approach and direct dealings. In the case of goods

[18] Ibid. 451.
[19] Ibid. 473, 474.
[20] Ibid. 477.

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which are manufactured for sale there may first be a sale by the manufacturers to someone who is called a wholesaler, who in turn deals with retailers who will sell to members of the public. There may, of course, be infinite varieties of situations, but those persons who may be called middlemen do not have direct dealing with purchasing members of the public. But there is no one in between the retailer and the purchasing member of the public. Similarly, the notion of retail business suggests business which takes place directly with members of the public. As repair work is by statutory definition included in the phrase "retail trade or "business," it follows that there may be "retail" repair work. That denotes, as Lord Dunedin pointed out, work done to the order of the owner of an object which is repaired without the intervention of a middleman. Thus the owner of a car may take it to a dealer with whom he contracts for repair work to be done on it: if the contract is one which entitles the dealer to send the car to a repairer so that the latter will actually do the repairs, then the latter will not be doing "retail" repair work. Between him and the owner of the car there will be someone else in the middle.

In my judgment, an insurer is not in this sense interposed between the owner of a damaged car and the repairer. The provisions of insurance policies may vary infinitely. A clause in a typical comprehensive private car policy, which was made an exhibit to the case, provides that the insurer may at its own option repair, reinstate or replace the motor-car or may pay in cash the amount of the loss or damage. It might be, therefore, that the owner would be left to make his own contract with a repairer and would be paid the amount of the damage by the insurer. The repair work would in such case be "retail." If the insurer at his option decided to repair the car, the insured would then make a contract with a repairer. In such a case the repair work would still be "retail." There would be no intervention of the insurer "between" the repairer and the owner. The insurer would merely take the place of the owner. The insurer would be in the position of a member of the public making a contract with a repairer. The insurer might, under the terms of a policy, be entitled to decide as to where a car should be repaired and might in some cases be entitled to have possession of the car in order to get it repaired; the insurer would be free just as any member of the public to go to any repairer who undertakes "retail" repair work.

In some cases an owner must, under his insurance policy, bear a part of the cost of repairs; in some cases he may wish to have additional work done at his own expense while repair work is being done at the expense of his insurers. In such cases the owner and the insurer may both have direct contractual relationship with the repairer. The insurer is not in such cases in the middle between the repairer and the owner; he and the owner stand side by side. By reason of the terms of insurance policies

contractual arrangements are made between insurer and insured concerning the cost of repairing damaged motor-cars; if as a result of such arrangements an insurer contracts directly with a repairer in regard to the insured's car, the position of the insurer does not, in my judgment, possess the features of the position of a middleman.

It is with diffidence that I express a view which does not coincide with some views expressed in certain Scottish cases which were cited to us, but as I have formed the conclusion that insurers are not middlemen, within the meaning of what was said by Lord Dunedin, I consider that the decision of the Lands Tribunal was correct in law.

PEARCE L.J. I agree.

Appeals dismissed.
Leave to appeal to House of Lords.

Solicitors: *Collyer-Bristow & Co. for Band, Hatton & Co., Coventry; Solicitor of Inland Revenue; E. N. Liggins, Coventry.*

E. D.

[SHROPSHIRE ASSIZES.]

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[1956 G. 93.]

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Salmon J.

Mines and Minerals—Coal—Breach of statutory duty—Roof and sides—Fall of coal from coal face—Duty to make secure side of working place—Whether "coal face" a "side"—Meaning of "secure"—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 49, 50 (2), *and regulation* 1 *of Coal Mines (Support of Roof and Sides) General Regulations,* 1947 (*S.R. & O.,* 1947, *No.* 973).

The plaintiff was employed as a ripper by the defendants in their coal mine at a coal face which was being worked on the "long wall" system, the face being 150 yards long and about six feet high. Having been detailed by the deputy in charge of his shift to go along the face and help fill-off coal which had been cut by a previous shift, the plaintiff, while walking along the coal face, was buried by a piece of coal which came away from the top of the coal face. The place was admitted to be a "working place" and the plaintiff claimed damages for breach of statutory duty, relying, inter alia, on section 49 of the Coal Mines Act, 1911, alleging that the defendants had failed to make secure the side of a working place. The plaintiff also alleged a further breach of statutory duty by contravention of the support rules (made by the mine manager pursuant to section 50 (2) of the same Act, as

[Reported by R. J. TOYN, Esq., Barrister-at-Law.]

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amended by the Coal Mines (Support of Roof and Sides) General Regulations, 1947), in that, inter alia, overhanging coal had not been spragged:—

Held, (1) that section 49 of the Coal Mines Act, 1911, in providing an obligation to make secure the sides of a working place, did not apply to the coal face itself; though it would have been otherwise if in the section the word "safe" had been used instead of "secure."

(2) That "overhanging coal" as described in the support rules did not apply to all coal that had been under-cut, but that the duty to sprag only arose where the face leant forward to an appreciable degree.

ACTION.

The plaintiff was an underground worker in the defendants' coal mine, employed there as a ripper, and at the time of the accident he was working on a coal face being worked on the long-wall system. The system was worked with three shifts. During the first shift a cut by mechanical cutter was made into the face of the seam to a depth of about four and a half feet and about six inches from the ground. The function of the second shift was filling-off, that is, to win and bag the coal cut by the first shift. The third shift had the job of advancing the rails and the roof and generally clearing up. The plaintiff was a member of the third shift.

On December 2, 1955, owing to a fault in the conveyor, the second shift had not completed the task of filling-off the coal, and one Reece, the deputy in charge of the third shift, decided to complete that task. Reece detailed the plaintiff, amongst others, to go along the face and help fill-off the coal. The coal face was 150 yards long and about six feet high; the plaintiff walked about four feet from the face and having gone about 50 yards along the face he was buried by a piece of coal about 12 feet long by two feet six inches thick which came away from a point two feet six inches from the roof. As a result he suffered serious injury.

The plaintiff brought this action for damages for personal injuries, relying, first, upon section 49 of the Coal Mines Act, 1911,[1] and alleging that the defendants had failed to make secure the side of a working place. Further, relying upon section 50 (2)[2] of the same Act, as amended by regulation 1 of the Coal Mines (Support of Roof and Sides) General Regulations, 1947, the plaintiff alleged a breach of statutory duty by the defendants in failing, inter alia, to sprag overhanging coal as required by the

[1] Coal Mines Act, 1911, s. 49: "The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

[2] S. 50 (2): "Holing props or sprags shall be set as soon as practicable, and shall be set at such regular intervals and in such manner as may be specified in the Support Rules, and shall not be removed until the coal is about to be taken down and before the roof supports (if any) have been advanced in the manner specified in such Rules."

Support Rules made under the section and governing the working in the mine. Alternatively, he claimed damages for negligence.

A. E. James and *Iain Black* for the plaintiff.
Kenneth Mynett for the defendants.

In addition to the decisions referred to in the judgment the following unreported judgments were cited in argument: *Boyde* v. *National Coal Board* (Jones J., Glamorgan Assizes, December 14, 1954); *Penny* v. *National Coal Board* (Byrne J., Newcastle Assizes, January 27, 1955); *Green* v. *National Coal Board* (Oliver J., Leeds Assizes, December 20, 1955); *Elliott* v. *National Coal Board* (Lord Cameron, Court of Session, June 22, 1956); *Young* v. *National Coal Board* (Lord Wheatley, Court of Session, July 5, 1956).

SALMON J. stated the facts and continued: The first breach of statutory duty which the plaintiff seeks to make out is a breach of section 49 of the Coal Mines Act of 1911. [His Lordship read the section and continued:] It is established that the duty imposed by that section is an absolute duty. That was decided in *Edwards* v. *National Coal Board*,[1] and the plaintiff says, in effect, that the coal face is a side of a working place, that a piece fell off the working face and injured him, and the fact that it fell off makes it obvious that the working face, or side, was not secure; and, therefore, that unless there is some escape for the board under section 102 (8) there is a liability to him for the damage which he suffered in this way.

A very interesting point arises here as to whether or not section 49 has any application to the facts of this case. There is no dispute that the point at which the plaintiff was working was a working place. The question is whether or not the coal face is the side of a working place within the meaning of that section. It has been said with great force—and I think quite rightly—that the words used in the section are quite wide enough to cover a working face, or the face of the coal seam. "There "is no reason why"—it is said—"a side of a working place "should not be formed by the face of the seam." I agree that the words in the section are wide enough to cover the coal face.

But it is said on behalf of the board that it is quite impossible to construe section 49 as meaning that the side of the working place there referred to is, or can be, the face of the seam. The words may be wide enough, says Mr. Mynett, but one should give them a narrower construction because if one gives them the widest construction that they can bear it results in an absurdity.

The case is put on behalf of the board thus. It is said that "secure" means, in relation to a side or a roof, "in such a "condition that it shall not fall down, nor shall any part of it "fall down," and, in relation to a side in particular, perhaps it

[1] [1949] 1 K.B. 704.

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means that the side, and all parts of it, shall stand firm. It is argued that since the whole object of mining is to take down the working face it makes nonsense of the section if one reads the section as referring to the working face.

Another point, perhaps, that could be made on behalf of the board is that the words "a person shall not, unless appointed "for the purpose of exploring or repairing . . . work in any . . . "working place which is not made so secure" do not appear to be very apt in their application to a working face. It might be said that the words "exploring" and "repairing" are not applicable to a working face and, therefore, that where there was a working face in an insecure condition every man who went there to make it secure would be contravening this section, and the board would be contravening this section in allowing him to go there. I am not sure that that point has quite as much force as I at one time thought it had, having regard to the decision of the Court of Appeal in *Walsh* v. *National Coal Board.*[2]

The main point, however, remains that this section cannot be intended to apply to the coal face because the whole object of mining is to take down the coal face; therefore, a section that refers to an obligation to make secure the sides of a working place, and prohibits anyone from working in such a place which has not been so made secure, cannot, in my judgment, be intended to apply to the coal face itself.

May I say that if for the word "secure" the word "safe" had been substituted I should have decided this point the other way. The difficulty arises because "secure" and "safe" are sometimes used as synonymous, but I do not think I should be justified in reading the word "secure" here as if it meant "safe," and the whole difficulty in construing this section, in my view, turns upon the word "secure." If the word "secure" means what I think it does, then it would be impossible, and I so find, to hold that that section applies to the coal face.

The next breach of statutory duty of which the plaintiff complains is a breach of section 50 (2) of the Coal Mines Act of 1911. [His Lordship read the subsection and continued:] The support rules that have been put before me, and which are relied on by the plaintiff, are exhibit P.6, and of the two passages relied on by the plaintiff the first reads as follows: "All over-"hanging coal or stone shall be securely spragged (stakered) as "soon as practicable until it is got down." The next passage on which the plaintiff relies is: "The man in charge of the coal "cutting machine shall see that holing blocks are put in the cut "at intervals not exceeding 5 feet." The plaintiff says that there has been a breach of both of those provisions. [His Lordship referred to the evidence, found that holing blocks were placed at distances not exceeding five feet where it was possible to do so, and continued:] I say "where it was possible" because

[2] [1956] 1 Q.B. 511; [1955] 3 W.L.R. 829; [1955] 3 All E.R. 632.

sometimes when this coal was cut it rated down immediately after—or very soon after—the cutter had passed, and, of course, once the coal was down on the floor there was nothing to support and nowhere to insert the holing block. Nor am I satisfied that the defendants failed securely to sprag any overhanging coal.

An argument was addressed to me to suggest that under these support rules any coal that had been under-cut was overhanging within the meaning of the support rules and, therefore, that there was a general obligation upon the defendants to sprag. I do not think "overhanging coal" applies to all coal that has been under-cut. I think it means what it says. If the coal overhangs, that is to say, if the face of the seam is not vertical but leans forward or juts out at any point to any appreciable degree, then there would be an overhang of coal which has to be supported by a sprag or stay. I am certainly not satisfied on this evidence that the defendants failed to sprag or support any coal that may have overhung; nor do I think that this accident was caused by any overhang of coal.

I find that all the deputies concerned did their jobs properly; I find that holing blocks were inserted as required by the support rules; I find that any overhanging coal or stone was supported by sprags; I also find that the deputies, before making their pre-shift report, did tap the surface in accordance with mining practice, in an attempt to discover whether or not there was any unsafe part of the surface which required attention, and I think they did that carefully and in accordance with ordinary mining practice.

I have come to the conclusion that this fall of coal was due to a fault which, for all practical purposes, was undetectable, and which has been described as slickenslide or glassy slant. That fault may sometimes be discovered by tapping and sometimes it is even visible in the surface. But where the fault is parallel with the surface and at a depth into the face of about two feet—or just over two feet, as it was here—I am satisfied on the evidence that it is, for all practical purposes, undetectable.

It is a very rare geological fault and everyone knows, I suppose, however tenuous their knowledge of mining may be, that even in the best regulated of mines, with every precaution taken, there is still the risk that there will be a fall of stone or coal and someone will be injured. If an injury occurs in those circumstances, it would be very difficult to see how any plaintiff could succeed.

In this case a very powerful argument has been addressed to me on the evidence given by the defendants' manager. I am bound to say that if it had not been for his evidence, and if one had looked merely at the rest of the evidence, this is a case which would have given me no difficulty at all. But it is said that, having regard to the manager's evidence, even though the board has complied with all its statutory obligations, it is liable in negligence. It is plain, I think, that if it is proved—as I think it is proved here—that the board did comply with its statutory

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obligations and did comply with ordinary mining practice, it has to be a very exceptional case where it could properly be said that in spite of that fact the board is liable because it ought to have done something more.

I do not agree with the argument that was addressed to me, that the fact that the board has complied with its statutory obligations and with mining practice necessarily excludes its liability in negligence. I do not think it does, as a matter of law. I think there could be cases where the board would, nevertheless, be liable in negligence. But, obviously, such cases must be rare indeed, and the only point is whether this is one of them.

The defendants' manager said in the course of his evidence that slickenslide or glassy slant were rare geological hazards, or faults, but that they were quite frequent on this face. It is to be observed that when he said that, he was, I think, being pressed about another part of his evidence in which he had said that it was impossible sometimes to detect slickenslide or glassy slant. However, he is the manager for the defendants, and I must and do accept the evidence which he gave against the defendants.

Mr. James, on behalf of the defendants, argued that this was one of those exceptional cases, since the manager knew that there were these exceptional hazards. According to counsel it is all very well saying that slickenslide is a rare geological fault against which, in normal circumstances, one cannot expect the board to take precautions, but when they know, or ought to know, of its presence, when they know that it is not some chance hazard that may occur but is very likely to occur, and when they know that it actually is in that seam at frequent intervals, then they ought to take some step against it and they have not done so: they have not taken any steps other than the ordinary steps in respect of ordinary coal faces.

That was a powerful and attractive argument, but the manager only became manager on the day of the accident. How he knows, or how he discovered, or when he discovered, that this fault was a frequent fault in this coal face I do not know, and there is no evidence about it. It seems to me that the plaintiff cannot win here unless he satisfies me that the defendants knew, or ought to have known, before the accident that slickenside or glassy slant was a fault that was frequent in this seam. I do not think there is any evidence before me of that, or certainly not sufficient evidence on which I would be justified in coming to the conclusion that they knew or ought to have known before the accident. After all, one would have expected, if it were so, that this would have been in the forefront of the plaintiff's case. The plaintiff being supported as he is, one would have expected to have had evidence called on his behalf to show that slickenside or glassy slant ought before the accident to have been foreseen in this particular coal face.

In those circumstances it follows, I think, that there has been no breach of statutory duty on the part of the board, and

no negligence. Sorry as I am for this man, I am driven to the conclusion that this is one of the accidents in mining that do happen without any fault being attributable to anyone, and I accordingly give judgment for the defendants.

[His Lordship said that had he been able to find in favour of the plaintiff he would have assessed the total damages at £600.]

Judgment for the defendants.

Solicitors: *Hooper & Fairbairn, Dudley; F. W. Dawson, Dudley.*

[COURT OF APPEAL.]

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Hodson, Parker and Ormerod L.JJ.

Arbitration — Special case — Remission to arbitrator — Relevant facts not found—Duty of party to apply for remission—Court's power to remit—R.S.C., Ord. 64, *r.* 14—*Arbitration Act,* 1950 (14 *Geo.* 6, *c.* 27), *s.* 22.

By a voyage charterparty dated June 30, 1951, the steamship *Catherine D. Goulandris* was chartered by the claimants to the respondent Citati to load at Basrah a cargo of scrap iron for carriage to Buenos Aires. The vessel duly arrived at the loading port but the charterer failed either to nominate an effective shipper or a loading berth and the vessel remained at the buoys until three days before the lay-days expired, when the shipowners cancelled the charterparty, no cargo having been provided. The claim of the shipowners for damages for breach of the charterparty was referred to a single arbitrator, who, at the request of the shipowners, stated an interim award in the form of a special case for the opinion of the High Court on questions of law. He found that the charterer had evinced an intention not to perform the charterparty and had committed an anticipatory breach of it which the shipowners were entitled to treat and accept as a repudiation of the contract. He, therefore, was of opinion that they were entitled to an interim award.

At the hearing of the special case before Devlin J. the shipowners, although the six weeks allowed by R.S.C., Ord. 64, r. 14, for making such an application had expired, applied for the remission of the award to the arbitrator to answer a question which counsel for the shipowners claimed to have been raised during the arbitration but which the arbitrator had not dealt with in his award, namely: "whether the charterer was on July 18, 1951 [date "of cancellation], willing and able to perform the charterparty "within such time as would not have frustrated the commercial "object of the adventure."

Devlin J. granted the application, and the charterers appealed against the remission:—

Held, that in deciding whether to remit a case the court is faced with two conflicting principles. On the one hand, an award in the form of a special case is intended to be and should be regarded as entirely final so far as the facts are concerned, and it is for the parties to ensure that, so far as possible, the relevant

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facts are found. A rigid application, however, of that principle would involve that in no case would it be open for the court on the hearing of the special case, either of its own volition or on the application of a party, to remit the case for further findings. On the other hand, there is the principle that the court before which the case comes for argument must be able to do justice between the parties, and should not be hampered by findings which, on its view of the law, are insufficient. In deciding which of the two principles should be given effect to the judge is given, by section 22 (1) of the Arbitration Act, 1950, a statutory discretion which is wholly unfettered and must depend on the exact facts in each case. Provided that an applicant can show a strong case on the merits, indicating a really definite issue for consideration, there is no reason why the court should not, as here, extend the time for remission.

Decision of Devlin J. [1957] 2 W.L.R. 713 on issue of remission affirmed.

Appeal from Devlin J.[1]

By a charterparty dated June 30, 1951, the shipowners, Universal Cargo Carriers Corporation, chartered their steamship *Catherine D. Goulandris* to Pedro Citati, to proceed to Basrah and there load a cargo of 6,000 tons of scrap iron for carriage to Buenos Aires, at U.S. $28 per ton freight. The vessel arrived at Basrah on July 12 and there being no cargo ready and no effective shipper nominated, she remained at the buoys. The lay-days presumably began to run from that date and would have expired on July 21. By the charterparty it was provided that the cargo would be brought alongside the ship in such a manner as to enable loading to proceed at the rate of 1,000 tons per weather working day. Time lost in waiting for berth was to count as loading time.

On July 17, after the vessel had been at the buoys for some five days, the cargo was still not available and on the next day, July 18, the shipowners cancelled the charter and re-chartered the vessel to other charterers at a lower rate of freight. On July 23 the vessel sailed for Bombay to load under the new charter. On July 24 the respondent obtained an injunction in New York against the shipowners, but on July 27 that was discharged by consent and the shipowners, without prejudice to their rights, granted Citati an option (to be exercised before midnight on August 15–16, 1951) to charter a substitute vessel from them on the same terms. No cargo, however, became available and the option was never exercised.

Thereafter, arbitration proceedings were started, the shipowners claiming their loss, represented by the difference in freight, and the charterer counterclaiming for repayment of advance freight which he had paid, the point in issue being whether the shipowners were entitled on July 18 to cancel the charter.

At the request of the claimants the arbitrator (Mr. Eustace Roskill Q.C.) stated his interim award in the form of a special

[1] [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70.

case for the opinion of the court on the question of law whether the shipowners were entitled on July 18, 1951, to treat the charterparty as discharged by the charterer's breach, and to claim damages accordingly. The special case was duly set down for argument and in February and March, 1957, it came before Devlin J. who, on the application of the shipowners, made an order remitting the award to the arbitrator to determine a point made by counsel for the claimants at the arbitration, but which the arbitrator had not dealt with in his award, namely, whether the charterer was on July 18, 1951, willing and able to perform the charterparty within such time as would not have frustrated the commercial object of the adventure.

The charterer contested the granting of the order and now appealed against it, contending that the claimants, not having applied to remit within the six weeks allowed by R.S.C., Ord. 64, r. 14, should not be given an extension of time; and, further, that the judge had no jurisdiction to remit on the application of a party.

A. A. Mocatta Q.C. and *Michael Kerr* for the charterer.
Ashton Roskill Q.C. and *H. V. Brandon* for the shipowners.

The following cases were cited in argument in addition to those referred to in the judgment: *Minister of Food* v. *Reardon Smith Line Ltd.*[2] and *Williams* v. *Manissalian Freres.*[3]

HODSON L.J. I will ask Parker L.J. to deliver the first judgment.

PARKER L.J. This is the charterer's appeal from an order of Devlin J., who, in the course of hearing argument on a special case stated by an arbitrator, acceded to an application made on behalf of the shipowners, and remitted the case for the finding of a particular fact. The appeal raises a short, though somewhat difficult, point as to whether the judge exercised his discretion properly in all the circumstances of the case. In order to understand the point, it is necessary to state a few of the facts. [His Lordship stated the facts set out above, and continued:]

Arbitration proceedings were started, the shipowners claiming their loss, represented by the difference in freight, and the charterer counterclaiming for repayment of the advance freight which he had paid. The point in issue, of course, was whether the claimants were entitled on July 18 to throw up the charter as they did. On March 22, 1956, the arbitrator stated an interim award (questions of liability only being dealt with) in the form of a special case. In paragraph 35 the arbitrator said this: "In so "far as it be a question of fact I find and in so far as it be a

[2] [1951] 2 T.L.R. 1158; [1951] 2 Lloyd's Rep. 265.
[3] (1923) 17 Ll.L.Rep. 72.

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"question of law I hold, that the respondent evinced an intention not to perform the charterparty and committed an anticipatory breach of the charterparty which the claimants were entitled to treat and accept and did treat and accept as a repudiation of the charterparty by re-chartering the vessel on July 18, 1951."

In paragraph 36 of the award the arbitrator left the question of law to the court in this form: "The question of law which the claimants requested me to state for the decision of this Honourable Court, and which I accordingly hereby state for such decision, is whether upon the facts found and upon the true construction of the charterparty the claimants were entitled on July 18, 1951, to treat the charterparty as discharged by the respondent's breach and to claim damages accordingly."

The special case was duly set down for argument, and was heard by Devlin J. in February of this year. The hearing lasted seven days, and many difficult and interesting questions were debated. For reasons which it is unnecessary to go into on this appeal, the judge expressed the opinion that on the findings of the arbitrator the claimants had not shown that by July 18, 1951, the charterer had by his conduct evinced an intention not to perform the charterparty.

The claimants, however, took a further point, namely, that on July 18 the charterer was not ready and willing to perform the charterparty within such time as would not frustrate the venture. This point, be it observed, had nothing to do with evincing an intention, but was directed to impossibility in fact. This, of course, depended on the actual position, whether known to the respondent or not, as it existed before, on or after July 18. Questions thereupon arose whether there were sufficient findings by the arbitrator on this point, and as to the power of the court to draw inferences.

The claimants contended that the findings as a whole—whether express findings, or findings in the course of the narrative—amounted to a finding in their favour, or, at any rate, were such as to lead to an irresistible inference in their favour. The judge, however, took a view against them, expressing the opinion that on the case as it stood the claimants had failed to make out their case. Accordingly, while not abandoning his contentions, but only to safeguard his position, Mr. Roskill for the claimants applied on the sixth day of the argument for the case to be remitted for a further finding on this point.

This, of course, involved an application to extend the time, since the six weeks allowed by Order 64, rule 14, had long since expired. The application was strongly resisted, but ultimately the judge remitted the case, giving the claimants all the costs to date, and, unless otherwise directed, any further costs in the arbitration incurred by either party by reason of the order for remission. The order was made orally on February 22, 1957.

It was perfected on March 13, and for this purpose the relevant part of the order is as follows: "And it is further ordered that "the said award be remitted to the arbitrator for him firstly to "answer the following question, namely, whether the respondent "was on July 18, 1951, willing and able to perform the charter-"party within such time as would not have frustrated the "commercial object of the adventure, and secondly, to recon-"sider if he should think fit so much of the said award as relates "to costs."

On March 12, 1957, the judge delivered a reserved opinion on his view of the law and its application to the case. I say that he delivered an "opinion" since, except in relation to the application to remit, it could not be a judgment until the further finding had been made. So far as this appeal is concerned, both parties proceeded on the assumption that the views expressed by the judge in his reserved opinion were right, and I think that we should do the same. Important questions will arise for determination if and when there is a substantive appeal—questions as to whether the facts are sufficiently found in the claimants' favour; whether the court has power to draw inferences of fact; and whether the scope of the decision in *Hudson Bay Company* v. *Dominga*[1] has the restricted application put upon it by the judge, and many other matters. I refrain from expressing any view upon them. The sole question here is whether, on the assumption that the judge's views are correct, it was a proper exercise of his discretion to remit the case.

In deciding whether to remit a case, the court, as I see it, is faced with two conflicting principles. On the one hand, an award in the form of a special case is intended to be and should be regarded as final subject only to the point of law raised. So far as the facts are concerned, it should be regarded as entirely final. It is for the parties before the arbitrator to state the question or questions of law which they desire to be left to the court; and while it is for the arbitrator to state the facts, it is for the parties to ensure that, so far as possible, the relevant facts are found. In this connexion I need refer only to the two cases decided by the same judge referred to in Russell at page 183, namely, *Nello Simoni* v. *A/S, etc., Straum*[2] and *Sinason-Teicher. Inter-American Grain Corporation* v. *Oilcakes and Oilseeds Trading Company.*[3] The parties can, of course, state to the arbitrator the facts on which they desire findings; and if he fails to make them they have the six weeks under the Order in which to peruse the award, and, if they think it necessary, to apply for remission. Once the relevant facts are found, the parties can argue such of the points of law left to the decision of the court as are open to them on those findings. A rigid application, however, of this principle would involve that in no case would it be open for the court on the hearing of the

[1] (1922) 10 Ll.L.Rep. 476.
[2] (1949) 83 Ll.L.Rep. 157.
[3] [1954] 1 W.L.R. 935; [1954] 2 All E.R. 497, 503.

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special case, either of its own volition or on the application of a party, to remit the case for further finding.

On the other hand, there is the principle that the court before which the case comes for argument must be able to do justice between the parties, and should not be hampered by findings which on its view of the law are insufficient. Bearing in mind the impossibility of drawing a hard and fast line between fact and law, the court may often find itself faced with difficulty. In this connexion I would refer to a passage in the judgment of Lord Wright M.R. in *Ben Line Steamers Ltd.* v. *Compagnie Optorg of Saigon.*[4] I refer to this for the general statement of the position and not in regard to the actual question which arose for decision in that case, namely, the calling of fresh evidence. Lord Wright said this[5]: "It has constantly happened in my "experience, both at the Bar and on the Bench, that when cases "so stated have come before the court—a judge or the Court of "Appeal—the court has found that the statement of facts given "by the arbitrator, on which the court was required to decide "the question of law, appeared to the court to be inadequate for "that purpose; and in those circumstances, as I understand it, "the practice of the court has been to treat itself as having a "discretionary jurisdiction to remit the case." Lord Wright then refers to the power under section 10 of the Arbitration Act, 1899, and goes on: "That is not limited to questions of this sort, "but it does, I think, apply to give a general power of remitting, "which, among other things, is applicable to this special diffi-"culty which has very often been experienced by the courts in "attempting to deal with the problem of law submitted, or "intended to be submitted, by a special case; and it has "happened from time to time that the court in remitting an "award in those circumstances has found it necessary, in order "that, as it appears to the court, the relevant facts should be "properly elucidated, to require the arbitrator to hear further "evidence. This is not a matter done to oblige the parties, or "either of them; it is a course taken by the judge or the Court "of Appeal to carry out the duty which is imposed upon them "when an award in the form of a special case comes up for their "decision."

It is in deciding to which of these two principles to give effect in any particular case that the judge has a discretion. It is a statutory discretion provided now by section 22 (1) of the Arbitration Act, 1950.[6] On the face of the provision, the exercise of the discretion is wholly unfettered, and must depend on the exact facts in each case. Thus in a case in which a party is seeking to raise for the first time an argument which, though open to

[4] (1937) 42 Com.Cas. 295.

[5] Ibid. 300.

[6] Arbitration Act, 1950, s. 22 (1): "In all cases of reference to arbitra-"tion the High Court or a judge "thereof may from time to time "remit the matters referred, or any "of them, to the reconsideration of "the arbitrator or umpire."

him on the question of law left to the court, was never taken before the arbitrator, and in which the arbitrator was never asked to find the relevant facts, the court would almost certainly refuse to remit the case, more especially when the six weeks had expired.

Mr. Mocatta, indeed, argued that this is really such a case. Whilst conceding that the point was taken before the arbitrator, he claims that it was only obscurely taken and that, as he puts it, the point never became a live issue in the arbitration. If it did, he asks with some force, how comes it that the claimants never suggested a finding on the point or asked for remission before? He points out, what is true, that the parties agreed on a large number of matters of fact which the arbitrator was asked to find: yet this matter was not specifically argued.

Mr. Roskill, on the other hand, states that the point was certainly taken before the arbitrator; and though he agrees that there is no express finding in his favour, he says that it has always been his contention (and he will in future contend the same if necessary) that the findings taken as a whole are sufficient, and that it was only in order to safeguard his position (if he is wrong) that he desired the case to be remitted.

For myself I think that in these circumstances it is necessary to look at the position strictly. The point is open on the pleadings by an amendment made shortly before the hearing of the arbitration. It was pleaded in paragraph 6A: "Further, or "alternatively, the respondent was unable and by his conduct "made it clear that he was unable at any material time or at all "to perform the said charterparty and thereby repudiated the "same, which said repudiation was accepted by the claimants as "hereinbefore set out." It is true that the plea is a little obscured by the words "and by his conduct made it clear that "he was unable," but even so I think that strictly the point is there, and was open on the pleadings. It was, as Mr. Mocatta now concedes, raised, albeit obscurely. How far it was persisted in, how far it became a live issue, is I think irrelevant. It is enough to say that the point was never abandoned.

That being so, are there any grounds on which it can be said that the judge wrongly exercised his discretion? It is said that the judge should not have extended the time, and a reference is made to Russell on Arbitration, 16th ed., at p. 325, and to the illustrations given, in particular to *Coles* v. *Ravenshear*.[7] That latter case, however, must be read in the light of the decision of this court in *Gatti* v. *Shoosmith*.[8]

In my judgment, provided that an applicant can show a strong case on the merits, indicating a really definite issue for consideration—see *per* Scott L.J. in *Temple Steamship Co. Ltd.* v. *Sovfracht*[9]—and also can explain the delay, there is no reason

[7] [1907] 1 K.B. 1; 23 T.L.R. 32.
[8] [1939] Ch. 841; 55 T.L.R. 1023; [1939] 3 All E.R. 916.
[9] (1943) 76 Ll.L.Rep. 35.

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why the time should not be extended. The applicant is, of course, at mercy, and stringent terms as to costs can be imposed, as they were in this case. Here I think the claimants fulfil both conditions. They showed a strong case on the merits, and for my part I am prepared to accept the explanation as to why an application to remit was only made on the argument of the special case.

It is also said that the court can only remit on one or other of the four grounds set out in Russell on Arbitration, 16th ed., at p. 285, which grounds were approved in *Montgomery, Jones & Co.* v. *Liebenthal & Co.*[10] The grounds there stated are: (1) where the award is bad on the face of it; (2) where there has been an admitted mistake, and the arbitrator himself asks that the matter may be remitted; (3) where there has been misconduct on the part of the arbitrator; and (4) where additional evidence has been discovered after the making of the award.

The only relevant category for the purpose of the present case is the third, namely, where there has been misconduct on the part of the arbitrator. It is said that only if the point was properly taken before the arbitrator could it be said that failure to make an express finding was misconduct on his part. As I have already said, I have come to the conclusion that the point was taken before the arbitrator, and therefore if necessary I would be prepared to say that this case fell within that third category. It is, however, I think, highly artificial to say that in all the circumstances there was even technical misconduct on the part of the arbitrator. For my part I prefer to treat those four grounds merely as guides to the exercise of discretion, and not as forming exhaustive grounds, at any rate when the award is in the form of a special case.

As Moulton L.J. said in *In re an Arbitration between Baxters and the Midland Railway Co.*[11]: "The jurisdiction of the court "is statutory, and cannot be increased or cut down in that way. "The reported decisions of the court only show the principles "which have guided the court from time to time in exercising its "jurisdiction, and, though they may afford a valuable guidance, "they do not restrict either the jurisdiction of the court in "deciding other cases, or the duty of the court to look at the "facts in each particular case. When the facts of any particular "case before the court are the same as the facts in the cases "cited, no doubt the court will follow those cases. But it must "not be supposed that reported decisions prevent the court from "deciding whether in the interests of justice it ought to send "the matter back to the arbitrator."

Moreover I think that different considerations arise according to whether an award is strictly a final award, or is an award in the form of a special case. In the former case, remission usually arises as an alternative to setting aside. Prima facie if parties

[10] (1898) 78 L.T. 406.

[11] (1906) 95 L.T. 20, 23.

agree on an arbitrator, they must accept his award as final for good or ill. Indeed, that was the settled law of this country down to 1802, when, for the first time, in *Kent* v. *Elstob*,[12] it was held that an award could be set aside for an error on its face. In this connexion I would refer to the history of the remedy fully explained by Lord Goddard C.J. in *Rex* v. *Northumberland Compensation Tribunal, ex parte Shaw*.[13] In those cases the discretion will not be readily exercised; and indeed it may well be that its exercise should be strictly confined to specific grounds.

Different considerations, as it seems to me, arise when there is a special case. The award is not strictly final then since the question of law is left to the court, and, as I said earlier, in such a case the court must have power to remit of its own volition if justice cannot otherwise be done. I think that in those cases the discretion of the court is wholly unfettered.

Finally, it is said that even if the court has an unfettered discretion to remit of its own volition, yet where as here the remission was on the application of a party, the principles referred to in *Montgomery, Jones & Co.* v. *Liebenthal & Co.*[14] apply. I cannot see any reason for such a distinction. If in any case it would be right and proper for a judge to remit of his own volition, how can it be said that he exercises his discretion wrongly when he accedes to an application by one of the parties? I would dismiss this appeal.

ORMEROD L.J. I agree.

HODSON L.J. I also agree.

Appeal dismissed.

Solicitors: *Holman, Fenwick & Willan; Constant & Constant.*

A. W. G.

[12] (1802) 3 East 18.
[13] [1951] 1 K.B. 711, 721, 722; [1951] 1 T.L.R. 270; [1951] 1 All E.R. 268.
[14] 78 L.T. 406.

[COURT OF APPEAL.]

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July 10, 11.

Lord Evershed M.R., Morris and Pearce L.JJ.

* LONDON TRANSPORT EXECUTIVE *v.* BETTS (VALUATION OFFICER).

Rates and Rating—Industrial hereditament—Road vehicle housing or maintenance—Public transport depot—Hereditament used for overhaul and repair of omnibuses—Whether used for "maintenance" of road vehicles—Whether a "place within . . . close, curtilage or "precincts of factory" but "deemed not to form part of the "factory"—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3.

A hereditament owned and occupied by the appellants was used as a depot for the periodic overhaul of omnibuses and for the repair of major accidents suffered by such vehicles. With insignificant exceptions the whole of the hereditament was used for dismantling and reconditioning used parts as distinct from manufacturing new ones. The process of overhaul involved detaching the body of the vehicle from its chassis, which was sent for overhaul elsewhere, and about 25 per cent. of the identifiable parts underwent some treatment or were replaced. After the process was completed the body would not necessarily be reunited to the original chassis. The hereditament was included in Part I of the valuation list but the appellants contended that it ought to be treated as an industrial hereditament and transferred to Part II of the list, not being excluded from the definition of "industrial hereditament" in section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, by subsection (2) [1]:—

Held, (1) that notwithstanding the extensive nature of the work done and the loss of identity of the original omnibus, the periodic overhaul was "maintenance" for the purposes of section 3 (2) (*b*) of the Act of 1928.

Hall & Co. Ltd. v. *South East Area of Surrey Assessment Committee* (1933) 4 Derating Appeals 29 applied.

(2) That the depot was excluded from the benefit of section 3 by subsection (2), although the whole of the hereditament, and not merely a definable part situated within the precincts of what would have been otherwise a factory within the definition, was used for the maintenance of road vehicles.

[1] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In "this Act the expression 'industrial "'hereditament' means a heredita- "ment . . . occupied and used . . . "subject as hereinafter provided as a "factory or workshop: Provided that "the expression industrial heredita- "ment does not include a heredita- "ment occupied and used as a factory "or workshop if it is primarily occu- "pied and used for the following "purposes or for any combination of "such purposes, that is to say . . .— "(*f*) any other purposes, whether or "not similar to any of the foregoing, "which are not those of a factory or "workshop."

Subs. (2), as amended by s. 69 of the Local Government Act, 1929, which added subparagraph (*a*): "For "the purposes of this Act . . . (*b*) "any place used by the occupier for "the housing or maintenance of his "road vehicles . . . shall, notwith- "standing that it is situate within "the close, curtilage or precincts "forming a factory or workshop and "used in connexion therewith, be "deemed not to form part of the "factory, but save as aforesaid, the "expression 'factory' or 'workshop' "have the same meaning as in the "Factory and Workshops Acts, 1901 "to 1920."

Observation of Lord Thankerton in *Potteries Electric Traction Co. Ltd.* v. *Bailey* [1931] A.C. 151, 181; 47 T.L.R. 154 considered.

Case stated by Lands Tribunal (Erskine Simes Q.C.).

The London Transport Executive (hereinafter called the executive) appealed against a decision of the local valuation court for Central Middlesex given on March 11, 1955, directing that a hereditament known as the Aldenham depot, Elstree, owned and occupied by the executive, should be entered in Part I of the valuation list for the rating area of Harrow Urban District with a rateable value of £20,300. The values were not disputed but the executive gave notice of appeal on the grounds that the hereditament had since August 10, 1953, been occupied and used for industrial purposes, namely, for the major overhaul and rebuilding of motor omnibuses and ought to be treated as an industrial hereditament in accordance with the Rating and Valuation (Apportionment) Act, 1928, and that the valuation list should be altered accordingly.

At the hearing of the appeal before the Lands Tribunal it was agreed between the parties that the question of whether or not the hereditament was in whole or in part an industrial hereditament should be determined by the tribunal and that any apportionment of values consequent upon a decision that it was industrial should be subsequently agreed between the parties.

The following facts were found by the tribunal: The depot is registered as a factory under the Factory and Workshops Acts. It was used at the material time for the periodical overhaul of the omnibuses used by the executive and for the repair of major accidents suffered by such vehicles. The work of overhaul is divided between the depot and the Chiswick works of the executive. At the date of the proposal, March 29, 1954, the overhaul work at the depot consisted of the overhaul of the body only, the chassis being merely prepared for dispatch to the Chiswick works for overhaul there, although heavy repairs to the chassis frame were carried out at the depot.

The overhaul of the executive's vehicles is done to a programme, each vehicle being completely overhauled every three and a half years, maintenance and repair work (other than in cases of major accidents) in the intervening period being carried out at the local garages of the executive.

On arrival at the depot a vehicle is inspected and all parts requiring attention are marked with chalk and entered on a schedule. It is then taken to the body dismount shop where the body is removed from the chassis by an overhead crane. The chassis is then taken to the chassis preparation shop where it is cleaned and made ready for dispatch to the Chiswick works for overhaul there. After overhaul it is returned to the depot but it is improbable that, on its return, its former body would be replaced on it, since the chassis goes into stock and will in due course be drawn out and fixed to the body next in turn for

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dispatch. The body is taken to a piece of machinery called an inverter which enables it to be turned on its side for washing and for the carrying out of certain underfloor and roof repairs.

From the inverter the body is taken by crane to the body repair shops. Here it is mounted on stilts which form a jig and hold the body at a convenient height for working between fixed gantries which afford convenient access at different levels. All defective parts are removed and subsequently go to appropriate shops elsewhere for reconditioning (if possible). The parts so removed are replaced by new or reconditioned parts taken by the men engaged on the job from stocks stored in what are known as cafeteria racks running along the side of the shop. The extent of the replacements carried out are, on the average, 1,940 pieces out of a total of 7,500 which constitute the total body; of these 1,940 pieces some 1,740 are reconditioned and subsequently reused. These numbers exclude nuts, bolts and screws. The body having been reintegrated, is then taken by overhead crane to another inverter, where a coating of protective paint is applied to the underside. From there it is carried to the mount shop where it is again mounted on a chassis, which has been overhauled at Chiswick and returned to the depot. It is then towed to the rectification shop, where it is inspected. It then goes out on a road test and returns to the rectification shop for the correction of any faults shown on the road test. From there it is towed to the preparation shop where it is prepared for painting and where certain minor painting, such as the cream line, is put in by hand. Here, in addition to rubbing down, masks or protective coverings are applied to those parts not to be painted the familiar red or green. In certain cases where the paint work is very bad, such as cases where small dents have been beaten out in situ, the vehicle may have previously been taken through the special preparation shop where the existing paint is chemically removed. After preparation the vehicle goes to the paint shop where it is painted with one coat of colour by electrical sprays hand operated. It is there air dried and the transfers are put on during this drying period. It then receives two coats of varnish and is oven dried after each coat. The vehicle then goes to the finishing shop where the reconditioned cushions and upholstery are fitted and any small touchings up and finishings are carried out.

Finally the vehicle goes to the licensing garage where it is inspected by the transport executive rolling stock engineer and the licensing authorities before it goes back to its own garage. For the purposes of the taxation officers, the bonnet number, the maker's chassis number and the registration number have to agree, and in view of the separation of body and chassis in the early stages of the overhaul and the substitution of a different reconditioned chassis at a later stage, body and chassis are renumbered so as to correspond with the licence. The whole process of overhaul of a vehicle from the time it enters to the time it leaves the depot occupies about three weeks.

So far as major accident repairs are concerned, of which during the year ended March, 1954, there were an average of between 10 and 20 vehicles a week, the vehicle is first inspected and the necessary body repair work carried out in the accident repair shops and any necessary repainting consequent upon such repairs done in the accident painting shop. Damage to the chassis would also be repaired in the depot in the development shops.

Even if a vehicle incurred a major accident within a short period before it was due for overhaul, it would go first to the accident repair shop for the accident damage to be repaired before it underwent overhaul, though in such case the repainting would be omitted in view of the complete repainting which each overhauled vehicle receives.

All defective parts, whether removed from a body in the body repair shops or the accident repair shop, are first examined to see if they are capable of reconditioning. If they are so fit they are collected in the pre-repair stores where they are made up into batches and sent to the appropriate shops in the depot, where they are reconditioned. After reconditioning, metal parts are stove enamelled and timber parts hand painted. They are again inspected and then go to the progress body repair stores, which, together with the main stores, which are used primarily for new material, form the reservoir from which the cafeteria racks are kept stocked.

There are two of the reconditioning shops of which special mention may be made, the trimmer's shop and the boards and blinds shop. In the former the cushions and upholstery are cleaned, repaired and rebuilt, and the leathercloth used for lining the omnibus and linoleum and cork tiles are cut to the necessary size from new material. In certain cases it proves necessary for new moquette to be used as the outer cover for the cushions and squabs (or backs of the seats), and this also is cut out and fitted in this shop. The extent of the reconditioning of the cushions and squabs varies from cleaning and a repaint of the back of the squab to a complete stripping to pieces and reassembling as in the original manufacture.

In the boards and blinds shops, destination blinds are repaired or reconditioned. During 1954, 500 new blinds were made and 370 reconditioned on an average each week. There was also at the depot a plant shop used for the maintenance and servicing of the plant used on the premises and the manufacture of certain plant and equipment for such use.

In 1955 there had been removed to the depot the reconditioning of chassis which had formerly been carried out at Chiswick. The defective parts were sent to Chiswick for reconditioning and after reconditioning returned to the depot. Chassis reconditioned at the depot have defective parts replaced from the store, to which the reconditioned parts are returned.

It was contended by Mr. Patrick Browne, for the valuation

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officer, that the whole of the hereditament is used for the maintenance of the vehicles and therefore is not a "factory" within the meaning of section 3 (2) (*b*) of the Act, and, alternatively, that if any parts of the depot are used for purposes other than maintenance which are in themselves factory purposes, the hereditament is excluded from the definition of an industrial hereditament by proviso (*f*) as being primarily occupied or used for purposes which are not those of a factory or workshop.

Mr. Michael Rowe Q.C., for the executive, contended: (i) That section 3 (2) (*b*) applies only to a place within the close, curtilage or precincts forming a factory or workshop which is used by the occupier for the housing or maintenance of his road vehicles as ancillary to the purposes of such factory or workshop, and does not apply to a close, curtilage or precincts used wholly for maintenance which apart from subsection (2) (*b*) would be an industrial hereditament within the meaning of the Act; (ii) that the work done on the hereditament is not "maintenance of road vehicles" within the Act, since maintenance in the Act means "ordinary "maintenance"; and (iii) in the alternative that the reconditioning shops are industrial while the fitting or assembly shops may be maintenance.

The tribunal decided in favour of the valuation officer, and the executive appealed.

Michael Rowe Q.C. and *David Widdicombe* for the London Transport Executive.

Maurice Lyell Q.C. and *Patrick Browne* for the valuation officer.

In addition to the cases referred to in the judgments, the following were cited in argument: *Scottish Motor Traction Co.* v. *Assessor for Edinburgh*[2]; *Automobile Proprietary Ltd.* v. *Brown*[3]; *Thorogood* v. *Van Den Berghs and Jurgens*[4]; *London Passenger Transport Board* v. *Railway Assessment Authority.*[5]

Lord Evershed M.R. The question in this appeal is that of the liability for rates of premises known as the Aldenham Road services depot or factory of the London Transport Executive.

The nature of the premises and of the operations carried out upon them is fully set out in the early part of the decision of the Lands Tribunal and I shall not take time by repeating what is there so fully, and, as is conceded, accurately, described. It is, however, necessary to say just this by way of brief summary of the operations. The London Transport Executive is responsible for the conduct of the London transport services, particularly its omnibus services, and as part of the working policy of the

[2] 1931 S.C. 416.

[3] [1955] 1 W.L.R. 573; [1955] 2 All E.R. 214.

[4] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; sub nom. *Thorogood, etc.* [1951] 1 All E.R. 682.

[5] (1942) 13 D.R.A. 80.

executive it is laid down by the executive that an omnibus (assuming that it has not met with some calamity in the meantime) after every three and a half years' service on the roads goes to this factory for "treatment," to use a neutral word, of a somewhat elaborate and detailed character. It appears that the body of the omnibus is altogether detached from the chassis and at the relevant date for the purposes of this appeal the chassis was taken elsewhere for the purpose itself of reparation treatment. The body is then subjected at the Aldenham Road depot to careful examination and scrutiny. Any part that has suffered injury is put right either by replacing the particular part or by some other repairing work. That, of course, includes all the detail of the body like the seating, panelling of the exterior, and so forth.

It is said that taking an average over a number of omnibuses and over an appreciable period, something like 25 per cent. of the identifiable parts undergo treatment of one kind and another, and a proportion of that 25 per cent. of parts is replaced by a different, new or reconditioned part.

Then, when all is done, a given body is replaced upon a chassis and there is left at the end an omnibus which might be fairly described as being as good as new. But it is a point of significance, and illustrative of one of the questions that we have to decide, that any given body, having been removed shortly after arrival at the Aldenham depot from its chassis, is by no means necessarily replaced upon the same chassis. Looking at the matter broadly, I think it fair to say that all the omnibuses can, at any rate for this purpose, be treated as of a uniform pattern, so that there is no point for the business purpose of the executive in putting any given body upon any given chassis provided only that for licensing and taxation purposes there is one identifiable whole. I shall have to say a little more later about the proper conclusions to be drawn from the operations which so far I have very briefly described.

I can pass to state the particular problem which arises under section 3 of the Rating and Valuation (Apportionment) Act, 1928, as amended.

[His Lordship read section 3 (1) and (2) as set out above and continued:] The two subsections are to my mind somewhat striking instances of the possible results of referential legislation. Parliament, by adopting the form of words I have read, has produced a result so involved and in certain respects so difficult of apprehension that it may be that some problems which emerge are almost insoluble: certainly an attempt to follow the Parliamentary intention is apt to lead you into circular argument.

The essence of the present case is the claim by the executive that the Aldenham depot is an industrial hereditament as defined in this section. If it is, then it is entitled to the benefit of derating.

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The questions which we have to determine are two. The first is whether in any case it can be said that the use of this factory or the conduct of the operations which I have so far very briefly described falls within subsection (2) (*b*) as constituting use for "maintenance of road vehicles." If it does not constitute such use, then there is nothing, at any rate for the purposes of the present case, to exclude the Aldenham depot from being an industrial hereditament and, therefore, entitled to the benefit of derating.

But a second point also has arisen. The language of paragraph (*b*) of subsection (2), it is said by the executive, is only applicable to a case in which the place used for the maintenance of road vehicles is part only—however great the part, still, part only—of the hereditament as a whole; and since here, for the purposes at any rate of this appeal, it can be taken that the operations which I have described are carried out upon the whole of the place, the whole of the hereditament, so it is said there is nothing in paragraph (*b*) which has the effect of excluding this depot from the benefit of the section.

I will go back to say something of the effect of this section and indicate the extreme difficulties which, by the language it has chosen to use, Parliament has presented to the court. One begins by asking whether there is here a hereditament occupied and used, "subject as hereinafter provided," as a factory. At this stage in the reading of the section the reader has not had indicated to him what is a factory; but he finds later in the section the reference to the Factory and Workshop Acts. It is not in doubt that if one looks back at the Factory and Workshop legislation, 1901 to 1920, the operations conducted at the Aldenham depot qualify the premises as a factory. But then there is found immediately after the opening sentence of the subsection the proviso which I have read. So the question arises or may arise whether, assuming the premises could otherwise properly be regarded as a factory, that prima facie conclusion is displaced by the fact that primarily they are as a whole occupied and used for a purpose which is not after all that of a factory.

In the present case (I will deal with this matter now in order to dispose of it) it appears that upon some part or parts of the depot specific manufacturing operations are carried out. It appears from the statement of the tribunal, in the decision, that what are known as destination blinds are, to some extent, made on these premises. The destination blinds I understand to mean the devices which you see in the front of the omnibus, so contrived that the conductor or driver can by turning a handle indicate to the public where the bus is going.

It appears also that there is made somewhere on the Aldenham factory, and to some extent, plant and equipment for use in the operations at Aldenham. I think it is quite clear that the extent of these manufacturing operations is, judged from a common sense point of view, negligible compared with the general

scope of the whole of the operations—so much so that I think it might fairly be said, if the question had to be determined, that these manufacturing processes could be disregarded upon the application of the de minimis rule.

It is also to be noted that the place in the depot where these manufacturing operations are carried out is not a place exclusively devoted to those manufactures. For example, the manufacture of the new blinds takes place in the same part of the whole premises as that in which existing destination blinds are repaired or reconditioned, and, substantially, the same observation applies to the manufacture of the plant and equipment.

A point somewhat debated earlier in the case was to the effect that the repairing operations (assuming for the moment that they were "maintenance," would be such that, taking the hereditament as a whole, it should in any event be said that primarily the hereditament was being used for purposes which were not those of a factory. But it is unnecessary, if I follow the argument, for the court to express a conclusion upon the matter. If and when it becomes necessary for such a point to be considered, the court will have to decide whether paragraph (*b*) of subsection (2) operates once and once only and for one purpose, or whether having arrived at a conclusion as to the applicability in a particular case of paragraph (*b*) of subsection (2) it is then necessary to go on to see whether, as a consequence, the proviso to subsection (1) has also to be considered.

I have said that it is in this case unnecessary for us to decide that point because for present purposes it is conceded that we should regard the operations of repair treatment (and I again use a neutral phrase) as being carried on upon the whole of the hereditament in question to the exclusion of everything else, so that the hereditament is either wholly used for the purpose of maintenance of road vehicles or none of it is so used, according to the answer to the question whether the repair treatment is or is not maintenance.

I will now revert to the problem created by the section. So far, having read subsection (1) only, there is no clue to the answer to the question whether what is being carried on, the operations which I have described, are or are not those of a factory.

One comes accordingly to subsection (2), which begins: "For "the purposes of this Act." I take the subsection therefore, first of all, as telling the reader that for the purposes of this Act the word "factory" has certain meanings, and, similarly, for the purposes of this Act certain places are not to be regarded as part of the factory. So much I think is tolerably clear. I will, however, now read again the few essential words—"For the "purposes of this Act any place used by the occupier for the "housing or maintenance of his road vehicles . . . shall, not-"withstanding that it is situate within the close, curtilage or

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"precincts forming a factory . . . and used in connexion therewith, be deemed not to form part of the factory . . . but save as aforesaid 'factory'" has the meaning contained in the earlier legislation.

First of all, one has something which is a factory within the Act. Then it is found that part of the hereditament which is used for certain purposes, purposes which if one looks at the factory legislation would still be clearly factory purposes, is nevertheless so used that the place where those operations are carried on is to be deemed not to form part of the factory at all.

It is easy enough to criticize the language of parliamentary draughtsmen, but I must say that it is unfortunate, to begin with, that for some reason or another Parliament, having previously directed the reader's attention to the phrase "for purposes of a factory" departs from that formula and proceeds to speak of a place used for a particular purpose being deemed *not to form part of the factory.* It might have been somewhat easier if Parliament had adhered to the previous formula and said that a place used for the particular purpose "shall be deemed not to be used for factory purposes." Still, Parliament has not done so. What is more significant, and this is the real point of Mr. Rowe's argument, is that Parliament has not said "shall be deemed not to be or to form part of the factory" but has confined itself to saying "to be deemed not to form part of the factory." So it is contended that by the very language used, Parliament shows that this first part of proviso (*b*) is limited in its application to those cases only in which the place used for maintenance is a definable part of what is otherwise, or what one shortly discovers hereafter is otherwise, a factory, falling short by some fractional margin however small of the whole. That result is undoubtedly one which at first sight the use of the formula "be deemed not to form part of the factory" does much to support. But if that argument is right, then it seems to me that the result is highly capricious, if indeed not illogical to the point of absurdity.

I refer back for a moment to paragraph (*f*) of subsection (1). It will be recalled that by that subsection and paragraph it is said that an industrial hereditament, which otherwise would qualify as such by virtue of its use as a factory, does not so qualify if it is primarily used for a purpose which is not the purpose of a factory. Subsection (2) (*b*) is saying that for the purposes in hand, part of a factory, a place which is a part of a factory (and which I will assume occupies 90 per cent. of it) used for the maintenance of road vehicles is not deemed to be part of a factory. It would appear somewhat strange if paragraph (*f*) of subsection (1) had no application to the case where the use of the hereditament as to 90 per cent. of the total was use of such a nature that took that part wholly outside the scope and definition of a factory altogether. Put somewhat differently, it is conceded by Mr. Rowe that if the particular undertaking is

a "factory" but 90 per cent. of it is used for the maintenance of road vehicles, then, at any rate, as to that 90 per cent., he would be deprived of the benefit of derating, and so long as the 90 per cent. increased to any figure short of 100, so he would be deprived; but once let him contrive that the whole 100 per cent. is used for the maintenance of road vehicles, then he can get the benefit of derating for the totality. I should be very reluctant to read this paragraph in a way which would produce that result. On the whole I do not feel that the language, notwithstanding the absence of the words "to be or" where one would expect to find them, is so compelling as to lead me to that conclusion; and I find assistance in the few words, "notwithstanding that "it is situate within the close . . ." The formula "close, "curtilage or precincts" is one that may be found in the earlier factory legislation, but according to the plain sense of the language, the paragraph is, I think, saying: "any place"—and I emphasize the word "*any* place"—"used for the main-"tenance of road vehicles notwithstanding that it is"—and I paraphrase that, "even though it be"—"within the close, the "confines, of a factory, still, it is not to be deemed part of the "factory; and if it so happens that the place is the whole, then "none of it forms part of the factory and the whole is excluded." I do not say the language is wholly happy, but I cannot find such a construction as I have given to be subversive of the meaning of the words used. I think that such a reading of the paragraph gives common sense and coherence to the two sub-sections read together.

It was said that the point was determined for us in *Potteries Electric Traction Co. Ltd.* v. *Bailey*[1] (commonly known as the "*Potteries Case*"). The main point in the *Potteries Traction Co.* case[1] arose in this way: that company owned and operated a fleet of omnibuses and upon the premises in question certain operations were carried out, not directly upon the vehicles themselves being brought there for the purpose (save for one exception I will mention in a minute) but upon the component parts which were to be used in the reparation of the vehicles themselves.

In the Court of Appeal the view had been taken that work which could be described as maintenance work upon these individual parts or manufacture of the parts themselves, could be regarded and should be regarded as constituting maintenance of the vehicles, because the parts when so made or reconditioned were intended to be used substantially, though not in fact exclusively, for the specific purpose of repairing or maintaining the vehicles.

It was the view of the House of Lords that that view was incorrect, that the destination of the component parts when made or repaired was irrelevant for the purposes in hand. If the parts

[1] [1931] A.C. 151; 47 T.L.R. 154.

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had not been made or repaired on these premises they would have had to be bought elsewhere, and it was not legitimate to pay regard to the circumstance that the purpose of making and repairing these parts was in order that the Potteries company should not have to buy them but should be able to use them for the reparation elsewhere of their vehicles.

There was, and I mention this to pick up the reservation I made a moment ago, one exception to the general conclusion. A defined part of the premises in suit was used as a paint shop where the vehicles themselves were painted or repainted; and so far as that identifiable part was concerned, the House of Lords agreed with the court below in treating it as constituting a place used for the maintenance of vehicles within subsection (2) (*b*) of the Act, so that to that extent the part of the whole was excluded from the factory definition.

Mr. Rowe, in the course of opening the case, was able to tell us by reference to the volume itself that in the case for the appellant the point with which we are now concerned, the point with which I have tried to deal arising under subsection (2) (*b*), was directly raised together with a number of other points. In the end, from the facts I have already stated, the particular question plainly did not arise for determination. The House was, in the end, left with the situation in which a definable and in fact relatively small part only of the total hereditament constituted a place used for the maintenance of road vehicles. But the point was none the less raised and so reliance was placed and placed in fact by both sides before us upon the language used particularly by Lord Thankerton[2]: "Subsections (1) and "(2)," that is, of section 3 of the Act of 1928, "appear to me "to lay down three conditions which must be complied with in "order to qualify the hereditament to be entered in the Special "List as an 'industrial hereditament,' namely:—(*a*) That the "hereditament, or some part of it, is occupied and used as a "factory or workshop within the meaning of the Factory and "Workshop Acts, 1901 to 1920; (*b*) if so, that any place used "by the occupier for the housing or maintenance of his road "vehicles or as stables, which is within the close, curtilage or "precincts forming such factory or workshop, is to be deemed "not to form part of such factory or workshop for the purposes "of section 3, and (*c*) if such hereditament is primarily used "and occupied for any of the purposes specified under heads (*a*) "and (*f*) of the proviso to subsection (1), then the hereditament "is not an industrial hereditament."

I have said that both Mr. Rowe for the executive on the one hand and Mr. Lyell for the valuation officer on the other have relied upon the language which I have read as supporting their respective but divergent contentions, and I think perhaps that fact alone suffices to emphasize the point which I make, namely,

[2] [1931] A.C. 151, 181.

that, as I think, Lord Thankerton was not directing his mind to this point at all and certainly not attempting to answer it. Whether or not the language of his paragraph (*c*) may be said, or may be cited hereafter, to support the view that having reached an answer under subsection (2) (*b*) one then still has to consider primary use under paragraph (*a*) is a matter upon which for reasons already indicated I say no more now. Lord Thankerton's paragraph (*b*) is not, though it follows it substantially, in fact a transliteration of the words of subsection (2) (*b*), and, indeed, Mr. Rowe relied upon that as indicating that Lord Thankerton was construing subsection (2) (*b*) so as to provide for him the answer to the present case. But I have been unable to find any clear answer to the present problem in the language which I have read, and in my judgment the *Potteries* case [3] cannot be relied upon as providing any answer sufficient to guide or direct us in the present case.

I, therefore, say no more on it, save only this: I do not find anything in the opinions either of Lord Thankerton or any of the other noble Lords which compels me to a different conclusion as to the meaning of subsection (2) (*b*) from that which I have already indicated. In my judgment, accordingly, it follows that the executive here cannot claim the benefit of derating on the ground that, if they are maintaining their road vehicles at the Aldenham depot, they are doing so on the whole of the hereditament and so able to say that paragraph (*b*) of subsection (2) does not apply to them. I think on that hypothesis it does.

It is therefore necessary to consider the second question, whether what they are doing at the Aldenham depot is in truth maintenance as that word is used in the paragraph. It is pointed out by Mr. Lyell that the word "maintenance," which is, after all, a common English word, is not qualified by any adjective. Referring again to the *Potteries* case,[3] there are references to operations there as being "ordinary" maintenance, and in their context the words were used in contrast to operations which could not be called maintenance at all. But, again, I am for my part satisfied that there is nothing in the *Potteries* case [3] which provides for us any guide to the problem presented here.

In the course of his very lucid decision, if he will allow me to say so, the Lands Tribunal referred to a number of cases which had been cited to him and which were also cited to us. One of them was *Hall & Co. Ltd.* v. *S.E. Area of Surrey Assessment Committee*,[4] where Charles J. said [5]: "The words," that is, maintenance, etc., "depend upon the circumstances and facts "of each case, necessarily fluctuating, and, as they fluctuate, "changing from overhaul to maintenance, or maintenance to "overhaul. It is indeed a matter of degree, and being a matter

[3] [1931] A.C. 151.
[4] (1933) 4 Derating App. 29.
[5] Ibid. 37.

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"of degree, it is clear in my judgment that it is a matter of "determination of fact upon the evidence." I agree. I think it is a matter of degree to be judged according to the circumstances of the case, and to the facts which I have already mentioned I will now make some slight additions as being to my mind highly relevant in considering the circumstances of this case.

The executive are responsible for a very large fleet of omnibuses in London. It is quite plain that an undertaking with those responsibilities has to determine upon some standard not only of efficiency and safety but also I think of convenience, and, indeed, appearance. I have already said that their omnibuses, as I understand the facts of the present case, may be taken as identical in design. Any parts, therefore, would be interchangeable from one vehicle to another. It seems to me from the facts as they are stated in the decision that the practice of taking these omnibuses every three and a half years to the Aldenham depot and there subjecting them to the close scrutiny and treatment which they there receive is a manifestation of a policy aimed at keeping on the roads of London omnibuses having a standard of efficiency and of safety and of appearance which in the exercise of their statutory duties the executive think proper.

The question is whether what is done, this series of operations which we are told takes some three weeks or so in respect of any individual vehicle, can reasonably be called maintenance as that word is ordinarily understood; or whether the operations amount to reconditioning or reconstruction, to something which should be described by some word with a significance distinct from maintenance.

The matter was expressed at the end of the decision by the tribunal in the following language: "As in all questions of degree "it is not easy to say on which side of the line a certain process "may be said to fall, but after a careful consideration of the "evidence in the light of the view which I had of the depot on "September 19, I have arrived at the decision that the processes "carried out at the depot can properly be described as the main-"tenance of vehicles. It is, I think, material that at the material "dates no manufacture of new parts other than destination blinds "was taking place at the depot. The work done at the depot was "work necessary to maintain the vehicles as a fleet in running "condition, and the fact that, in order to carry out the work "more expeditiously and efficiently, reconditioned parts were "substituted in place of reconditioning and replacing the defec-"tive parts actually removed cannot in my view change what is "in fact a repair into a reconstruction. Nor I think can the fact "that, instead of dealing with each dented plate or mudguard as "the damage occurs, such repairs are carried out to a programme, "alter the essential character of the work. Looking at each of "the individual processes they seem to me to fall clearly within "what, if one was dealing with a single vehicle, might properly "be called maintenance, and I do not think that because they

"are done collectively to a fleet of vehicles they can be said to "lose this character."

I find in that exposition of his conclusion no error in law.

It is not to be forgotten that according to the Lands Tribunal Act, 1949, the decision of the Lands Tribunal upon questions of fact are final. Section 3 (4) of the Act of 1949 so provides, giving, however, the right to an aggrieved party to take the matter to this court as being erroneous in point of law.

In the recent case *B.P. Refinery (Kent) Ltd.* v. *Walker*[6] questions of degree again arose, and we then considered to what extent it was competent or proper for this court, upon these questions of degree, to substitute a conclusion of our own for that of the tribunal. There is no doubt that cases may arise (and in certain instances arose in the *B.P. Refinery* case[6]) in which this court thought that the tribunal had misdirected itself as a matter of law in reaching the conclusion on the question posed as a question of fact—in that case whether specific things were buildings or in the nature of buildings. But we then considered somewhat fully the extent of the proper right and duty of this court to interfere in matters of this kind. I will quote one passage from the judgment of Denning L.J.[7] After stating, as I have just done, that the tribunal may misdirect itself and thereby expose its decision to review, Denning L.J. continued: "There is, however, a considerable area where two reasonable "men, each of whom properly understood the statute, could "reasonably come to different conclusions. In such cases, the "mere fact that the tribunal comes to a different conclusion "from that to which some of the members of this court might "come does not mean that the tribunal falls into an error in "point of law. The question is then one of degree in which the "tribunal of fact is supreme so long as it does not step outside "the bounds of reasonableness"; and my brother supported that conclusion by certain references to authorities.

I apply that test here. I am not to be taken as saying that had I tried this case I would have come to a different conclusion, but I find it impossible to say that a tribunal properly understanding the statute could not reasonably conclude, in the special circumstances of this case and against the background of the whole operations and the responsibilities of the executive, that these operations were in truth and in reality maintenance of the executive's road vehicles. The point that an omnibus body may be married after its original divorce to some chassis which was not previously part of its make-up is no doubt a forceful point. But it does not seem to me to suffice, because to try and find the original chassis and reunite the two components as before could achieve nothing but the occupation of time; in other words, efficiency plainly requires, I should have thought, the conjunction

[6] [1957] 2 W.L.R. 907; [1957] 1 All E.R. 700.

[7] [1957] 2 W.L.R. 907, 925.

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of body and chassis in the way that it is in fact carried out. To take an example, it would be absurd to suppose that when the wheels were all taken off and given new tyres one had to ensure that every wheel went back on to the same axle, near or off side position, the axle from which the wheels had been originally detached.

I say then no more than this: taking the matter as a whole, viewing it broadly and in the light of the whole evidence, it seems to me impossible to say that the conclusion which the tribunal reached was not a reasonable conclusion justified by the language of the section. I, therefore, hold upon that question also that the executive fail, and in the end it follows that the appeal must be dismissed.

Morris L.J. I concur entirely in the judgment that my Lord has just delivered. I find myself agreeing so fully with its reasoning that I do not find that there is anything I could usefully add.

Pearce L.J. I, too, agree with all that has been said.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *M. H. B. Gilmour; Solicitor to the Inland Revenue.*

E. D.

[COURT OF APPEAL.]

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July 4.
Lord Evershed M.R., Morris and Pearce L.JJ.

*TRZNADEL *v.* BRITISH TRANSPORT COMMISSION.

[1956 T. No. 1318.]

Railway — Negligence — Ganger injured by train — Practice to allow workmen to walk on track — Liability of employer — Liability of engine driver.

The plaintiff was employed by the defendants, the British Transport Commission, as a ganger. It was the practice, known to the defendants, for the gangers to walk along the track in order to reach the place of their employment. The plaintiff was walking along the track when, in order to avoid an approaching train, he stepped into the adjoining track, where he was knocked down and seriously injured by a train coming from behind him. He alleged that the defendants were negligent in allowing him to use the track as a means of access to his work and he further alleged that the engine driver was not keeping a proper look-out:—

Held, (1) that the defendants were not negligent in giving permission to their men to walk on the track.

(2) That the duties of an engine driver were different to the duties of the driver of a vehicle on a public road, and those who

used a railway track did so with the knowledge that a train might be coming which could not be pulled up in a short space of time. On the facts, there had been no negligence on the part of the engine driver.

Decision of Finnemore J. affirmed.

APPEAL from a decision of Finnemore J.

The plaintiff, Frank Trznadel, was employed by the defendants, the British Transport Commission, as a ganger on their track at Bordesley, Birmingham. On December 10, 1953, at 7.30 a.m., he was walking along the track facing oncoming traffic to get to the place of his employment, when he stepped off that track to avoid an approaching train. He did not step to the side, away from the two tracks, but into the middle of the adjoining track and he was there knocked down and seriously injured. The circumstances of the accident are more fully stated in the judgment of Morris L.J.

In this action the plaintiff claimed damages from the defendants on the ground that they had been negligent in causing or permitting him to use the railway track as a means of access to his work without ensuring that it was safe for him to do so. Further, the plaintiff alleged that they were negligent by their servant in that the driver of the engine, which caused the injury, failed to keep a proper look-out, went too fast, failed to give warning of its approach, failed to slow down or stop so as to avoid striking the plaintiff and gave him no opportunity of avoiding being struck.

Finnemore J. dismissed the plaintiff's action, holding that the defendants had not been guilty of negligence.

The plaintiff appealed.

A. W. M. Davies for the plaintiff.

Neil Lawson Q.C. and *Tudor Evans* for the British Transport Commission.

No cases were cited in argument.

LORD EVERSHED M.R. I will ask Morris L.J. to give the first judgment.

MORRIS L.J. Frank Trznadel, who was the unsuccessful plaintiff in this action, was employed by the British Transport Commission. On the morning of December 10, 1953, he was walking along the railway track in order to go to the hut where he and the other members of his gang of workers on the line would assemble in the morning. The conditions were not very good. The judge has said that daylight had not begun: there was mist and there was rain.

The plaintiff was walking along the track, and some distance ahead he saw another member of the gang, a man named Guest. The plaintiff thought that he could see as much as 100 or more

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yards, and could see Guest at that distance ahead. The plaintiff was walking on the track which would be used by any oncoming traffic: an approaching train would therefore face him. He saw the ganger ahead step off the track. He realized that a train was coming: it was a goods train. What he did then was to step from the track, and instead of stepping to the side, to the part that is known as the cess, the part away from the two railway tracks, he stepped into the centre of the other railway track. There were two sets of lines at this part.

As the goods train was passing him there was a certain amount of noise. Whether or not it was because of that noise, he had not in fact heard an oncoming engine. There came a time when he looked round and saw that there was an oncoming engine. In fact, there were two engines together. Those two engines had been engaged in pushing trucks up an incline towards the Camp Hill Goods Depot and they were then returning down the incline. They were coasting, so there would not be much or any noise from steam. The tender of one of the two engines was to the front. The tender knocked the plaintiff down and he was severely injured.

The plaintiff brought this action against his employers, the British Transport Commission, and alleged that his injuries were the result of negligence on their part. The action was tried by Finnemore J. at the Birmingham Assizes in December last, and the judge dismissed the claim.

Now, there are really three points to be considered. Mr. Davies has submitted that the defendants were negligent in permitting the plaintiff to use the track at all. Secondly, he has submitted that the driver of the engine that ran into him was negligent. The third point that arises is in reference to the conduct of the plaintiff himself, for it was pleaded by the defendants that he was guilty of negligence and that that negligence contributed to the accident.

Owing to the fact that the two engines were coasting down this incline, with the tender of one of them leading, it was shown by the evidence that the driver in the driver's cab would have his view considerably obstructed. Some photographs were put before us illustrating how there was considerable interruption in the range of vision of the driver. Evidence suggested that an immediate distance of perhaps 100 yards or so in front of the tender would not be visible to a driver.

The judge dealt particularly in his judgment with the issue of alleged negligence on the part of the engine driver. He acquitted him entirely of negligence.

Mr. Davies has, in the first place, said that there was negligence on the part of the defendants in allowing the plaintiff to use this track. He said that they were negligent in causing or permitting the plaintiff to use the track, but, on reflection, he

concentrated on the allegation that the negligence was in permitting the plaintiff to use the track, and he said that other means of approach should have been provided.

There was evidence given by a witness called by the British Transport Commission, a Mr. Hook, that the plaintiff and others had been told not to go along the track but to use another approach to their hut. But the judge held in his judgment that it was a known practice for the plaintiff and men employed in his gang to take the particular way to work that the plaintiff was on this occasion following.

Having so found, the judge said this: "There was some "controversy apparently in the beginning of this case when "letters were being exchanged about this point, but it is now "conceded that in fact these men did walk along the railway "property from the entrance at Camp Hill to their place of "work day by day; and that is what the plaintiff was in fact "doing. The photographs show that there is certainly plenty "of room or enough room to have been clear of both tracks, and "certainly to have drawn clear of the track on which the goods "train was coming without proceeding in the middle of the other "track, though of course that is the simplest way of walking and "not necessarily wrong, providing one kept an extremely acute "look-out and remembered that traffic was coming from the rear "and therefore one had to look back that way."

Now, accepting that it was a known practice, I cannot think that it was negligent on the part of the defendants to permit the plaintiff to use this track. The plaintiff was a member of a gang, whose duty consisted in working day by day on the lines themselves, on the track. Of course, during his actual period of work there would be certain regulations relating to look-out men which would enure for his protection; but, in considering whether it was negligent to allow somebody at 7.30 in the morning to walk along a track to a hut by the track, it seems to me that it is reasonable to have in mind the knowledge possessed by the plaintiff himself. If permission or licence was being given to him to use the track, it was being given to one who knew all the circumstances.

When he was cross-examined about this, the plaintiff was asked: "You work on this length of line, do you not? (A) Yes. "(Q) You had worked there every day for over a year? (A) Yes. "(Q) You knew that an engine or train went past on those lines "at least once every 10 minutes in each direction? (A) Yes; I "was aware of this, that there were many trains on this line." He also said that he knew that engines were used to help to push trains up the hill, and that those engines had to come down the hill without a train, and that he had seen such engines coming down the hill many times. In those circumstances it seems to me that the plaintiff knew all about the situation and knew all about its dangers and perils.

It is pleaded in the statement of claim that the defendants

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were negligent in causing or permitting the plaintiff to use the railway track as a means of access to the cabin without ensuring that it was safe for him to do so. It seems to me clear that safety cannot be ensured on a railway track where at any moment trains may be coming in either direction along the two respective tracks.

The plaintiff knew that there was plenty of space by the side of the track. He did not have to be told that there would be peril if he walked along a track with the risk that a train might come from behind. He knew the layout; he knew all the facts; he knew that there was the space on the side. The evidence of the witness to whom I have referred, Hook, was to the effect that the plaintiff had been told that he must always step out into that part of the side which is known as the cess.

Mr. Davies submitted that, if permission was being given, the engine drivers ought to have been warned. But the engine drivers, again, would know that it is always possible that people will be walking along the line who are entitled to be walking, or that others not entitled might be walking, and I cannot think that, in the circumstances of this case, there was any negligence in failing to give any special instruction to the engine drivers.

Without, therefore, dealing with the suggestion that there should have been some particular provision of arrangements for approaching the line from what I think was called the Arthur Street entrance, and assuming that it was the known practice for men to walk down the line as the plaintiff was doing, I cannot think that it would be right to say that the defendants were negligent in giving permission for such practice, or that, having given it, they were negligent in failing to take any steps with regard to the plaintiff or others.

That brings me to the other part of the case, in relation to the allegations of negligence against the engine driver. It is said that he did not keep a proper look-out. The judge negatived that suggestion. It is quite true that if the tender is leading, there is some obstruction of the vision of the engine driver. To counteract that, the engine driver has to lean out. But, of course, he cannot lean out the whole time, and he must not lean out too far because of structures that may be by the side of the track.

It seems to me that the judge approached the case quite correctly when he referred to the duties of an engine driver and pointed out that they must be different from the duties of the driver of a vehicle on a public road. As the judge said, an engine driver's duties are entirely different. The engine driver is driving on fixed tracks; he is driving on private property; he has, of course, to watch for the signals; he has to have in mind that he is driving to a schedule of time. He must take all reasonable steps that he can to ensure that he stops if there is any obstacle ahead; but it is not like a roadway; and those who have permission to use a railway track use the track with the

knowledge that a train may be coming which is being driven at speed and which cannot be pulled up in a very short space of time, and which is being driven by an engine driver who cannot have that full check on everything that is on the track that the driver of a motor-car on a road must be expected to have.

Then it was said that the engine driver ought to have whistled; but it was pointed out that if it were laid down that the engine driver ought to have whistled at this time and at this point because of the fact that some members of this gang might be going to their work, and if that were carried to its logical conclusion it would mean that the engine driver would have to whistle the whole of the time, and that indeed engine drivers would have to whistle at so many times of the day at so many places on the tracks.

I do not think there was any error at all in the approach of the judge when he came to the conclusion that it was not shown that there was any failure on the part of the engine driver. The judge said, having approached this case most sympathetically, that he could not avoid the reflection that the plaintiff himself, in failing to walk on the side and in walking along a track with his back to oncoming traffic, had been doing a most regrettably unwise thing.

If negligence had been established as against the defendants, either vicariously or otherwise, it might be that this is a case in which a court might have taken the view that the calamity was in the main, or very largely, or practically entirely, the result of the regrettably ill-advised conduct of the plaintiff himself. But it is not necessary to deal further with that part of the case.

I feel that Mr. Davies has put forward every possible consideration in support of the case for the plaintiff, but, in my judgment, it would not be right to say that any blame for this unfortunate event is to be attributed to the defendants in the action. I therefore think that the appeal fails.

PEARCE L.J. I agree.

LORD EVERSHED M.R. I also agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co. for Bosworth, Bailey, Cox & Co., Birmingham; M. H. B. Gilmour.*

B. A. B.

[CHANCERY DIVISION.]

* *In re* MOSES AND COHEN LTD.

1957
July 15, 31.
Roxburgh J.

[No. 00422 of 1957.]

Company—Register—Name struck off register—Neglect to make returns—Application to restore name to register—Whether penalty exigible

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as condition of restoration—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *ss.* 107 (2) (3), 124 (1) (3), 200 (4) (5), 353 (6), 440 (1) (2).

The directors and secretary of a company, which was formed in June, 1955, failed to comply with the statutory provisions of the Companies Act, 1948, under which they were directed to furnish notice of the situation of their registered office and other information to the registrar of companies, and they consequently became liable for default fines. Notices sent to the company by the registrar were ignored and in May, 1957, the company was struck off the register.

A petition was presented by one of the directors for the restoration of the company to the register and the question arose whether (in considering whether the order should be made) the breaches by the officers of the company ought to be passed without further notice:—

Held, that it would be too great a penalty to refuse the relief prayed, and that the court had under the Act no power to impose default penalties on the parties responsible as a condition of such restoration.

In re Brown Bayley's Steel Works Ltd. (1905) 21 T.L.R. 374 applied.

Petition.

On June 3, 1955, Alan, Edmunds & Phillips, solicitors, instructed one T. A. Herbert, a non-practising barrister, to form a company of estate agents and mortgage brokers under the name of Moses and Cohen Ltd. The instructions, which were in writing, were received by Herbert "at approximately 4.30 p.m. "by hand personally" and stated the address of the proposed registered office and the names of the proposed directors (Moses and Cohen) and of the proposed secretary (Herbert himself). Herbert and his wife were directors of Business Economy Products Ltd., which carried on business as (inter alia) specialists in company formation. They were both active in that business and that company claimed to have incorporated more than 4,000 companies.

Moses and Cohen Ltd. was incorporated on June 18, 1955, by Herbert or his company. His wife and he (described as "barrister at law") subscribed the memorandum and articles of association in which Moses and Cohen were named as the first directors and he was named as first secretary.

Neither the company, nor its directors, nor its promoter-secretary complied with section 107 (2) or 200 (4) of the Companies Act, 1948,[1] within the period prescribed or at all.

[1] Companies Act, 1948, s. 107: "(2) Notice of the situation of the "registered office, and of any change "therein, shall be given within four-"teen days after the date of the "incorporation of the company or of "the change, as the case may be, to "the registrar of companies, who shall "record the same. . . . (3) If default "is made in complying with this "section, the company and every "officer of the company who is in "default shall be liable to a default "fine."

S. 124: "(1) Every company having "a share capital shall, once at least "in every year, make a return con-"taining with respect to the registered "office of the company, registers of "members and debenture holders, "shares and debentures, indebtedness, "past and present members and "directors and secretary, the matters "specified in Part I of the Sixth

On July 13, 1955, Herbert resigned, and one Nelson, a young solicitors' clerk, took his place. He had never been called on to perform any duties in the day-to-day affairs of the company and was under the impression that all matters concerning the company would be attended to by its directors who would bring to his attention any formalities requiring his signature.

On May 21, 1957, the company was struck off the register. Before doing this the registrar sent notices to Herbert and his wife at the address of their company. They completely ignored them.

A petition was presented by one of the directors for the restoration of the company to the register and the question arose whether the breaches by the company's officers of their statutory duties, in respect of which they had become liable for "default "fines," ought to be allowed to pass without further notice.

"Schedule to this Act and the said "return shall be in the form set out "in Part II of that Schedule or as "near thereto as circumstances admit. ". . . (3) If a company fails to com- "ply with this section, the company "and every officer of the company "who is in default shall be liable to "a default fine."

S. 200: "(4) The company shall, "within the periods respectively men- "tioned in the next following sub- "section, send to the registrar of "companies a return in the prescribed "form containing the particulars "specified in the said register and a "notification in the prescribed form "of any change among its directors "or in its secretary or in any of the "particulars contained in the register, "specifying the date of the change. "(5) The periods referred to in the "last foregoing subsection are the "following, namely, (a) the period "within which the said return is to "be sent shall be a period of fourteen "days from the appointment of the "first directors of the company; and "(b) the period within which the said "notification of a change is to be "sent shall be fourteen days from the "happening thereof. . . . (7) If . . . "default is made in complying with "subsection . . . (4) of this section, "the company and every officer of the "company who is in default shall be "liable to a default fine."

S. 353: "(6) If a company or any "member or creditor thereof feels "aggrieved by the company having "been struck off the register, the "court on an application made by the "company or member or creditor "before the expiration of 20 years "from the publication in the Gazette "of the notice aforesaid may, if "satisfied that the company was at "the time of the striking off carrying "on business or in operation, or "otherwise that it is just that the "company be restored to the register, "order the name of the company to "be restored to the register, and "upon an office copy of the order "being delivered to the registrar for "registration the company shall be "deemed to have continued in exist- "ence as if its name had not been "struck off; and the court may by "the order give such directions and "make such provisions as seem just "for placing the company and all "other persons in the same position "as nearly as may be as if the name "of the company had not been struck "off."

S. 440: "(1) Where by any enact- "ment in this Act it is provided that "a company and every officer of the "company who is in default shall be "liable to a default fine, the com- "pany and every such officer shall, "for every day during which the "default, refusal or contravention "continues, be liable to a fine not "exceeding such amount as is "specified in the said enactment, or, "if the amount of the fine is not so "specified, to a fine not exceeding £5. "(2) For the purpose of any enact- "ment in this Act which provides "that an officer of a company who is "in default shall be liable to a fine or "penalty, the expression 'officer who "'is in default' means any officer of "the company who knowingly and "wilfully authorizes or permits the "default, refusal or contravention "mentioned in the enactment."

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Moses and Cohen Ltd., *In re.*

Morris Finer for the petitioner.
Denys Buckley for the Board of Trade.

The case referred to in the argument was referred to in the judgment.

Cur. adv. vult.

July 31. Roxburgh J. stated the facts, read section 107 (2) and (3) of the Companies Act, 1948, and continued: A "default "fine" means a fine not exceeding £5 a day during default. This, on the face of it, looks formidable enough; but section 440 (2) contains a drastic limitation of the meaning of the phrase "in default" to an officer who "knowingly and wilfully "authorizes or permits the default." So much for the registered office.

Section 200 provides that a company shall within fourteen days from the appointment of its first directors send a return to the registrar of companies containing prescribed information regarding its directors and secretary; penalty as before.

[His Lordship read subsections (2) and (3) of section 124 and continued:] This return was due before the end of the year 1956; "default" and "default fine" mean the same as before.

Moses and Cohen Ltd. now seek to be restored to the register, and such an order must be made, because to keep them off for ever would be too great a penalty for the shortcomings of their directors and their promoter-secretary. But am I bound to allow these breaches of the Act to pass without further notice? Unfortunately, I believe that I am.

Counsel has informed me that the Board of Trade do not contemplate any proceedings for "default." I can well understand that decision, because it might be difficult to satisfy a criminal court that even Herbert acted "knowingly and wil-"fully," though I must not be taken to accept the explanation which he has given. Moreover, a criminal prosecution might seem like a sledge-hammer to crack a nut of incompetence and inattention to duty, and this might result in reluctance to convict. But, in the event, these important statutory provisions can, in general, be disregarded with impunity; and statutes only enforceable with difficulty, if at all, tend to debase the currency of the law. There seems to be a case for allowing the court in such circumstances as these to impose some penalty (beyond costs) on the company, as a term of its restoration to the register. I should have thought fit to do so; but I find that I have no jurisdiction. I must impose either the extreme penalty (which would be unjust) or none at all.

Section 353 (6) of the Companies Act, 1948, provides that "the court may by the order give such directions and make such "provisions as seem just for placing the company and all other "persons in the same position as nearly as may be as if the "name of the company had not been struck off."

In 1905, Buckley J. in *In re Brown Bayley's Steel Works Ltd.*,[1] having remarked on the frequency of these applications, said that if he had jurisdiction to do so, he should mark his disapproval by ordering some penalty to be paid as a condition of making a restoration order, but he found that he had no power to do this. He concluded his observations by saying that he hoped that those who had the control of the amendment of company law would consider whether the law on this subject did not require alteration. I agree that the restricted discretion conferred by section 353 (6) does not extend to any effective action. But perhaps after fifty years it may not seem premature to draw attention once more to the frequency of these applications and to the underlying cause.

Petition granted.

Solicitors: *Alan, Edmunds & Phillips; Solicitor, Board of Trade.*

J. L. D.

[1] (1905) 21 T.L.R. 374.

[PROBATE, ETC., DIVISION.]

* PAICE *v.* PAICE.

1957
June 27.
Sachs J.

Legal Aid—Costs—Divorce—Costs of interlocutory application reserved inter partes to trial judge—Direction by trial judge for legal aid taxation—Effect of Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *Sch.* 3, *para.* 4 (1)—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *reg.* 18 (3) (*as amended by S.I.* 1954, *No.* 166).

A taxation of costs in accordance with the provisions of the Legal Aid & Advice Act, 1949, Schedule 3, made by a trial judge extends to all the costs of the suit whether or not they have been reserved inter partes.

APPLICATION.

After the hearing of a suit in which a husband petitioned for divorce and the wife respondent cross-prayed for a decree of restitution of conjugal rights, Sachs J. granted the husband a decree nisi and made no order as to costs save that the wife's costs should be taxed under the Legal Aid and Advice Act, 1949.

The wife subsequently lodged her bill of costs, but the taxing officer declined to deal with the bill on the ground that the trial judge had not dealt with the question of costs relating to two interlocutory applications made on October 26, 1954, and November 23, 1954, the costs of which had been reserved by the registrar to the trial judge.

The wife applied to Sachs J. for an order disposing of the costs of those applications.

Armstead Fairweather for the wife.

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SACHS J. Where the court reserves costs of an application or other proceedings to the judge at trial, prima facie that is a reservation of the inter partes costs and is not intended to affect the legal aid taxation. So, where the judge after the trial of a cause orders, in common form, taxation in accordance with the Legal Aid and Advice Act, 1949, Sch. 3, that order on its proper construction normally relates to all the costs of the action irrespective of whether they have inter partes been reserved to the judge at trial.

[His Lordship added that if in the present case his order reserving the costs as drawn up was in some form which did not enable the later common form order for legal aid taxation to apply to them, the former should be amended under the slip rule.[1]]

Order accordingly.

Solicitors: *John W. W. Sachs & Co., Bromley, Kent.*

J. B. G.

[1] R.S.C., Ord. 28, r. 11.

1957
June 27, 28; *July* 23, 24, 25, 26.

Lloyd-Jacob J.

* KORES MANUFACTURING CO. LTD. *v.* KOLOK MANUFACTURING CO. LTD.

[1957 K. 358.]

Restraint of Trade—Employment—Agreement—Agreement between two companies that neither company would engage servants of the other—No provision giving power to determine contract—Duration—Reasonableness—Public policy—Validity.

Contract—Termination.

By letters dated August 30, 1934, and September 3, 1934, respectively, two companies agreed that neither company would, without the written consent of the other company, employ any person who had been a servant of the other company during the previous period of five years. The letters were silent as to the duration of the proposed agreement.

In an action commenced in 1957 by one of the companies against the other company claiming (1) a declaration that the agreement was a valid and subsisting agreement; (2) an injunction to restrain the defendants from employing a certain employee of the plaintiffs without the plaintiffs' consent in writing contrary to the agreement and (3) an injunction to restrain the defendants from employing without the consent of the plaintiffs in writing any person who during the period of five years immediately preceding the commencement of such employment was in the employment of the plaintiffs:—

Held, (1) that the contract was void on the grounds that it was in restraint of trade and contrary to public policy, in that on the facts the period of five years was longer than was required to protect the parties' legitimate interests, imposed an unreasonable fetter on the freedom of a workman to offer his labour, and could in certain circumstances produce a public mischief.

(2) That it was reasonable to imply a term that the contract should be terminable on twelve months' notice.

Mineral Water Bottle Exchange and Trade Protection Society v. *Booth* (1887) 36 Ch.D. 465 and *Herbert Morris Ltd.* v. *Saxelby* [1916] 1 A.C. 688; 32 T.L.R. 297 applied.

Witness action.

On August 30, 1934, a letter was written by Koreska (Gt. Britain) Ltd. (the name of which company was subsequently changed to Kores Manufacturing Co. Ltd.) to Kolok Manufacturing Co. Ltd. in the following terms: "In consideration of "your agreeing not without our written consent to, at any time, "employ any person who, during the then past five years, shall "have been a servant of ours, we undertake not, without your "written consent, to, at any time, employ any person who, during "the then past five years, shall have been a servant of yours."

In answer to that letter Kolok Manufacturing Co. Ltd. wrote to Kores Manufacturing Co. Ltd. the following letter, dated September 3, 1934: "We acknowledge receipt of your letter of "the 30th ultimo with reference to the employment of our "respective employees. We welcome this suggestion from which "it is understood that your company and our own will refrain "from engaging any person or persons who have been in the "employ of either firm during the previous period of 5 years. "As such an arrangement has our fullest support we hereby "agree to the terms of your letter of the above date. We are "sure that this arrangement will prove to be of mutual benefit, "and we shall be happy at any time to consider other proposals "which have for their objects similar safeguards."

In 1957, as a result of negotiations between Hugh Anthony O'Neill and Kolok Manufacturing Co. Ltd., relating to an application by him for a position on their staff, an agreement of July 1, 1957, was entered into between him and that company (he being at that time in the employment of Kores Manufacturing Co. Ltd.) under which Kolok Manufacturing Co. Ltd. appointed him as Chief research chemist for two years and thereafter "unless and "until this agreement is determined by six months prior notice "in writing given by either party to the other and so that such "notice in writing may be given so as to expire at or at any time "after the conclusion of the said period of two years."

During the negotiations, notice was given by O'Neill to Kores Manufacturing Co. of his wish to resign from the service of that company, and a dispute arose between the two companies, as to whether, having regard to the letters of August 30, 1934, and September 3, 1934, Kolok Manufacturing Co. Ltd. were entitled to employ him.

A writ was, therefore, issued in May, 1957, by Kores Manufacturing Co. Ltd. claiming (1) a declaration that an agreement contained in the letters of August 30, 1934, and September 3, 1934, was a valid and subsisting agreement; (2) an injunction to restrain the defendants themselves or by their servants or agents

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from employing without the plaintiffs' consent in writing one Hugh Anthony O'Neill contrary to the terms of the said agreement; (3) an injunction to restrain the defendants themselves or by their servants or agents from employing without the consent of the plaintiffs in writing any person who during the period of five years immediately preceding the commencement of such employment was in the employment of the plaintiffs.

On motion made on May 21 and 24, 1957, for an injunction, an order was made that (it being agreed that the issues between the parties were those formulated in the schedule to the order and that those were the only issues between them in this action) the action should be set down forthwith for trial in Middlesex before a judge alone and that delivery of pleadings be dispensed with.

The schedule to the order was as follows:

"1. Whether (as the plaintiffs contend and the defendants "deny) the letters mentioned in the indorsement on the writ of "summons were of contractual effect.

"2. If the answer to (1) be 'yes'—whether (as the defendants "contend and the plaintiffs deny) such contract was and is void "as being in unreasonable restraint of trade and contrary to "public policy.

"3. If the answer to (2) be 'no'—whether (as the defendants "contend and the plaintiffs deny) such contract was terminated "by the tacit mutual consent of the plaintiffs and the defendants "in or about 1941 or alternatively in or about June 1955.

"4. If the answer to (3) be 'no'—whether (as the defendants "contend and the plaintiffs deny) such contract contains an "implied term that the same is terminable by reasonable notice "given by either party to the other and that 6 months' notice "is reasonable."

The question as to the validity of the contract set out in the letters mentioned in the writ was decided in the negative, but his Lordship stated in his judgment his findings on the facts, in case the plaintiffs appealed from his decision.

J. G. Strangman Q.C. and *Peter Oliver* for the plaintiffs.
Gerald Gardiner Q.C. and *R. S. Lazarus* for the defendants.

Cases cited in argument not referred to in the judgment: *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co. Ltd.*[1]; *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*[2]; *Davies* v. *Thomas*[3]; *Winter Garden Theatre (London) Ltd.* v. *Millenium Productions Ltd*[4]; *Martin Baker Aircraft Co. Ltd.* v. *Canadian Flight Equipment Ltd.*[5]

LLOYD-JACOB J. By an order dated May 28, 1957, the issues between the two parties to these proceedings were defined as

[1] [1913] A.C. 781; 29 T.L.R. 743.
[2] [1914] A.C. 461; 30 T.L.R. 313.
[3] [1920] 2 Ch. 189; 36 T.L.R. 571.
[4] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331.
[5] [1955] 2 Q.B. 556; [1955] 3 W.L.R. 212; [1955] 2 All E.R. 722.

follows, and the questions posed for the determination of the court are expressed in this language: [His Lordship read the issues as set out above and continued:] The letters to which the first question makes reference were written in 1934. [His Lordship read the letters and continued:] The defendants no longer contend that these documents do not create contractual obligations between the parties, and an affirmative answer to question 1 is conceded by them.

The history of the matter is as follows. The plaintiff company, under their name at that time of Koreska (Gt. Britain) Ltd., carried on business in the manufacture of carbon papers and typewriter ribbons before 1934 at a factory in Hoxton, and in 1934 transferred their manufacture to West Road, Tottenham, in the North of London, and occupied premises adjacent to those wherein the defendants carried on a similar business.

In the course of time both businesses grew in size and analogous products were added to their articles of manufacture, but they have continued in active competition in respect of their main business interests. It is not in doubt that in relation to these the constant handling of dyes and dyed material involved in the manufacture creates some difficulty in recruiting manual labour, and, further, that both the technique of manufacture and the introduction of variants give rise to the development of trade secrets which the manufacturers seek to guard. Both companies, as well as a number of other companies, operate independently in what is a highly competitive field.

It appears from the evidence that the managing directors of these two companies met and discussed some aspects of the likely outcome of the plaintiffs' transfer to Tottenham, and they agreed on the exchange of letters to which reference has already been made. As the correspondence discloses and the evidence confirms, the agreement was invoked in 1936 to secure the discharge by the plaintiffs of a woman worker who had previously been in the employment of the defendants.

Later, in 1939, a Dr. Lant, who had been engaged in a consultative capacity by the plaintiffs, or, I think more accurately, by their associates in Vienna, transferred his services to the defendant company. This gave rise to some discussion between the companies, but in the result both parties appear to have agreed that the scope of the agreement did not include consultants, and in consequence the matter was permitted to drop.

Then, in 1941, the parties had occasion to consider the operation of this agreement in the light of the changed circumstances created by the war. The Ministry of Labour, under the powers conferred by war-time legislation, were responsible for directing available labour to meet industrial requirements. Both the plaintiff company and the defendant company experienced a shortage of labour during the war and looked to the Ministry to assist them to overcome their difficulties. It was apparent to both that refusal to engage any worker directed by the Ministry

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to seek employment with either, save on grounds which the Ministry could accept as reasonable, would lead the Ministry to refrain from directing any labour into their factories. Neither party was prepared to inform the Ministry of the arrangement whereby they had hitherto restricted their engagement of workers to persons not hitherto employed by the other, and in consequence they sought a way out of the difficulty.

There is a conflict of recollection as to what was decided, but, having heard the evidence, I myself have no doubt whatever that neither Dumont's evidence nor his memoranda can afford any reliable guide in its resolution. He gave me the strong impression that, having succeeded to the office of O'Brien, who had made this agreement with the plaintiffs in 1934, he determined to allow the plaintiffs to believe it was still operative while seeking freedom for his company to escape it.

I have no hesitation in accepting as accurate Tourlamain's account of the discussion in 1941, as set out in his letter of confirmation. In 1943 the plaintiffs, by their managing director, Lefebure, whose evidence I accept as reliable, invoked the agreement in respect of a Mrs. Murfitt; and again in 1953 Lefebure applied it in respect of an application for employment by the plaintiffs made to him by Ansell, an ex-employee of the defendants.

Later, in 1955, the plaintiffs followed the practice adopted in 1939 in regard to consultants by engaging a Dr. Cooke, despite his relationship previously with the defendants in a consultative capacity. This was in no manner inconsistent with the recognition by the plaintiffs of the existence of the agreement and its operation in full.

In that year the plaintiffs decided to transfer their main factory to Harlow, and inquiries made of their workpeople disclosed that much of the female labour was not sufficiently mobile to accompany them to their new location. The plaintiffs were naturally anxious to maintain their Tottenham factory in production up to the actual date of removal, and Lefebure telephoned to Petts, of the defendant company, and, whether or not he actually mentioned the agreement, sought an assurance that its terms would be observed by the defendants, and offered as a concession that as from the date of removal his company would waive any objection to the engagement by the defendants of any female labour previously employed by the plaintiffs which had been rendered redundant by the removal. I am satisfied that nothing was said by Lefebure nor understood by Petts to indicate that the 1934 agreement was to be regarded as terminated in any way.

In March, 1957, the plaintiffs' chief chemist, one O'Neill, gave three months' notice to leave and sought employment with the defendants. The plaintiffs objected on the ground that engagement of this man by the defendants would be in breach of the 1934 agreement, and this has resulted in this litigation, the

defendants contending that no such bar exists, or, if it exists, is not enforceable in the courts.

It is evident from my findings that question 3 must be answered in the negative both in respect of the events of 1941 and the events of June, 1955.

Question 4 involves the application of well-established principles whereby the court will seek to secure business efficacy for a contract which by its terms is silent as to its duration, having regard to the principle of the common law that both parties must be deemed to have intended a reasonable commercial bargain between them. The mere fact that the character of perpetuity attaches to the legal personality of the contracting parties is not of itself sufficient to determine that the agreement was intended to be permanent. (See the observations of Russell J. in *Crediton Gas Co.* v. *Crediton U. D. C.*[1])

Consideration must plainly be given to the nature of the subject-matter involved, and in the present case the agreement relates to the engagement of labour. The fact that it was entered into in anticipation of a removal of the plaintiffs' factory to a new position where competition for labour with the defendants might become acute, as well as the readiness of the parties to consider a modified operation when labour supply in fact became difficult, both point against an intention that the restriction should go on for ever if one party so insisted.

Had the matter been considered at the time, I can well imagine both parties regarding a year's notice of determination as not unreasonable. The position has, however, to be considered as at the date of issue of the writ, when the removal of the plaintiffs' factory to Harlow had avoided the primary competition which the agreement was devised to avoid.

In my judgment the period of 12 months is by no means unreasonably short. As the employees of both parties run into the hundreds, it might well take a year to negotiate with all of them agreements to secure an effect similar to that of the agreements here in suit, so that the period of one year cannot be fairly regarded as too long.

On question 4 I should be prepared to hold that termination by either party on 12 months' notice can fairly and properly be read into this agreement.

Question 2 remains to be dealt with, and, so far as I know, no agreement of the precise character here under consideration has as yet been considered by the court. In the case of *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth*,[2] both Chitty J. and their Lordships in the Court of Appeal considered a rule by which the members of a trade protection society were required not to employ certain ex-servants of a fellow member until after two years had expired from the cessation of service.

[1] [1928] Ch. 447; 44 T.L.R. 369. [2] (1887) 36 Ch.D. 465, 471.

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The present agreement is between two only of some 20 or so competitors in business, of whom at least four of substantial size carry on business within the London area.

In his judgment in the case referred to Cotton L.J. expresses the objection to the enforcement of the rule by saying "it might "be used most oppressively by preventing a man who had never "been in any confidential position and never desired improperly "to use the information he had then acquired from getting "employment from another master in the trade which he knew "most about, and which he could best carry on."

For my own part, I would hold this objection equally applicable if, instead of information, it was an acquired skill which the employee desired to offer to another employer. Having regard to the existence of other competing manufacturers in the London area, it cannot be said that this agreement prevents an ex-employee of either party from exercising his skill and knowledge, but it undoubtedly restricts his freedom of choice, and that for a period of such duration as in effect to deny him the opportunity of alternative occupation in his trade within easy reach of his home.

In Lord Parker's speech in *Herbert Morris Ltd* v. *Saxelby*[3] Lord Macnaghten's opinion in *Nordenfelt* v. *Maxim-Nordenfelt Gun & Ammunition Co.*[4] was quoted and explained. It is there laid down that two conditions must be fulfilled if the restraint is to be held valid: first, it must be reasonable in the interests of the contracting parties, i.e., it must afford no more than adequate protection to the parties thereto; and, secondly, it must be reasonable in the interests of the public, i.e., in no way injurious to the public.

Assuming, without deciding the point, that it was a reasonable provision in the interests of these two firms that competition for workpeople should be avoided, it would appear that a five-year ban upon a manual worker was wholly unnecessary to secure it. For a man who relies on weekly employment for support, a denial of engagement in his own trade for six months would effectively drive him to some alternative occupation, and the same considerations would in all probability apply also to a woman worker. So far as concerns more highly skilled personnel, Lefebure very frankly acknowledged that for an assistant works manager, a period of 21 months between his dismissal by the plaintiffs and his engagement by the defendants would be effective to protect the plaintiff's legitimate interests. I have heard no evidence to establish this period of five years as appropriate to any category of employee—still less as appropriate to all categories, and I cannot hold it to be no more than the interests of the parties necessitated.

If the matter be approached from the standpoint of the public interests, the agreement appears equally objectionable. The

[3] [1916] 1 A.C. 688, 707; 32 T.L.R. 297.

[4] [1894] A.C. 535; 10 T.L.R. 636.

public interest did in fact require, for some part of the war period, a direction of labour at the instance of a Government department —a direction which, but for the willingness of the parties to submit to it, would have been rendered impossible of performance by this agreement. The enforcement of its terms by the court would accordingly at that time have produced a public mischief. In considering this aspect of the case, the court is not primarily concerned with what in practice has been done under the contract, but rather with what may be done and what mischiefs may arise if the full terms of the bargain are applied. The position could well have arisen in which the defendants were seeking additional labour, and workpeople fully competent to meet the demand were applying by the score in the hope of securing work of the kind to which they were accustomed, at a convenient distance from their homes. This agreement would permit the plaintiffs to insist that such workpeople must be denied employment by the defendants, although there may have existed no possibility of the plaintiffs themselves offering alternative employment in a practicable manner to the applicants for work. The disastrous consequences to the community of informing these persons that rejection was the consequence of faithful service to a previous employer require no elaboration.

I entertain no doubt that Lefebure himself would not wish the agreement to be applied in this fashion, and his attitude when the move to Harlow was in progress fully justifies this opinion. But benevolence in operation, although it may mitigate the effect, cannot remove the evil of tyranny. Even if this court could import into this contract a limitation which the parties did not think it desirable to insert, namely, that written consent would invariably be given in all cases where the employee could not fairly be expected to continue his former employment, there would still remain a fetter on the freedom of the workman to offer his labour where he wished, and this a fetter which no interest of the employers necessarily required for their protection.

I must accordingly hold against the plaintiffs on the second question and I will hear counsel as to the proper order to make on these findings. [A discussion then took place with regard to the manner in which the costs should be borne, after which his Lordship concluded:] I feel that the only order which I can make is that I must dismiss this action with costs.

Solicitors: *Hardman, Phillips & Mann; Richards, Butler & Co.*

J. L. D.

[COURT OF APPEAL.]

C. A.

1957
July 30.

Hodson, Parker and Ormerod L.JJ.

* COCKBURN *v.* COCKBURN.

[1955 D. No. 44.]

Husband and Wife — Maintenance — Divorce — Modification order — Arrears—Judgment summons—Evidence by debtor of difficulty in complying with obligations to two families—Suspension of maintenance order pending payment of arrears by instalments ordered—No power to suspend order to benefit debtor on judgment summons —Statutory procedure applicable on modification orders—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5—*Matrimonial Causes (Judgment Summons) Rules,* 1952 (*S.I.* 1952, *No.* 2209), *r.* 6—*Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 28 (1)—*Matrimonial Causes Rules,* 1950 (*S.I.* 1950, *No.* 1940), *rr.* 3, 50.

A coalminer, earning an average wage of about £10 a week, was divorced by his wife, and she obtained from the district registrar a maintenance order at the rate of £78 a year, payable weekly during their joint lives and until further order. After the divorce the husband married a widow with one child, and she subsequently bore him a child. In April, 1957, the first wife took out a judgment summons under the Debtors Act, 1869,[1] to enforce an order for arrears of maintenance due under the maintenance order. In accordance with normal procedure she did not appear on the hearing of that summons before the county court judge, but the debtor, her former husband, gave evidence to show that he was unable to meet all his obligations owing to his means and circumstances. The judge thereupon ordered that he should pay off the arrears and the costs of the summons by instalments of £1 each calendar month, and that the original maintenance order should be suspended until those amounts had been paid off. On appeal by the wife:—

Held, that the order made was contrary to the requirements of justice to a former wife and the statutory requirements of the Matrimonial Causes Act, 1950,[2] and the rules made thereunder,

[1] The Debtors Act, 1869, s. 5 (2): "For the purposes of this section any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary such order:"

[2] The Matrimonial Causes Act, 1950, s. 28: "(1) Where the court has made an order under section nineteen, section twenty, section twenty-two, section twenty-three or subsection (2) of section twenty-four of this Act, the court shall have power to discharge or vary the order or to suspend any provision thereof temporarily and to revive the operation of any provisions so suspended:"

The Matrimonial Causes Rules, 1950, r. 3 (3): "Every application in a matrimonial cause for ancillary relief, that is to say, every application . . . (i) for an order (in these Rules referred to as 'a modification order') discharging, modifying or temporarily suspending any order for alimony pending suit, maintenance of the children, maintenance, a secured provision, permanent alimony, periodical payments or for securing periodical payments to a wife, shall be made by notice in accordance with Form 2 issued out of the Divorce Registry: . . ."

R. 50: "(1) An application for a modification order shall be supported by an affidavit by the applicant setting out full particulars of his property and income and the grounds on which the application is made. (2) The respondent to the application may, within fourteen days after delivery of the affidavit, and (unless he is the petitioner in the cause) after entering an appearance, file an affidavit in answer, but no further evidence shall be filed by any party without leave."

and must accordingly be discharged. Nothing in the Debtors Act, 1869, nor in the Matrimonial Causes (Judgment Summons) Rules, 1952,[3] gave a judge power to suspend a maintenance order on a judgment summons in such a way as to benefit a respondent debtor who showed, in the absence of the applicant, that he could not meet his obligations under the order because of other legal or moral commitments. Where such evidence was given on a judgment summons, the practice to be followed was to adjourn the summons and to give the debtor an opportunity to apply for a modification order himself in accordance with the statutory rules, which also gave the former wife an opportunity to be heard in answer. The matter should be sent back to the judge to be dealt with in the light of the court's direction as to the correct practice.

INTERLOCUTORY APPEAL from Judge Ernest Ould, sitting as special commissioner in divorce at Doncaster District Registry.

A wife, Annie Cockburn, having divorced her husband, John Savage Cockburn, coalminer, obtained a maintenance order from the district registrar dated November 22, 1955, at the rate of £78 per annum payable weekly "during their joint lives and until "further order." After the divorce the husband remarried, his second wife being a widow with one child, and another child was born to her after the marriage.

On April 26, 1957, a judgment summons under the Debtors Act, 1869, was issued out of the Doncaster District Registry at the instance of the first wife to enforce an order for arrears of maintenance due under the order of November 22, 1955, amounting to £33 7s. 6d. In her affidavit to that summons the first wife stated that she was without means except the payments which she received from the defendant under the order for maintenance, and that he was also liable to pay £1 10s. a week in respect of the child of the marriage under an order of a court of summary jurisdiction. The wife did not appear on the hearing of the judgment summons before the special commissioner, which was on May 20, 1957, but the defendant, her former husband, attended and gave evidence as to his means and circumstances, supplemented by a statement as to his earnings supplied by his employers, which showed that he occupied a house rent-free and received concessionary coal, but that his average earnings were about £10 a week. He also stated that he was to some extent incapacitated from earning full wages as a coalminer at the face by reason of the state of his health.

[3] Matrimonial Causes (Judgment Summons) Rules, 1952, r. 6: "(1) On "the hearing of a judgment summons "the judge may make an order of "commitment or may—(*a*) where the "judgment is for damages or costs; "or (*b*) where the judgment is for "alimony, maintenance or other "periodical payment and it appears "to the judge that the judgment "would have been varied or sus-"pended if an application had been "made by the debtor for that pur-"pose, make an order for payment, "either at a specified time or by "instalments, of the amount due "under the judgment and the costs "of the judgment summons. (2) If "an order of commitment is made, "the judge may direct execution of "the order to be suspended on terms "that the debtor pays the amount "due, together with the costs of the "judgment summons, either at a "specified time or by instalments, in "addition to any sums from time "to time accruing due under the "judgment."

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The special commissioner made an order that "the respondent "do pay the sum of £33 7s. 6d. and costs amounting to £3 14s. 6d. "by instalments of £1 each calendar month, the first payment "to be made on June 20, 1957, and a similar payment on the "20th day of each month thereafter and that the original main-"tenance order dated November 22, 1955, be suspended until "after the said amount of £33 7s. 6d. and costs is paid off."

The wife appealed, asking that the order of the commissioner might be rescinded or, alternatively, varied.

J. F. S. Cobb for the wife.
C. P. Heptonstall for the husband.

The following cases were referred to in argument, in addition to those referred to in the judgment: *Bellenden* v. *Satterthwaite* *; *Barefoot* v. *Clarke*.†

HODSON L.J. stated the facts as to the order appealed from and continued: The Debtors Act, 1869, which is the governing statute, was considered by Lord Esher M.R. in 1886 in *Reg.* v. *Judge of Brompton County Court and Reeves* [1]; and *In re a Judgment Debtor* [2] Luxmoore J. said: "It is the fact however "that, as Lord Esher M.R. states in *Reg.* v. *Judge of Brompton "County Court and Reeves*,[3] the section does not enable the judg-"ment creditor to ask merely for an instalment order. Before "the judge can make an instalment order, he must have before "him an application for committal. It is accordingly the practice "of the court, always to require evidence of means to be filed "on a judgment summons, and not to make a committal order "on the first application, save in the most exceptional cases."

This is a case in which an instalment order was made by the judge for a payment of £1 every calendar month, the first payment to be made on June 20, 1957, and a similar payment on the 20th of each month thereafter; but he added to the instalment order a provision that the original order dated November 22, 1955, be suspended until the amount of the debt had been cleared off.

The appeal is based on the proposition that the judge had no jurisdiction to suspend the original order, and I think it is clear that there is no such provision in the Debtors Act, 1869. As to the rules applicable to matrimonial cases where the Debtors Act is operated, rule 6 provides: [His Lordship read rule 6 of the Matrimonial Causes (Judgment Summons) Rules, 1952, and continued:] There is no provision in those rules for the suspension of the original maintenance order, and I think there is no justification for it in the language of section 5 of the Debtors Act,

* [1948] 1 All E.R. 343.
† [1949] 2 K.B. 97; 65 T.L.R. 325; [1949] 1 All E.R. 1039.
[1] (1886) 18 Q.B.D. 213.
[2] [1935] W.N. 128; 51 T.L.R. 524.
[3] 18 Q.B.D. 213.

1869, which provides: "For the purposes of this section any "court may direct any debt due from any person in pursuance "of any order or judgment of that or any other competent court "to be paid by instalments, and may from time to time rescind "or vary such order." That I think must refer to a variation of any directions for payment by instalments.

The question of payment by instalments in these cases is naturally involved closely with the liability for maintenance which is concurrently running. In this case the order made by the district registrar was for £78 a year, and if that order were running and were to be envisaged as being fulfilled in the future, the judge would naturally have that in mind in making an instalment order, and it is, of course, convenient that the two matters should be dealt with together. But there are considerations of justice involved here which are important. If anyone requires or desires the modification, discharge or suspension of an order for alimony or maintenance, provisions are made in the rules for that to be dealt with: see rule 3 (3) (*i*) of the Matrimonial Causes Rules, 1950, which apply to the proceedings in this case, which were instituted before the Matrimonial Causes Rules, 1957, came into operation. It is provided by rule 50 of the Matrimonial Causes Rules, 1950: "(1) An application for a modification order shall be supported by "an affidavit by the applicant setting out full particulars of his "property and income and the grounds on which the applica-"tion is made. (2) The respondent to the application may, within "fourteen days after delivery of the affidavit, and (unless he is "the petitioner in the cause) after entering an appearance, file "an affidavit in answer, but no further evidence shall be filed "by any party without leave."

No steps were taken by the debtor in this case to get his obligations under the order removed or suspended or in any way varied, and the county court judge, no doubt with the object of saving time and expense to the parties, did his best in the difficult circumstances of the case, to which I shall refer, to deal with the situation because he formed the view, I must assume, that this was a case where the man could not in the circumstances in which he then was pay the arrears under the existing order so long as the existing order was running.

The jurisdiction to modify or discharge orders of this kind is dealt with by a statutory provision, section 28 (1) of the Matrimonial Causes Act, 1950, which reads as follows: "Where the "court has made an order under section nineteen, section twenty, "section twenty-two, section twenty-three or subsection (2) of "section twenty-four of this Act, the court shall have power to "discharge or vary the order or to suspend any provision thereof "temporarily and to revive the operation of any provisions so "suspended." That section includes under its operation maintenance orders. It is quite true that there is no reference therein to the Rules of Court as such, but the rules, having been made

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under statutory powers, are intra vires, and in my opinion are to be followed in the working of section 28 (1).

Those rules have not been complied with in this case and if they are not complied with an injustice may well be inflicted on one party or the other. In this case, this being a judgment summons, the wife was not and did not need to be present on the hearing of the application, which is merely dealt with on proof of the husband's means and his cross-examination on that matter—in this case supplemented by a statement by his employers as to his earnings. Part of his case was that he was in a measure incapacitated from earning full wages by the state of his health, and that was a matter on which the applicant, his former wife, might have been able to give relevant evidence, having lived with him and having known of the state of his health in earlier years.

Therefore, I think it is clear that in the interests of justice it would not be right, quite apart from the imperative obligation imposed by the rules, to allow the application to reduce or suspend maintenance to be short-circuited. I have made such inquiries as I have been able after the conclusion of the argument in this case and I am informed that the common practice followed in these cases, although it may have been departed from on occasions, is for a man, who reveals himself as being in difficulties in complying with the obligations of the maintenance order and who appears on the hearing of the judgment summons, to be given an opportunity of making an application to the court, which first comes before the registrar who deals with these matters, and for the judgment summons to be adjourned accordingly. That I think is the correct practice which ought to be followed.

The facts of this particular case are very simple and of a kind which must in these days unhappily be very common. The man is a miner and he earns about £10 a week. No exact calculation has been made of the cash value to him of the rent-free house which he occupies and the concessionary coal which he receives, but roughly speaking his income is not far off £10 a week taking one week with another. He was divorced by the applicant in this case, who has a child, and he was ordered by the justices to pay 30s. a week for the maintenance of this child. After he was divorced, he married again. His second wife had a child already and he has undertaken the moral obligation of supporting that child and the legal obligation of supporting the second wife. There is now a third child by the second wife and he is under the legal obligation of supporting that child.

The judge recognized the position as being one of very great difficulty. It is a situation with which the courts nowadays are trying to deal very frequently. Divorce and the right to remarry have been with us for a very long time, but it is only in comparatively recent times that it has been a common thing for people to remarry who have not the means to keep more than

one wife; and the odd situation has now come on us in which a man of large means who pays surtax is able to have several wives and deduct the maintenance from his income and be very little worse off than he was; whereas a man in the position of a working man who pays neither surtax nor any considerable amount of income tax finds it quite impossible to comply with the law which still in this country enables divorced wives or wives who have obtained divorces to obtain maintenance from their husbands who have to provide for a number of wives in excess of one. This is such a case. The law being as it is, it is quite impossible for the courts to ignore the just claims of the first wife because the man has taken on himself other obligations, although the courts have to take into account those obligations as involving a reduction in the capacity of the man to pay for the upkeep of his first wife. The first wife has a young child of two years of age and she is unable to go out to work; she has got nothing and, if this suspension of the existing order stands, will get nothing, for some time to come, and meanwhile she is dependent on the generosity of her own parents.

In my judgment, the judge was wrong in suspending the operation of the maintenance order, and the matter must be dealt with by an application by the man himself for a reduction of the maintenance order before that situation can come about. The first step should in justice be taken by him, and he should not be able, when he is brought up on a judgment summons, to get the benefit of a situation which he has done nothing himself to obtain. On the facts of this case, which I think ought to be sent back to the judge for reconsideration, it seems to me that there is no ground for saying that the order ought wholly to be suspended. The wife's means have not increased in any sense; the husband's means have decreased in the sense in which I have described, but unless we are to pay no attention to the statutory provisions of Parliament, which enable women who have divorced their husbands to obtain maintenance, it is quite impossible to argue that this woman ought to have nothing. That means that the husband ought to be given an opportunity of putting forward to the judge the case that there ought to be a reduction in the existing order; and the wife will be entitled to argue and to prove, if she can, that the fact that his earnings are relatively low for a miner working at the coalface is due to his own volition rather than to the ill-health of which he complains. In other words, the amount of the variation of the existing order is a matter for further consideration, and there ought not to be any suspension of that order on the material now available. I recognize, however, that the maintenance order and the instalment order are bound up together, and it is very unsatisfactory to leave the instalment order standing if the order for suspension of the maintenance order goes. Therefore, the whole order of the county court judge should be discharged and the matter should be sent back to him for further consideration, with a direction

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that he should give the debtor an opportunity of applying for a variation of the existing order in order that the instalment order, if the county court judge thinks fit to make it, should be made in the light of that variation.

For these reasons this appeal should be allowed.

PARKER L.J. I entirely agree and have nothing to add.

ORMEROD L.J. I agree and have nothing to add.

Appeal allowed.
Order set aside. Judgment summons sent back to commissioner for re-hearing.
Husband to be given opportunity to apply under rule 6 (1) (b) of Matrimonial Causes (Judgment Summons) Rules, 1952.

Solicitors: *Jaques & Co. for Oxley & Coward, Rotherham; Peacock & Goddard for Silvester & Sons, Goole.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

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Oct. 3.
Lynskey J.

* REALISATIONS INDUSTRIELLES ET COMMERCIALES S.A. *v.* LOESCHER AND PARTNERS.

[1956 R. No. 1472.]

Bankruptcy—Stay of pending proceedings—Bankruptcy of defendant—Whether stay automatic—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 9 (1).

The making of an order of adjudication in bankruptcy in respect of a defendant in pending proceedings does not operate as a stay of those proceedings, the effect of section 9 (1) of the Bankruptcy Act, 1914, being that the proceedings continue until stayed either by the Bankruptcy Court or the court in which the proceedings are pending.

PRELIMINARY POINT OF LAW.

The plaintiffs, Realisations Industrielles et Commerciales Societe Anonyme, brought an action for breach of contract against the defendants, Loescher and Partners, a partnership which, although sued as a firm, consisted solely of a person named Helmuth Otto Loescher. The hearing of the action having been fixed for October, 3, 1957, on October 2 Loescher filed his own petition in bankruptcy in the Croydon County Court and the registrar thereupon made an order of adjudication. The question

for the decision of the court was whether the order of adjudication operated as a stay of proceedings.

R. Lane Mitchell for the plaintiffs.

The defendants did not appear and were not represented.

No cases were cited in argument.

LYNSKEY J. stated the facts and continued: Counsel for the plaintiffs asks me to hear proof of the case and to give him judgment; also, I suppose, he will ask for costs. The question that I have to consider is whether the making of an order of adjudication in bankruptcy operates as a stay of proceedings so as to prevent my continuing with the action, if the plaintiffs desire. If one has an adjudication in bankruptcy of a plaintiff, his adjudication operates of necessity as a stay of proceedings, because the property which the plaintiff has in his claim would pass to the official receiver or the trustee in bankruptcy, so there is nothing left in him which he can enforce, and in those circumstances, of course, it would be necessary to have the official receiver or the trustee in bankruptcy brought in as a plaintiff in whom the property vests immediately on the bankruptcy. That, of course, is a matter which I have not to consider directly, because one has to bear in mind the provisions of R.S.C., Ord. 17, r. 1, which provide that an action is not abated by death or bankruptcy; but I think in those circumstances the court would not be able to go on without, at any rate, having the official receiver or the trustee before it.

In the case of the bankruptcy of a defendant, however, there is nothing at all in the Bankruptcy Act, 1914, which says anything about the effect of an adjudication order on pending proceedings, or suggests or says that an adjudication of itself operates as a stay of proceedings. In fact, the effect of an order of adjudication in bankruptcy on an action has not been dealt with as such in the Bankruptcy Act, 1914, nor has it been dealt with in the rules made thereunder; but the matter seems to be left to be dealt with under the provisions of section 9 (1) of the Bankruptcy Act, 1914, which provides: "The court may, at any "time after the presentation of a bankruptcy petition, stay any "action, execution, or other legal process against the property "or person of the debtor, and any court in which proceedings "are pending against a debtor may on proof that a bankruptcy "petition has been presented by or against the debtor, either "stay the proceedings or allow them to continue on such terms "as it may think just."

The effect of that subsection is that the power of the court to stay proceedings is given both to the Bankruptcy Court and also to the court in which proceedings are pending; but nothing operates to restrict the words "at any time after presentation "of a bankruptcy petition," and those seem to be the operative

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Lynskey J.

words. The power continues not only after the presentation of the petition, but even after adjudication, and in those circumstances it seems to me that until an order is made by the Bankruptcy Court or the court in which the proceedings are pending, staying the proceedings, those proceedings continue and are not stayed automatically.

I imagine that in the ordinary case the creditor plaintiff is not desirous of proceeding with his claim against the defendant bankrupt, because his hope of getting anything out of him after judgment is somewhat remote. But I have to deal with this case because of the difficulty in which the plaintiffs are placed. They are ready for trial, and they have brought a witness over from Paris, who unfortunately is ill, and it is, of course, desirable that his evidence should be taken. I cannot bind the Bankruptcy Court, but it may be that the effect of my hearing the case today, and if I am satisfied that the plaintiffs have established their case and I give judgment for them, will be that the official receiver or trustee in bankruptcy will accept that judgment as being some proof of the debt when it comes to be proved in bankruptcy, and that he will not require the presence of this witness a second time. But that is a matter with regard to which I cannot bind the Bankruptcy Court.

But as the plaintiffs have asked that the matter should be dealt with in this way, and as there is no stay of proceedings by any Bankruptcy Court, I propose to hear the case.

Solicitors: *Rowe & Maw.*

J. D. P.

[COURT OF APPEAL.]

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Jan. 21, 22, 23, 24, 25; *Feb.* 21.

Lord Merriman P., Hodson and Morris L.JJ.

* GLEDHILL *v.* LIVERPOOL ABATTOIR UTILITY CO. LTD. AND ANOTHER.

[1954 G. No. 3684.]

Factory—Crane or lifting machine—Chain—Corporation's abattoir used by plaintiff's employers for slaughtering pigs—Pigs attached by slip sling chain to vertical conveyor belt—Chain too thick to grip pig's leg—Fall of pig onto plaintiff—Whether chains of good construction and adequate strength — Whether chains properly maintained—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 23, 24.

Negligence—Duty of care—Intermediate inspection—Defective tackle—Injury to workman—Knowledge of defect. Licensor and Licensee—Knowledge of invitee of danger—Defective tackle—Injury to workman.

The Factories Act, 1937, provides by section 23 (1) (*a*): "no "chain, . . . or lifting tackle shall be used unless it is of good "construction, sound material, adequate strength and free from "patent defect."

Section 24 (1) provides: "All parts and working gear . . . of "every lifting machine shall be of good construction, sound "material, adequate strength and free from patent defect, and "shall be properly maintained."

By section 152 (1): "'Maintained' means maintained in an "efficient state, in efficient working order, and in good repair."

The first defendants carried out slaughtering work at the abattoir of the Liverpool Corporation, the second defendants. The plaintiff, employed by the first defendants, was injured when a pig, which he had attached to a continuously revolving endless conveyor belt to be carried to the floor above, fell on him. The pigs were attached to the conveyor belt by means of a ring shackle to which was hooked a chain, which was put in a slip sling round one of the pig's hind legs. The chains, which were supplied by the corporation, were strong and, as chains, were without fault, but due to their thickness did not always grip the pig's leg properly so that the leg was liable to slip out of the slip sling, as the plaintiff and the first defendants knew. The plaintiff claimed damages against the corporation, inter alia, alleging negligence and breach of sections 23 and 24 of the Factories Act, 1937. On appeal:—

Held, (1) that section 23 clearly applied to the chains in question, but it could not be said that because they were not suitable for the purpose for which they were being used that they were not of "good construction" (*Beadsley* v. *United Steel Companies Ltd.* [1951] 1 K.B. 408; 66 T.L.R. (Pt. 2) 902; [1950] 2 All E.R. 872 applied); nor could it be said that because they were too strong, they were not of "adequate strength," and, accordingly, there was no breach of section 23.

(2) That the chains fell more naturally within the provisions of section 23, but if they were in fact "parts" of a lifting machine within section 24, they were of good construction, sound material, adequate strength and properly maintained, and, accordingly, there was no breach of section 24.

(3) The corporation did not owe a duty to the plaintiff either as a neighbour under *Donoghue* v. *Stevenson* [1932] A.C. 562; 48 T.L.R. 494, or as an invitee, since the plaintiff's own knowledge that the chains were not suitable exonerated the corporation in both cases; accordingly the corporation were not liable either at common law or for a breach of statutory duty.

Decision of Cassels J. reversed.

APPEAL from Cassels J.

The plaintiff, Thomas Gledhill, a slaughterman, was employed by the Liverpool Abattoir Utility Co., the first defendants (referred to as "the employers"). The employers had contracted with the Ministry of Food to slaughter pigs for the Ministry, and by reason of an arrangement between the Ministry and the Liverpool Corporation, the employers used the Stanley Abattoir, owned by the corporation, for the slaughtering.

The plaintiff worked in the pen where the pigs were electrically stunned. After being stunned, the pigs were sent some 14 feet to an upper floor by means of an elevator consisting of a continuously revolving endless conveyor belt, on which ring shackles were spaced at suitable intervals. In order to attach the pig to the ring shackle, chains were provided which had a ring at one end and a double form of hook at the other. The chain was adjusted to form a slip link which was placed round the lower

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part of one of the pig's legs. The hook at the other end was then attached to one of the upward-moving shackles and the pig, head downwards, would then be carried up to the floor above, where the hook would attach to a horizontal rail or track. Accordingly, on its downward course no chain would be attached to the shackle. Only one pig at a time was attached to the conveyor belt, but when one pig would be reaching first-floor level, a slaughterman would be getting ready to attach another pig. On June 17, 1954, when one pig which was being elevated had practically reached the first-floor level, its leg slipped through the slip link of its supporting chain and the pig fell on the plaintiff, who was injured.

The chains in use at the time of the accident were heavy, strong and large linked. These chains had been in use for about a year before the accident. Previously a lighter type of chain had been used but the chain had broken on two or three occasions and the employers had requested the corporation to supply new chains, which they had done. The slaughtermen had complained to their foreman that, when using the new chains, some difficulty was experienced in making a slip link which would always properly grip the pig's leg. On several occasions a pig had slipped out of the slip link and fallen back on to the floor of the pen but no damage had been done until the plaintiff's accident. The foreman had complained to the employers and to the corporation's chief engineer that the new chains were unsatisfactory but the employers had made no complaint to the corporation relevant to the present case. The plaintiff himself had made no complaint but he knew that there was a tendency for the pig's legs not to be gripped as well with the new chains as with the thinner chains previously used; he also knew that when the thicker chains were in use there had been occasions when pigs fell owing to their legs slipping through the slip link, particularly when the chains became greasy in use owing to contact with pigs' legs; he also knew that frequent complaints had been made to the foreman of the unsatisfactory features of the newly provided chains.

The plaintiff brought an action against his employers alleging that they had been negligent in failing to maintain a safe system of work. By their defence, the employers denied negligence. They pleaded contributory negligence on the part of the plaintiff and that the corporation were at fault and were in breach of their statutory duty under sections 23 and 24 of the Factories Act, 1937.[1] The plaintiff thereupon joined the corporation as

[1] Factories Act, 1937, s. 23: "(1) The following provisions shall "be complied with as respects every "chain, rope or lifting tackle used "for the purpose of raising or lower-"ing persons, goods or materials:— "(a) no chain, rope or lifting tackle "shall be used unless it is of good "construction, sound material, ade-"quate strength and free from patent "defect . . . (2) In this section the "expression 'lifting tackle' means "chain slings, rope slings, rings, "hooks, shackles and swivels."

S. 24: "(1) All parts and working "gear whether fixed or movable, "including the anchoring and fixing "appliances, of every lifting machine

defendants, alleging negligence and breach of statutory duty and the employers served a notice on the corporation claiming indemnity or contribution.

Cassels J. held that the employers were liable to the plaintiff in failing to maintain a safe system of work; that the corporation, the second defendants, were also liable to the plaintiff. He held that plaintiff was not guilty of contributory negligence and awarded him £600 damages against both defendants. As between the defendants the judge ordered that each should contribute one half of the damages and costs.

The corporation brought the present appeal against the plaintiff and the employers. As the employers did not appeal against the judgment entered against them in favour of the plaintiff it was agreed that in any event the plaintiff would hold his judgment against the first defendants. The employers did not allege that there was any contract between them and the corporation pursuant to which the corporation was obliged to indemnify them.

H. I. Nelson Q.C. and *J. M. Davies* for the corporation, the appellants.

J. S. Watson Q.C. and *Dudley Collard* for the employers, the respondents.

G. E. McClelland for the plaintiff.

The following cases, in addition to those referred to in the judgment were cited in argument: *Grant* v. *Australian Knitting Mills* [2]; *Farr* v. *Butters Bros. & Co.*[3]; *Mayne* v. *Johnstone & Cumbers Ltd.*[4]; *Galashiels Gas Co. Ltd.* v. *O'Donnell* [5]; *Payne* v. *Weldless Steel Tube Co. Ltd.*[6]; *Denny* v. *Supplies and Transport Co. Ltd.*[7]; *Slater* v. *Clay Cross Co. Ltd.*[8]

Cur. adv. vult.

February 21. MORRIS L.J., reading the judgment of the court, stated the facts and continued: The case must be approached on the basis that the chains were strong and as chains were without fault, but were unsatisfactory in that, when ordinarily used, they might not properly grip a pig's leg, with the result that when a pig was being raised up by the elevator the pig's foot might on occasions slip through the loop of a chain and so might fall on to a man working in the pig pen. In this sense the chains were not of the right character. There was no

"shall be of good construction, sound "material, adequate strength and "free from patent defect, and shall "be properly maintained. . . . (8) In "this section the expression 'lifting "'machine' means a crane, crab, "winch, teagle, pulley block, gin "wheel, transporter or runway."

S. 152: "'Maintained' means "maintained in an efficient state, in "efficient working order, and in good "repair."

[2] [1936] A.C. 85, 52 T.L.R. 38.

[3] [1932] 2 K.B. 606.

[4] [1947] 2 All E.R. 159.

[5] [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319.

[6] [1956] 1 Q.B. 196; [1955] 3 W.L.R. 771; [1955] 3 All E.R. 612.

[7] [1950] 2 K.B. 374; 66 T.L.R. (Pt. 1) 1168.

[8] [1956] 2 Q.B. 264; [1956] 3 W.L.R. 232; [1956] 2 All E.R. 625.

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question, however, of any hidden defect in regard to them. The case must further proceed on the basis that the plaintiff knew all this and that his employers also did.

If the corporation as well as the employers are liable to the plaintiff, then the measure of contribution as between the defendants is not assailed. But if the corporation are in no way liable to the plaintiff, then it does not appear that any case has been proved entitling the employers to recover against the corporation or to be indemnified by the corporation. It has therefore to be considered whether the plaintiff is entitled to succeed against the corporation either on the basis of a breach of statutory duty or on the ground that the corporation owed some common law duty to the plaintiff and failed to perform such duty.

In dealing with the allegation of breach of statutory duty, the judge referred to section 23 (1), and also to section 24 (1), of the Factories Act, 1937, and to the statutory definition of the word "maintained," and he said: "In the case of *Beadsley* v. *United* "*Steel Companies Ltd.*[1] reference was made to the particular "sections which I have just read and it was held that no condition "of suitability ought to be read into them, and Mr. Wooll, on "behalf of the plaintiff, would like this point to be left open "because he feels that he is bound by the decision on that case "in the Court of Appeal." The judge approached the matter by considering the effect of the words "adequate strength." He said: "The peculiarity of this case is that the complaint is not "that this chain was too weak, but that it was too strong, and "I think that may be a breach of the statutory duty of the second "defendants, the Liverpool Corporation. If, it being their duty, "for this purpose which they fully knew of raising the body of a "pig in its process of slaughter to a height of 14 feet, they "supplied a chain which was not of adequate strength but of "much more than the necessary strength and too heavy in its "links to be used in the usual manner, they might very well be "in breach of their statutory duty as prescribed in the Factories "Act in those particular sections."

It is not clear from the judgment of the judge whether or not he was actually holding the corporation liable on the ground of breach of statutory duty. If he was so holding them liable, then his conclusion was based upon his consideration of the words "adequate strength" and not upon any of the words in the statutory definition of the word "maintained." It is to be noted also that *Beadsley's* case[2] dealt with section 23 and not also with section 24. The employers are, however, fully entitled to submit (as in the appeal proceedings they gave formal written notice that they would submit) that the corporation should be held liable for breach of statutory duty both on the findings of the judge (whether or not such findings were strictly within the allegations pleaded) and also on the basis as alleged in the pleadings. The

[1] [1951] 1 K.B. 408; 66 T.L.R. (Pt. 2) 902; [1950] 2 All E.R. 872.

[2] [1951] 1 K.B. 408.

corporation accepted that there had been no abandonment by the employers at the hearing below of the submissions presented before us. It therefore becomes necessary to consider the applicability and effect of the two sections in relation to the facts of this case.

It is admitted by the corporation on the pleadings, and the admission was repeated before us, that the abattoir constituted a factory within the meaning of the Factories Act, 1937, and was at all material times owned by and was in the possession and control of the corporation.

[His Lordship read subsections (1) (*a*) and (2) of section 23 of the Factories Act, 1937, and continued:] We think that this section clearly applies, and accordingly it becomes necessary to consider whether there was a breach of it. The chains complained of in this case were either chains as such or were "chain slings" so as to bring them within the definition of "lifting tackle." The provisions requiring compliance under section 23 are "as respects "every chain, rope or lifting tackle used for the purpose of "raising or lowering persons, goods or materials." The particular provision under (*a*) prevents user "unless" the condition of the chain, rope or lifting tackle is as prescribed.

It was pleaded that the chain slings "were not of good con-"struction in that they did not grip the animal securely or "sufficiently." The question is thus raised as to the meaning of the phrase "good construction." Does the phrase import or denote suitability for some particular purpose? The decision in *Beadsley* v. *United Steel Companies Ltd.*[3] shows that it does not. The case dealt with the words "good construction." In his judgment Singleton L.J. said[4]: "If the legislature had "intended to make the occupier of a factory responsible because "a chain or lifting tackle which was not suitable was used, it "would have been quite easy to say: 'no chain, rope or lifting "'tackle shall be used unless it is of good construction, sound "'material, adequate strength, free from patent defect and "'suitable for the purpose for which it is used.' Those last few "words do not appear and they are not part of the law." Birkett L.J., in his judgment, said[5] that the words "good "construction" mean "well made."

But it is necessary also to consider the words "adequate "strength." It may well be that the question as to whether strength is adequate can only be answered by reference to, and when there is knowledge of, the task which is involved. It is provided by section 23 (1) (*c*) that "no chain, rope or lifting "tackle shall be used for any load exceeding the safe working load "thereof" as shown by the table referred to in section 23 (1) (*b*) or marked upon it as denoted in section 23 (1) (*b*). It may be that the "adequate strength" of a chain, rope or lifting tackle must be in relation to its safe working load. Thus, a chain or rope when

[3] [1951] 1 K.B. 408.
[4] Ibid. 412.
[5] Ibid. 414.

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new will have a prescribed safe working load. The effect of wear and tear may be to diminish strength. If strength ceases to be adequate, the chain or rope must no longer be used. It is, however, in our judgment, not necessary to express any final view on these matters, for we cannot think that where there is an obligation not to use a chain unless it is of adequate strength, a breach is established by proving that the strength was more than was necessary. It would be irrational to suppose that a rope or chain must be of a strength precisely equal to but not a whit above the strain imposed upon it. The chains which were in use were well made and they were strong enough to carry considerably heavier loads than they were in fact called upon to carry. We cannot think, therefore, that they were other than of good construction and of adequate strength. In our judgment, therefore, no breach of section 23 is shown.

[His Lordship read subsections (1) and (8) of section 24, and the definition of "maintained" in section 152 (1), and continued:] It is said that the elevator at the abattoir is either a "transporter" or a "runway" within subsection (8) and that the chains constituted "parts." It seems to us that the chains fall more naturally within the compass of section 23. But it is argued that the chains are "parts" of the elevator. They are certainly not fixed parts as are the shackles. Instead of having chains at all, a rope or wire might be used which at one end would hold an animal and at the other end would be tied to one of the shackles. The chains which in fact are in use are attached to the elevator at ground level but pass away from the elevator at first-floor level. In one sense, therefore, the chains are merely attachments which are from time to time joined on to the elevator but not so as to be "parts" of it. But it is said that they may be regarded as being so necessary in the process of lifting the animals that they are "parts" of the elevator. There is no evidence as to how this matter would be regarded by technicians qualified to give an accurate description of the elevator. In these circumstances, we propose to proceed on the basis, but without accepting it, that the chains are comprehended within the wording of section 24. The fact that the chains do come under section 23 does not of itself negative the possibility that they may also be covered by section 24. If section 24 is being considered, the question which arises is whether, on the facts of this case, the addition of the words "and shall be properly maintained" brings about a different result.

In *Latimer* v. *A. E. C. Ltd.*[6] the wording of section 25 (1) of the Factories Act, 1937, came under consideration. That subsection provides: "All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained." Lord Asquith,[7] in his speech, adopted the view that it was the "sound construction" which had to be "maintained in an

[6] [1953] A.C. 643; [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

[7] [1953] A.C. 643, 661.

"efficient state, in efficient working order and in good repair." He held that the words "of sound construction" control, colour or canalize the whole of section 25 (1), and the definition.

On this view, the obligation, if section 24 (1) applies to these chains, is that they must be of good construction, of sound material, of adequate strength and free from patent defect, and must continue to be in all these conditions, in that as regards each one of them the chains must be maintained in an efficient state, in efficient working order and in good repair. On this approach, if the chains were of good construction and of adequate strength, then there is no evidence at all which in any way suggests that the chains did not at all times continue to be of good construction and of adequate strength.

If an alternative approach is adopted and if the words "and "shall be properly maintained" are read as imposing different and additional obligations, then under section 24 (1) the chains would have to be (a) of good construction, (b) of sound material, (c) of adequate strength, (d) free from patent defect, (e) maintained in an efficient state, (f) maintained in efficient working order, and (g) maintained in good repair. For the reasons that we have already given, the chains were in the condition denoted by (a), (b), (c) and (d). There is no suggestion that they were not maintained in good repair. Can it be said that the chains were not maintained in an efficient state or in efficient working order? While it is open to us to draw inferences from any facts which have been found, we cannot think that it would be correct to say that the chains were not in an efficient state or in efficient working order. At the date of the hearing they had been in regular use for about three years. The complaint made against them is that they are not of the particular strength and have not links of the particular size that would make their use most agreeable and convenient for those who handle them: to that extent and in that way they are not the most suitable in character. But there is nothing wrong with their "state" or with their "working order." If, therefore, section 24 applies, then on the view of the matter most favourable to the plaintiff, a breach of statutory duty by the corporation is not, in our judgment, established.

We pass now to consider the common law position. The judge held the corporation liable on the basis of the law as laid down in *Donoghue* v. *Stevenson*.[8] He held that the corporation knew that the plaintiff would be using the equipment which they were providing, and that they had failed to take reasonable care to ensure that the chains were free from defect, the defect being that on some occasions the chains did not effectively grip the legs of pigs. It has to be remembered that the corporation supplied new chains when they were asked to do so by the employers and that the new chains were in use for about a year before the

[8] [1932] A.C. 562; 48 T.L.R. 494.

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plaintiff was injured. A large number of pigs were dealt with in the course of a year. The number was stated as being either 100,000 or 125,000, and, as the evidence to which we have referred shows, the great majority were lifted without incident. No case of physical injury had occurred prior to the time when the plaintiff was hurt. It was open to the employers to devise any system they chose whereby the chains could safely be attached to the legs of pigs. In *Donoghue* v. *Stevenson*[9] Lord Atkin said: "My Lords, if your Lordships accept the view that this pleading "discloses a relevant cause of action you will be affirming the "proposition that by Scots and English law alike a manufacturer "of products, which he sells in such a form as to show that he "intends them to reach the ultimate consumer in the form in "which they left him with no reasonable possibility of inter-"mediate examination, and with the knowledge that the absence "of reasonable care in the preparation or putting up of the "products will result in an injury to the consumer's life or "property, owes a duty to the consumer to take that reasonable "care."

The way in which the judge stated the matter was as follows: "It is said on behalf of the plaintiff that the second defendants "might be brought in under the law which is known as *Donoghue* "v. *Stevenson*,[10] and the way in which it is argued is that the "plaintiff was the second defendants' neighbour and that the "second defendants knew that the plaintiff and men like him "would be engaged in the process with which they were familiar "which involved the use of the equipment which the second "defendants were providing and that the plaintiff can be "regarded as the ultimate consumer—or perhaps I might sub-"stitute for the word 'consumer' the word 'user'—and it was "well within the knowledge of the second defendants (certainly "through Mr. Alexander, their engineer) the purpose for which "these chains were being used and the manner in which they "would be used."

The questions arise as to whether, on the facts of this case, the corporation owed a duty to the plaintiff and whether there was a breach of any such duty and whether, if there was, damage resulted from such breach. It is submitted by the corporation in the first place that there was intermediate examination of the chains by the employers: that the chains themselves were in no way defective as regards their strength, and that it was for the employers to come to a conclusion as to whether the chains would satisfy their system of work or as to how to adapt their system so as safely and effectively to use the chains. It is further submitted by the corporation that the plaintiff himself also had ample opportunity of examining the chains supplied by the corporation, and further that he full well knew all about the chains for a long time before the time of the accident.

In our judgment, the plaintiff cannot bring himself within

[9] [1932] A.C. 562, 599. [10] [1932] A.C. 562.

any application of the principles laid down in *Donoghue* v. *Stevenson*.[11] The corporation supplied new chains at the request of the employers, and if the employers were not content with what they received they could have made further requests which doubtless would have met with compliance. The corporation knew that the employers could examine the new chains, as could also the plaintiff and other slaughtermen, and furthermore that the features of the new chains would at once be apparent to those who would use them. The chains were perfectly strong, but it transpired that, being big, they would not always readily afford a holding grip. But, in our judgment, there was no absence of reasonable care in supplying the chains and no expectation that any injury would result from their use. The corporation were entitled to assume that if the chains did not prove suitable or convenient, they would not be used. They cannot be held responsible for their user by those who had full knowledge that some difficulties were in some cases and on some occasions presented. In certain circumstances the plaintiff might be a "neighbour" of the corporation towards whom they owed a duty of care. Such duty, if it arose, would relate only to the safety of the plaintiff, but could not be measured by or be made co-extensive with the obligations of an employer towards those whom he employs. But in the present case the full and complete knowledge possessed by the plaintiff (that is to say, of the features of the new chains) defeats his attempt to hold the corporation liable. The conclusion is the same whether the plaintiff is regarded as a neighbour towards whom duties of the kind denoted in *Donoghue* v. *Stevenson*[12] were potentially owed by the corporation or whether he is regarded as a neighbour towards whom the corporation potentially owed the duties of an invitor to an invitee. On either approach, the knowledge possessed by the plaintiff exonerates the corporation. In *London Graving Dock Co. Ltd.* v. *Horton*[13] Lord Porter pointed out in his speech that in the circumstances pleaded in *Donoghue* v. *Stevenson*[14] actual knowledge by the purchaser of the ginger-beer bottle as to the true state of affairs would have been a complete answer to the claim. Lord Porter said as follows[15]: "Your "Lordships' House held that, assuming the facts alleged to be "true, the manufacturer would have escaped if it was natural "to expect that the intermediate vendor would take care to see "that the contents were in order. The pursuer, however, could "recover from the manufacturer because such an examination "was not to be expected. The law required the latter to be "careful not to run the risk of injuring a person whom he con-"templates or ought to contemplate as likely to be injured by "his negligence, but an examination by the retail vendor, if

[11] [1932] A.C. 562.
[12] Ibid.
[13] [1951] A.C. 737; [1951] 1 T.L.R 949; [1951] 2 All E.R. 1.
[14] [1932] A.C. 562.
[15] [1951] A.C. 737, 750.

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"rightly expected, could be relied upon by the manufacturer and "would have been a complete answer to the claim. Still more "so would knowledge by the purchaser of the true position, "whether such knowledge was actual or such as the circum-"stances would warrant the manufacturer to assume. The "defence did not have to show that the pursuer drank the "contents with a full knowledge of the risk: it would have been "enough if examination and consequent knowledge was to be "expected." So in the same case Lord Normand, in speaking of the notice of warning of unusual dangers to be given by an occupier to an invitee, said [16]: "When there is already know-"ledge, notice or warning will have no effect and the omission "of it can do no harm. So the defendant who has failed to give "warning may yet succeed if he proves that the injured person "had knowledge of the unusual danger. But whether it be "knowledge gained without a warning or knowledge conveyed "by a warning, it must be sufficient to avert the peril arising "from the unusual danger. The knowledge must, therefore, be "full knowledge of the nature and the extent of the danger. "In the present case the judge has found that the plaintiff had "full knowledge of the nature and the extent of the peril, and "the finding is beyond doubt warranted by the evidence, which "shows that the plaintiff had before his accident complained of "the same defects in the staging as were proved at the trial." So in the present case the plaintiff had full knowledge of the nature and extent of the complaint in regard to the chains. He had such knowledge for about a year before his accident.

The claim of the plaintiff seems very much like an attempt to saddle the corporation with the responsibilities of an employer, an attempt bearing some resemblance to that unsuccessfully made in *O'Reilly* v. *Imperial Chemical Industries Ltd.*[17] In that case it was sought to say that there was a relationship of master and servant of a temporary character. A lorry driver employed by British Road Services had over a long period of years been engaged in carrying loads under the control of the defendants between their various depots. Loading and unloading was done under the supervision of the defendants, who supplied the necessary equipment. The plaintiff, while unloading at one of the depots, was injured through the unsafe system of work of the defendants. It was held in this court that he had failed to prove a relationship of master and servant pro hac vice and that his claim failed. It was in that case further contended on behalf of the plaintiff that, in all the circumstances and by giving instructions to the plaintiff, the defendants became under a duty akin to or of the same nature as that between master and servant. That contention failed. Jenkins L.J. said [18]: "If there is no "relationship here of master and servant in the ordinary sense.

[16] [1951] A.C. 737, 755.
[17] [1955] 1 W.L.R. 1155; [1955] 3 All E.R. 382.
[18] Ibid. 1164.

"as I hold there is not—indeed, it was not and could not be "contended that there was—and if the facts here do not suffice "to discharge the heavy onus lying on those who seek to make "out a case of employment pro hac vice—and in my view they "do not suffice to discharge that onus—then it seems to me that "the plaintiff's case must necessarily fail; for I decline to erect "in cases of this kind a new duty which is neither the duty "subsisting between invitor and invitee, nor the duty arising "from the relationship of employer and employee."

Chapman or Oliver v. *Saddler & Co.*[19] depended very much on its special circumstances. A firm of stevedores employed by a shipowner and a porterage company employed by the consignee of the ship's cargo were unloading a ship. The cargo was of maize in bags. The stevedores provided rope slings by which they raised the cargo to the ship's deck. The porterage company then had to transport the cargo to the dockside by means of a dock crane. The stevedores permitted the porters to use their rope slings which would already be round the bags and it was a matter of mutual convenience that the same slings should be used throughout. The stevedores knew that the porters relied upon them to take care that the slings were safe. The porters had themselves no opportunity of examination. It was held that in the special circumstances the firm of stevedores owed a duty to the porters to see that the slings were in a fit condition to take the weight of a load. A sling broke and a porter was killed. On the facts, it was held that the stevedores had failed in the discharge of the duty which they owed.

The facts in the present case are quite different. Whatever may have been the provisions of the contract between the corporation and the Ministry of Food and of the contract between the Ministry and the employers (as to which we have no knowledge) there was ample opportunity for independent examination of the chains by the employers and, indeed, by the slaughtermen themselves. It was submitted by Mr. Watson that the corporation remained in possession and control of the abattoir and of their machinery within it, and that the corporation and the employers were engaged in a joint operation, in the course of which the corporation equally with the employers were using the chains which were provided. But even if that could be said to have been the position, the plaintiff never became in any way the servant of the corporation. If the plaintiff be regarded as an invitee of the corporation, his claim must fail, since on the evidence he was well aware of any such element of danger as the use of the chains may have involved. Reliance upon the principles enunciated in *Donoghue* v. *Stevenson*[20] does not avail the plaintiff because of the ample opportunities for examination of the chains enjoyed by the employers and by himself, and furthermore because of the complete knowledge which he possessed as to all the features of the chains of which he now complains.

[19] [1929] A.C. 584; 45 T.L.R. 456. [20] [1932] A.C. 562.

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In our judgment, no case against the corporation was established either by the plaintiff or by the employers. In the result, therefore, we allow the appeal of the corporation. The liability to the plaintiff should remain solely with the employers, who, in our judgment, should bear the costs incurred by the corporation.

Appeal allowed.
Judgment in favour of plaintiff against second defendants set aside.
Leave to appeal to the House of Lords.

Solicitors: *Cree, Godfrey & Wood for Thomas Alker, Liverpool; P. R. Kimber; Silverman & Livermore.*

C. J. E.

[BIRMINGHAM ASSIZES.]

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July 30.
Lynskey J.

* PARKES *v.* KNOWLES AND ANOTHER.

[1957 P. No. 4948.]

Costs — Payment into court — Payment by one of two defendants — Acceptance by plaintiff—Whether money "recovered" in the action —Plaintiff's costs against unsuccessful defendant on county court scale—Successful defendant's costs against plaintiff on High Court scale — R.S.C., Ord. 22, *r.* 4 — *County Courts Act,* 1955 (4 *&* 5 *Eliz.* 2, *c.* 8), *s.* 1.

The plaintiff suffered personal injuries whilst travelling in a motor-car driven by the first defendant when it collided with an omnibus owned by the second defendants. The plaintiff began an action against both defendants in the High Court, and each defendant blamed the other for the accident. The first defendant paid into court £100 under the provisions of R.S.C., Ord. 22, r. 1. The plaintiff gave notice of acceptance of that sum in satisfaction of his claim and applied to the court under Ord. 22, r. 4, to deal with the amount in court:—

Held, (1) that the sum of £100 paid into court was money recovered in the action.

(2) That as the action was accordingly one which should have been started by the plaintiff in the county court, his costs against the first defendant must be limited to scale 3 of the County Court scales, but that the second defendant was entitled to his costs on the High Court scale.

(3) That it was proper, in the circumstances, to make a direct order to the first defendant to pay the second defendant's costs on that scale.

ACTION.

On July 14, 1956, the plaintiff, Clive Parkes, was travelling as passenger in a motor-car driven by the first-named defendant, Albert John Knowles, when it collided with an omnibus belonging

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[Reported by R. J. TOYN, Esq., Barrister-at-Law.]

to the second-named defendants, the Birmingham and Midland Red Motor Omnibus Co. Ltd., and as a result the plaintiff sustained personal injuries in respect of which he started this action in the High Court against both defendants. Each defendant blamed the other for the cause of the accident.

On June 28, 1957, the defendant Knowles paid into court the sum of £100 under the provisions of R.S.C., Ord. 22, r. 1. The plaintiff gave notice of acceptance of the amount paid in in satisfaction of his claim, and upon application to the court under Ord. 22, r. 4,[1] to deal with the amount in costs the questions arose whether the £100 was money recovered in the action so as to affect the plaintiff's entitlement to costs under section 1 (2) of the County Courts Act, 1955,[2] and to what scale of costs the second defendant was entitled.

Gilbert Griffiths for the plaintiff.
A. E. James for the first defendant.
A. J. Flint for the second defendant.

LYNSKEY J., after stating the facts and reading Ord. 22, r. 4 (1) (2) and (3), continued: The application now comes before me under rule 4 (3) of Order 22 as to what order as to costs shall be made. It is quite clear, of course, in the first instance, that the defendant paying into court is liable to the plaintiff for his costs of the action, at least up to the date of payment into court. That is a little complicated in this case,

[1] R.S.C., Ord. 22, r. 4: "(1) Money "may be paid into court under rule 1 "by one or more of several defendants "sued jointly or in the alternative, "upon notice to the other defendant "or defendants. (2) If the plaintiff "elects within 14 days after receipt of "notice of payment into court to "accept the sum or sums paid into "court, he shall give notice as in "Form 4 in Part II of Appendix B to "each defendant. (3) Thereupon all "further proceedings in the action or "in respect of the specified cause or "causes of action (as the case may "be) shall be stayed, and the money "shall not be paid out except in pur"suance of an order of the court or a "judge dealing with the whole costs "of the action or cause or causes of "action (as the case may be)."

[2] County Courts Act, 1955, s. 1: "(2) Where an action founded on con"tract or tort is commenced in the "High Court which could have been "commenced in the county court and "the action is not referred for trial to "an official referee, then subject to "subsections (3) and (4) of this sec"tion the plaintiff—(*a*) if he recovers "a sum of less than £300, shall not "be entitled to any more costs of the "action than those to which he would "have been entitled if the action had "been brought in the county court; "and (*b*) if he recovers a sum less "than £75, shall not be entitled to "any costs of the action; so, how"ever, that this section shall not "affect any question as to costs if it "appears to the High Court or a "judge thereof (or where the matter "is tried before a referee or officer of "the Supreme Court, to that referee "or officer) that there was reasonable "ground for supposing the amount "recoverable in respect of the plain"tiff's claim to be in excess of the "amount recoverable in an action "commenced in the county court.

"For the purposes of paragraphs (*a*) "and (*b*) of this subsection, a plain"tiff shall be treated as recovering the "full amount recoverable in respect of "his claim without regard to any "deduction made in respect of con"tributory negligence on his part or "otherwise in respect of matters not "falling to be taken into account in "determining whether the action "could have been commenced in the "county court."

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because, having regard to the County Courts Act, 1955, an action in respect of personal injuries of this sort could have been brought against both defendants in the county court.

[His Lordship read section 1 (2) of the County Courts Act, 1955, and continued:] The first question raised on that by plaintiff's counsel is that this £100 paid into court is not money recovered in the action. In my view it is. The action was brought; the money was paid into court in the action; the notice of acceptance of the money has been given under the rules in relation to the action; and the money will be paid to the plaintiff as the result of the action having been brought by him. That being so it seems to me quite clear that this is money recovered in the action.

The next question that arises is one of fact, that is, was there reasonable ground for supposing the amount recoverable in respect of the plaintiff's claim to be in excess of the amount recoverable in an action commenced in the county court? There may be cases where it is very doubtful as to what amount the plaintiff would recover in actual fact. Of course, if it is a case of contributory negligence it is dealt with by the other part of the rule. But in this particular case the plaintiff was a passenger and he was bound to recover against one or the other of the defendants. So, in deciding whether the amount paid into court was sufficient he was in no way interested in any question of liability as affecting the amount that he would recover.

The acceptance by the plaintiff of the amount of £100 paid into court shows that the £100 is a fair amount to be paid to him in respect of his injuries; at any rate, he thinks so. That being so, it seems to me that this is an action which should have been started in the county court and there is no real reason for thinking that he would not have recovered in the county court everything that he would possibly be entitled to in respect of these injuries. The result is, in my view, that the plaintiff is entitled to recover from the first defendant, who paid into court, his costs, and these costs must be limited to scale 3 of the County Court scales.

The next question that arises is in relation to the costs of the second named defendants, who have not paid into court. The rule provides that all proceedings shall be stayed and the effect of the payment out to the plaintiff of course puts an end to the action so far as he is concerned, because he can no longer allege any damage against the other defendant as he has been recouped in full.

The result, so far as the second defendant is concerned, is that there is no further issue to be tried and the second defendant is entitled to his judgment with costs. The question is from whom shall he recover them. He, prima facie, is entitled to recover them against the plaintiff, but if one makes a Bullock order it means a double taxation. The question is whether the plaintiff is entitled to add to the costs which he is to obtain from the first defendant the costs he would have to pay to the second defendant.

I think I ought to exercise my discretion here in exactly the same way as I would have exercised it if this action had been fought to conclusion and the conclusion come to was that the first defendant was alone to blame and that the proper amount to be paid was £100. That being so, it seems to me that if the plaintiff was reasonable in joining both defendants in the action he is entitled to recover his costs. Having regard, first of all, to the letter that was written and, secondly, to the allegations, and lack of allegations, of negligence in the two defendants' pleadings, it seems to me that the plaintiff was not only reasonable in joining both defendants but would have been extremely foolish if he had not done so.

Under those circumstances it seems to me that the plaintiff is entitled to recover from the first defendant the costs he is to pay to the second defendant. If I make what is known as a Bullock order it involves double taxation, which I do not like—it only adds to the costs and does not help anybody, so what I propose here to make is a direct order.

So far as the second defendant is concerned he is not affected by the plaintiff's choosing the High Court. He has been brought here; he has had to fight here. In those circumstances it seems to me that the proper order to make here is that the first defendant pay the plaintiff's costs on scale 3 of the County Court scales, and the first defendant pay the second defendant's costs on the High Court scale.

Order accordingly.

Solicitors: *Hewitt & Walters, Birmingham; Putsman & Co., Birmingham; Rutherfords, Tamworth.*

[CHANCERY DIVISION.]

* *In re* TAYLOR, DECD.
LLOYDS BANK LTD. *v.* JONES.

1957
June 20; *July* 18.
Upjohn J.

[1957 L. 1226.]

Will—Construction—Acceleration—Residue on trusts for two persons after death of tenant for life, subject to defeasance—Disclaimer by tenant for life of all interest under will—Effect of disclaimer.

A testatrix, who died in 1953, by her will gave her residuary estate upon trust to pay the income to her brother A during his life. By clause 6 she directed as follows: "After the death of my "brother [A] the bank [her executor] shall stand possessed of my "residuary trust estate in trust to pay and divide the same unto "and equally between [B and C] or such of them as shall be "living at the death of the survivor of myself and the said [A] "absolutely. Provided always that if either of them . . . shall "die before the death of the survivor of myself and my brother "leaving issue him surviving who being male attain the age of 21

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"years or being female attain that age or marry under that age "such issue shall take per stirpes and if more than one equally "between them the share which his her or their parent would have "taken of and in my residuary trust estate if he had survived "myself and my brother [A]."

By a deed dated November 24, 1955, A disclaimed his life interest and any interest as next-of-kin in the estate of the testatrix.

Doubts having arisen as to the effect of the disclaimer on the provisions of clause 6 with regard to the question of acceleration, the executor took out a summons to determine whether and if so in what manner the interests of B and C had been thereby accelerated:—

Held, that the residuary estate was held on trust for B and C in equal shares and subject to defeasance, as provided by clause 6.

In re Flower's Settlement Trust [1957] 1 W.L.R. 401; [1957] 1 All E.R. 462 applied.

In re Davies, decd. [1957] 1 W.L.R. 922 considered.

ADJOURNED SUMMONS.

By her will, dated May 3, 1950, the testatrix, Bessie Percival Taylor, who died on February 22, 1953, gave her residuary estate "upon trust to pay the actual income arising from my "residuary trust estate as from my death to my brother the said "Thomas Taylor during his life." By clause 6 of her will she directed as follows: "After the death of my brother the said "Thomas Taylor the bank shall stand possessed of my residuary "trust estate in trust to pay and divide the same unto and "equally between the said Geoffrey Bethell Jones and Thomas "Percival or such of them as shall be living at the death of the "survivor of myself and the said Thomas Taylor absolutely "provided always that if either of them the said Geoffrey Bethell "Jones and Thomas Percival shall die before the death of the "survivor of myself and my brother the said Thomas Taylor "leaving issue him surviving who being male attain the age of "21 years or being female attain that age or marry under that "age such issue shall take per stirpes and if more than one equally "between them the share which his her or their parent would "have taken of and in my residuary trust estate if he had sur-"vived myself and my brother the said Thomas Taylor."

By a deed of disclaimer, dated November 24, 1955, the testatrix's brother, Thomas Taylor, disclaimed his life interest in the estate of the testatrix, and also, as her next-of-kin, disclaimed any such interest in that estate.

Doubts having arisen as to the effect of this disclaimer, Lloyds Bank Ltd. (the executors of the will) took out a summons to determine (inter alia) (1) whether, having regard to the disclaimer, the interests in the residuary estate of the said Bessie Percival Taylor, given to the defendants, Geoffrey Bethell Jones and Thomas Percival, had been accelerated and had become absolute and indefeasible; (2) if they had not been so accelerated whether, during the lifetime of the said Thomas Taylor, the income of the residuary estate: (i) was held on trust for Geoffrey Bethell Jones and Thomas Percival in equal shares, subject to a gift over in the

terms of the proviso to clause 6 of the will, or (ii) devolved as on a partial intestacy; or (3) was held on any other and if so what trusts.

James Fitzhugh for the plaintiff executor.

E. I. Goulding and *V. G. H. Hallett* for the first and second defendants, Geoffrey Bethell Jones and Thomas Percival, named in the gift of residue.

G. M. Parbury for the third, fourth and fifth infant defendants (issue of the first and second defendants).

A. C. Sparrow for the sixth, seventh, eighth and ninth defendants, claiming to be interested on an intestacy.

Denys Buckley for the Treasury Solicitor, also claiming to be interested in the event of an intestacy.

Cases cited in argument not referred to in the judgment: *In re Hodge* *; *In re Vernon.*†

UPJOHN J. stated the facts and continued: The difficulty in this case has been caused by the fact that the testatrix's brother, Thomas Taylor, disclaimed his life interest on November 24, 1955. He was also her next-of-kin and disclaimed any interest as such in the estate of the testatrix.

The question is: What happens during the remainder of the life of the testatrix's brother? Three views have been submitted to me: First, that one must treat it as though the brother had really died, and you then find that Jones and Percival have absolute vested interests, which are now indefeasible; the second view is that there is a partial acceleration, that is to say, the property is now held upon trust for Jones and Percival on the trusts declared by clause 6 of the will; the third view is that during the remainder of the brother's life there is an intestacy as to income.

Before I consider those arguments, there is a question of construction of the will with which I must deal. It is, I think, made clear by the observations of Chitty J. in *In re Townsend's Estate* [1] that if at the time of the determination of the prior estate, whether it be by disclaimer, or witnessing the will, or for some other reason, the gifts following on that estate are still contingent, there can be no acceleration for the reason that, the gifts being still contingent, you cannot tell whether they will take effect. Income cannot be accumulated pending the contingency, for by giving away the life estate the testator has evinced an intention against acceleration, and therefore necessarily the income must remain as on a partial intestacy undisposed of, at all events until the contingency following on the life interest takes effect.

* [1943] Ch. 800; 59 T.L.R. 373; [1943] 2 All E.R. 304.

† (1906) 95 L.T. 48.

[1] (1886) 34 Ch.D. 357; 3 T.L.R. 204.

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It is submitted here that the gift after the death of the brother is a contingent gift. The general rule in such a case as this is not in doubt, and it is set out at the foot of p. 316 of the third edition of Hawkins on Wills. The rule is: "A bequest to several, "or to a class, 'or' to such of them as shall be living at a given "period, is construed as a vested gift to all, subject to be divested "in favour of those living at that period, if there be such; and "if none are then living, all are held to take. . . . Thus if the "gift be to A for life, with remainder to his children, or such of "them as shall be living at his decease, and no child is living "at the death of A, all the children are entitled, as if the gift "had been to A for life, with remainder to his children sim-"pliciter. . . . So if the gift be to A for life, and after his death "to his children or the survivors:—the rule in *Cripps* v. "*Wolcott*[2] being applicable."

It is submitted that although the first words of the gift in the sixth clause fall apparently within that rule, when one looks at the whole of the gift one finds that the gift is really contingent because the testatrix has added this at the end of clause 6: "and if more than one equally between them "the share which his her or their parent would have taken "of and in my residuary trust estate if he had survived "myself and my brother the said Thomas Taylor." It is said that shows that the original gift was contingent. I cannot accept that argument. In using the phraseology which she did in the concluding words of the clause, the testatrix was merely pointing out the interest which Jones or Percival would undoubtedly take if they or either of them in fact survived the testatrix and her brother. In my judgment it throws no light on the problem whether the gift is contingent or whether it is vested subject to being divested. It is equally accurate in either event. Therefore, one must construe the will by reference to the actual words of the gift at the beginning of clause 6, and it seems to me that it is clearly covered by the rule that I have just read.

Accordingly, in my judgment, the gift to Jones and Percival is initially vested. It is liable to be divested in certain events. To take as an example; if Jones dies in the lifetime of the brother leaving issue, then it will go to his issue. If he dies without leaving issue, then it will go to Percival, provided that Percival survives the testatrix's brother. If neither of them survives the brother and neither of them leaves issue, then the gift will be divided equally between their estates.

The question then is whether it is possible to accelerate the gift, and, if so, in what manner. The principle of acceleration is well established and well known, and I need read only one authority, namely the recent case of *In re Flower's Settlement Trusts*.[3] In delivering the judgment of the court, Jenkins L.J.

[2] (1819) 4 Mad. 11.

[3] [1957] 1 W.L.R. 401, 405; [1957] 1 All E.R. 462.

said: "The principle, I think, is well settled, at all events in "relation to wills, that where there is a gift to some person for "life, and a vested gift in remainder expressed to take effect on "the death of the first taker, the gift in remainder is construed "as a gift taking effect on the death of the first taker or on any "earlier failure or determination of his interest, with the result "that if the gift to the first taker fails—as, for example, because "he witnessed the will—or if the gift to the first taker does not "take effect because it is disclaimed, then the person entitled in "remainder will take immediately upon the failure or determina-"tion of the prior interest, and will not be kept waiting until the "death of the first taker."

Applying that, and, as has been said in a number of the earlier authorities, treating the words "after the death" as mere words of limitation and as equivalent to "subject to the foregoing trust," we reach this conclusion, that the gift takes effect immediately on the operation of the disclaimer.

That appears to be the prima facie application of the rule, but then a difficulty arises, because the trusts then following are not absolutely vested remainders. They are vested subject to being divested. Mr. Goulding, for the first two defendants, submits that the trust for Jones and Percival is only postponed in order that the life interest may be enjoyed by the brother; that the testatrix desired to assure that only living objects would receive her bounty; therefore, that the reference to survivorship is nothing more than a reference to the prior life interest, and the gift becomes absolutely vested when the brother disclaimed as though he had actually died. He referred to a number of authorities.

Since the matter was last before me, Vaisey J. delivered a reserved judgment in *In re Davies, decd.*[4] He has permitted me to see a transcript of his judgment, and counsel have had the like opportunity, and they have addressed me on it. Mr. Goulding's submission is that it really matters not that the class may change by reason of the disclaimer, as undoubtedly it does change, if he is correct in his submission, because the issue of Jones and Percival are cut out, although, in fact, the testatrix's brother is very much alive.

Vaisey J. dealt with that matter, and he said: "It is clear, "however, that acceleration may and does sometimes alter the "constitution of a class of beneficiaries from what it would have "been if the gift had not been accelerated." Then he refers to *In re Johnson.*[5]

In *In re Davies*[4] there was a gift to a Mrs. Mackintosh of a share of the testatrix's estate, and the will said: "Mrs. Primrose "Mackintosh's portion to be hers for life and then to be divided "equally between her issue." She, too, disclaimed. Had she

[4] [1957] 1 W.L.R. 922, 925; [1957] 2 All E.R. 57.

[5] (1893) 68 L.T. 20.

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not disclaimed, the class of issue would, of course, have been determined as at her death. Vaisey J. held that, as she had disclaimed, the class of issue was to be determined at the date of the death of the testatrix, thereby altering the class to take.

I respectfully agree with the decision of Vaisey J. He was treating the words "then to be divided equally" merely as words of remainder, and accordingly on the disclaimer there was a gift to Mrs. Mackintosh's issue on the death of the testatrix.

A perfectly general rule of law must then be applied, namely, that where there is an immediate gift to a class, the class then closes; and that seems to me to be the explanation of this decision. No violence at all was done to the language of the testatrix. All that happened was, that by virtue of the acceleration and applying a general rule of law, the class was ascertained at a different period. That, in my judgment, is also the effect of *In re Johnson.*[6] That was a curious case, but it seems to me that it all depended on the decision that on the true construction of the will in that case the class was to be ascertained, not on the death of a survivor, but on the coming into force of a certain trust for sale. Therefore, it was another example of construing a will according to its ordinary meaning, and then applying the perfectly general rules with regard to a class. That, I think too, is the explanation of *Jull* v. *Jacobs.*[7]

The question is whether I can apply that reasoning to this case. It is to be observed at once that unless I construe the words "or such of them as shall be living at the death of the "survivor of myself and the said Thomas Taylor" as merely meaning "to such of them as shall be living at the termination "of the foregoing trusts," I am, if I give effect to Mr. Goulding's argument, misconstruing the will. I do not think that as a matter of construction I can so construe the words. The testatrix has made it perfectly clear that the gift is to be to "such of them as "shall be living at the death of the survivor of myself and the "said Thomas Taylor" and she has said it again at the conclusion of clause 6. I do not feel at liberty to depart from her precise language. Therefore, it seems to me that if I were to apply the doctrine of acceleration in the way in which Mr. Goulding submits, I am misconstruing the will. That, as I have pointed out in dealing with *In re Davies, decd.*,[8] *In re Johnson*[9] and *Jull* v. *Jacobs*,[10] has, so far as I know, never been done.

The principle of acceleration is a helpful principle, when one is considering the problem where there is a gap by revocation by codicil or by witnessing the will, or otherwise, but it does not permit one to misconstrue the will in order to give effect to the doctrine. Accordingly, I feel that I cannot accept Mr. Goulding's argument, because I am cutting out issue long before the event on which they may be entitled to take, that is, if Jones or Percival

[6] 68 L.T. 20.
[7] (1876) 3 Ch.D. 703.
[8] [1957] 1 W.L.R. 922.
[9] 68 L.T. 20.
[10] 3 Ch.D. 703.

dies before the survivor of the testatrix and her brother. It seems to me that I am not at liberty in the name of the principle of acceleration to do that violence to the testatrix's language. Accordingly, I must reject that argument.

Then it is said by Mr. Parbury that there is an acceleration in this sense that the property is now held on the trusts declared by clause 6. Mr. Buckley has argued that that cannot be done, because he submits that the doctrine of acceleration applies only where you find an absolute vested remainder following on the life interest which has determined.

I see no reason for such a limitation on the doctrine and it is not justified on the authorities. In the first place, in *In re Townsend* [11] it is perfectly plain that Chitty J. thought that there could be a gap, and an intestacy as to income when the gift was contingent, but that gap could be filled if and when the gift became vested, and then there would be an acceleration, because he pointed out that, although the income was undisposed of, yet, if there should be a child born to W. S. Townsend, then *Jull* v. *Jacobs* [12] would apply, and the interests of children in remainder would be accelerated.

Furthermore, it seems to me that the view that there must be an absolute vesting is contrary to the decision of the Court of Appeal in *In re Conyngham.*[13] In that case there was, by a will dated in 1915, a devise of certain estates to the use of the testator's brother, the plaintiff, for life, with remainder to the use of the plaintiff's first and other sons successively, according to seniority in tail male, with remainder to the use of the nephew, the infant defendant, for life. Then there was a revocation of the plaintiff's life interest by codicil. He had at the time no issue, and therefore there was a gap. It was held that the nephew, the infant defendant, took because he had a vested remainder, but, of course, that could be divested, as appears from the head-note, if the plaintiff had a son, but until he had a son there was an acceleration in favour of the next remainderman.

Mr. Buckley tried to escape from the consequences of that decision by saying that it was not a case of a vested remainder liable to be divested, but a mere postponement. This is too subtle. It was clearly a case of a vested remainder liable to be divested, and Harman J. so treated it when dealing with *In re Conyngham* [14] in *In re Hatfield.*[15]

The next point that Mr. Buckley put was this: He said that,

[11] 34 Ch.D. 357.
[12] 3 Ch.D. 703.
[13] [1921] 1 Ch. 491; 37 T.L.R. 420.
[14] [1921] 1 Ch. 491.
[15] [1957] 3 W.L.R. 28; [1957] 2 All E.R. 261.

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in any event, and apart from his earlier argument, if you adopt the submission made by Mr. Parbury you are giving the first two defendants interests not given to them by the will, because he submits that the testatrix intended that one or other of them should receive on the death of the life tenant an absolute interest in possession, and she did not intend that they should have in possession, first of all, interests subject to defeasance, and then, on the death of the brother, interests if they were then living which were indefeasible. He submitted, therefore, that, in that way, it was very like a contingent gift, because he said that the persons to take could not be ascertained until the brother died. I cannot myself accept that argument either. You must, of course, apply the ordinary canons of construction. The testatrix says that after the death of her brother the residuary estate is subject to certain trusts, namely, a trust to pay and divide the residuary estate equally between Jones and Percival, with certain clauses of defeasance. I have already held that, in my judgment, the interest was a vested interest on the death of the testatrix. The question is, When did it vest in possession? That must be found on the true construction of the will. It seems to me that, as a matter of construction, it vested in possession immediately on the determination of a prior estate, and, therefore, although the first two defendants may have received some interest not entirely contemplated by the testatrix, nevertheless they are there waiting to receive a vested remainder on the determination of the prior estate. It is not an absolutely vested remainder, but it is a remainder subject to defeasance. That, as a matter of construction, seems to me to be the necessary consequence that flows from the disclaimer. The defeasance clauses and the proviso remain. It follows, therefore, that the trustees must hold the residuary estate on the trusts set out in clause 6.

I must, therefore, declare that there is no room for an intestacy of any sort. I shall declare that the residuary trust estate is now held on trust for the defendants, Geoffrey Bethell Jones and Thomas Percival, in equal shares, subject to defeasance as provided by clause 6 of the will.

Declaration accordingly.

Solicitors: *Slater, Heelis & Co., Manchester; Stoneham & Sons for Grundy, Kershaw, Farrar & Co., Manchester; Treasury Solicitor.*

J. L. D.

[CHANCERY DIVISION.]

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July 3, 4, 5, 31.

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Revenue — Income tax — Non-resident — English company carrying on French company's trade without authorization during the war — Profits arising from such trade—Whether English company assessable to income tax as agent—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, para.* 1 (*a*) (iii), *and All Schedules Rules, rr.* 5, 6, 10.

Agency—Ratification—Competency of principal—Need for competent principal when acts are done—Enemy alien not so competent.

The appellants, a company of trawler owners, took control of a trawler belonging to a French company which was in an English harbour at the fall of France in 1940. The appellants owned 49 per cent. of the shares in the French company but had no authority from the French company for their actions. They later, with the approval of the Minister of War Transport and the support of the Fisheries Section of the French Naval Forces, sent the trawler to sea, but they were never formally appointed managers of the vessel. They kept accounts of the ship's takings and expenses and after deducting their commission a profit was shown. In 1945 the trawler was returned to France and the French company approved the appellants' actions. Assessments to tax were then made on the appellants under Schedule D to the Income Tax Act, 1918, para. 1 (*a*) (iii),[1] and All Schedules Rules, rr. 5 and 6,[2] in respect of the profits made through the trawler's trading operations, between 1940 and 1945.

[Reported by JENNIFER WEST, Barrister-at-Law.]

[1] Income Tax Act, 1918, Sch. D, para. 1: "Tax under this Schedule "shall be charged in respect of— "(*a*) The annual profits or gains "arising or accruing—. . . (iii) to any "person, whether a British subject "or not, although not resident in the "United Kingdom, from any property "whatever in the United Kingdom, "or from any trade, profession, em-"ployment, or vocation, exercised "within the United Kingdom; . . ."

[2] All Schedules Rules: "5. A "person not resident in the United "Kingdom, whether a British subject "or not, shall be assessable and "chargeable in the name of any such "trustee, guardian, tutor, curator, or "committee, or of any factor, agent, "receiver, branch, or manager, "whether such factor, agent, receiver, "branch, or manager has the receipt "of the profits or gains or not, in "like manner and to the like amount "as such non-resident person would "be assessed and charged if he were "resident in the United Kingdom and "in the actual receipt of such profits "or gains.

"6. A non-resident person shall be "assessable and chargeable in respect "of any profits or gains arising, "whether directly or indirectly, "through or from any factorship, "agency, receivership, branch, or "management, and shall be so assess-"able and chargeable in the name of "the factor, agent, receiver, branch, "or manager."

"10. Nothing in these rules shall "render a non-resident person charge-"able in the name of a broker or "general commission agent, or in the "name of an agent not being an "authorized person carrying on the "regular agency of the non-resident "person or a person chargeable as if "he were an agent in pursuance of "these rules, in respect of profits or "gains arising from sales or trans-"actions carried out through such a "broker or agent."

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The commissioners held that these were trading activities carried on by the appellants as regular and authorized agents for the French company within the meaning of rule 10 of the All Schedules Rules. On appeal:—

Held, allowing the appeal, (1) that the appellants could claim to be authorized persons only under the doctrine of ratification, since they had no express authority for their activities given before or during the period of their trading activities.

(2) That, if they were so authorized by reason of the doctrine of ratification, they were carrying on a "regular agency" within the meaning of rule 10 of the All Schedules Rules.

Gavazzi v. *Mace* (1926) 42 T.L.R. 389; 10 T.C. 698 and *Nielsen, Andersen & Co.* v. *Collins, Tarn* v. *Scanlan* [1928] A.C. 34; 44 T.L.R. 53; 13 T.C. 91 applied.

(3) That the doctrine of ratification can only operate if at the time the act to be ratified was done the agent had a competent principal, and since the French company was an alien enemy at the time these acts were done, the doctrine could not operate.

Firth v. *Staines* [1897] 2 Q.B. 70; 13 T.L.R. 394 and *Sovfract (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)* [1943] A.C. 203; 59 T.L.R. 101; [1943] 1 All E.R. 76 applied.

APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

The Boston Deep Sea Fishing and Ice Company Ltd. (hereinafter called "the appellants") appealed to the Special Commissioners against assessments to income tax in the sum of £1,000 for each of the years from 1940–1941 to 1944–1945 inclusive made upon them as agents for Pêcheries de la Morinie (hereinafter called "the French company") under rule 5 of the All Schedules Rules of the Income Tax Act, 1918. The profits intended to be brought into charge were the profits arising from a trade alleged to be carried on within the United Kingdom by the French company through the agency of the appellants in connexion with the steam trawler *St. Jean*. It was not disputed that the trade was carried on by the appellants and not by the French company.

The appellants contended that they were never constituted agents of the French company within the meaning of "agency" as understood in the fishing industry and set out in paragraph 15 of the case as follows: "15. (1) In the fishing industry there is "a well understood distinction between management and agency. "Management of a vessel involves full control of the movement "of the vessel and the engagement of the skipper and crew. A "manager is in the same position as an owner, except as regards "his accountability to the owner. An agent is agent for turning "round a vessel on a particular occasion when it visits a port "other than its usual port; the agent lands the fish, sells it, "refuels and restores the vessel and sees that it gets to sea "again; he uses his discretion regarding running repairs, but "does not put major repairs in hand without consulting the owner "or manager. He does not tell the skipper where to fish on his

"next voyage. The agency is for one particular turn-around, "though it may be, and often is, repeated regularly by the agent "on behalf of the same owner and vessel. For this the agent "receives a commission which varies between 2 per cent. and "5 per cent. of the gross sales of fish landed; during the war the "usual commission was 3 per cent. Such agency is called turn-"around agency."

They further contended that they were not authorized persons carrying on the regular agency of the French company in relation to the *St. Jean* within the meaning of rule 10 of the General Rules applicable to all Schedules to the Income Tax Act, 1918; alternatively, that if they were such agents and so authorized, their transactions were carried out in the ordinary course of their business as general commission agents and accordingly the French company was not chargeable in the appellants' names by virtue of section 17 of the Finance Act, 1925.

The Inspector of Taxes contended that the appellants were, in relation to the *St. Jean*, agents of the French company within rules 5 and 6 of the said General Rules; that the appellants were authorized persons carrying on the regular agency of the French company within rule 10 of the said General Rules; that the appellants' transactions were not carried out in the ordinary course of their business as general commission agents within section 17 of the Finance Act, 1925.

The Special Commissioners found that the trading operations carried on by means of the *St. Jean* from July, 1940, to November, 1945, were carried on by the appellants as regular agents for the French company, and that they were authorized persons carrying on a regular agency within the meaning of general rule 10. They further found that the appellants' transactions went beyond the scope of their ordinary turn-around agency business and their general commission agency business since they had full control of the movement of the vessel and the engagement of the skipper and crew. Upon this point there was no appeal.

John Senter Q.C. and *D. C. Miller* for the taxpayers.

Sir Frank Soskice Q.C., *Sir Reginald Hills* and *A. S. Orr* for the Crown.

Cases cited in argument and not referred to in the judgment: *Wilcock* v. *Pinto & Co.*[3]; *Whitney* v. *Inland Revenue Commissioners*[4]; *Drummond* v. *Collins*[5]; *Williams* v. *Singer, Pool* v. *Royal Exchange Assurance*[6]; *Stanley* v. *Inland Revenue Commissioners*[7]; *Edwards* v. *Bairstow*[8]; *Porter* v. *Freudenberg*[9];

[3] [1925] 1 K.B. 30.

[4] [1926] A.C. 37; 42 T.L.R. 58.

[5] [1915] A.C. 1011; 31 T.L.R. 482.

[6] [1921] 1 A.C. 65; 36 T.L.R. 661.

[7] [1944] 1 K.B. 255; 60 T.L.R. 209; [1944] 1 All E.R. 230.

[8] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48.

[9] [1915] 1 K.B. 857; 31 T.L.R. 162.

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La Banque Jacques-Cartier v. *La Banque D'Epargne de la Cité et du District de Montreal*[10]; *Smart* v. *Lincolnshire Sugar Co. Ltd.*[11]

Cur. adv. vult.

July 31. HARMAN J. read the following judgment. This case is a curious aftermath of the fall of France in 1940. When that lamentable event happened the French trawler *St. Jean*, with whose earnings we are here concerned, happened to be in the port of Fleetwood, whither she had repaired to land her catch. She was owned by a French limited company known as Pêcheries de la Morinie, which had its commercial domicile in France, its head office being at Boulogne, but the *St. Jean* on the capture of that town had fled to Lorient, whence on the orders of her owners she had been fishing on the Great Sole Bank. The appellants carry on at Fleetwood the business of trawler owners, and also that of managers and agents for both British and foreign vessels. They are the proprietors of 49 per cent. of the shares in the French company, and in 1940 their managing director, one Fred Parkes, was a member of the board of the French company. The appellants in the ordinary course of their business acted as agents in the sense described in paragraph 15 of the case for the vessel, when she came into Fleetwood, manned by a French skipper and crew. When the news of the French capitulation arrived Parkes took it upon himself to immobilize the vessel to prevent her falling into German hands. The skipper and two of the crew were repatriated to France, but the rest stayed in England. Thereafter Parkes, without, so far as appears, any authority, but doing the best he could in the circumstances and also regarding the fact that the French company was largely indebted to the appellants, sent the ship to sea with an English skipper chosen by himself and a crew mainly French. Thereafter a body known as the Fisheries Section of the French Naval Forces took an interest in the vessel and her crew, and eventually through the good offices of the Minister of War Transport prevailed upon Parkes to allow the vessel to be manned as far as possible by French officers and crew. She was thus during the war controlled partly by the appellants and partly by the French Fisheries Section. The appellants were never formally appointed by the Minister to be managers because, I suppose, the existing arrangements seemed good enough. The appellants kept accounts of the ship's takings and expenses, and after deducting a commission for themselves a considerable profit was shown. The arrangement above described went on till the end of 1945, when the ship returned to France under the control of her owners, the French company, representatives of which had at the end of the war visited the appellants and approved their conduct and accounts and the commission they had reserved for themselves.

[10] (1887) 13 App.Cas. 111.

[11] [1937] A.C. 697; 53 T.L.R. 306; [1937] 1 All E.R. 413.

In making the various applications required under the controls operating in wartime the appellants held themselves out as being managers acting with the authority of the French owners, but they never had any such authority. Parkes, it is true, was a director of the French company until the spring of 1941, when he was removed from the board without his knowledge, but whether on or off the board he had no authority from the French company to manage or delegate the management of the vessel. There was no agreement on the subject between the two companies before the fall of France.

Under these circumstances assessments to tax were made on the appellants for the years 1940–1941 to 1944–1945 inclusive under Schedule D to the Income Tax Act, 1918, para. 1 (*a*) (iii), and All Schedules Rules, r. 5, upon the footing that the trade was carried on by the French company within the United Kingdom through the appellants as its agent so that the French company could be charged in the agent's name. At the hearing before the Special Commissioners they found that the trade was not carried on by the French company as principal, and no one is concerned to dispute this. The commissioners further found that the activities were carried on by the appellants and not by the Fisheries Section of the Free French Movement, and this is not disputed. A controversial point was whether in carrying on the business the appellants were brokers or general commission agents within the exception provided by rule 10 of the All Schedules Rules, the material part of which is in these words: "Nothing in these rules shall render a non-resident person "chargeable in the name of a broker or general commission "agent." This was to some extent modified by section 17 of the Finance Act, 1925. On this the commissioners found that the appellants did not come within the exception, and this point has not been contested before me. The dispute before me was whether, as the commissioners found, the appellants were in what they did "an authorized person carrying on the regular "agency." In considering this question and coming to a finding upon it, it seems to me that the commissioners were construing rule 10 and that this, therefore, is a question of law: see *Bell* v. *National Provincial Bank of England*.[1] If this be wrong and the decision was one of fact, or rather an inference from the facts, I have to consider whether there were any facts to justify the commissioners in reaching this conclusion.

At the outset, on the facts as I have stated them, it seems to me clear that subject to the question of ratification the appellants were not authorized persons at all. It is true that they held themselves out as managers, but no one altered his position over the years on that account, so that no question of estoppel arises. If, however, by reason of the doctrine of ratification they must be treated as authorized, the ratification dating back to

[1] [1904] 1 K.B. 149; 20 T.L.R. 97.

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the year 1940, then I think that they would satisfy the words "carrying on the regular agency." This awkward phrase is discussed by Rowlatt J. in *Gavazzi* v. *Mace*,[2] where, after reading rule 10, which I have already read, he says this: "It is quite "clear that it was assumed by those who drew that rule . . . "that there would be no attempt to charge any agent otherwise "than in respect of profits on sales and transactions carried out "by him or through him. Then this provision says that 'a non-"'resident shall not be chargeable in the name of a broker or "'general commission agent, or in the name of an agent not "'being an authorized person,' and so on. I find great difficulty "in quite understanding the fabric of this enactment. First of "all, I do not quite see why you want the words 'broker or "'general commission agent' at all, because a broker or general "commission agent is an agent who is not an authorized person "carrying on a regular agency of the non-resident person, and "therefore they would be protected without being mentioned at "all. But they are put in, I suppose, as a sort of indication of "the line on which the draftsman's mind is travelling before he "comes to the phrase which supersedes those words, and "expresses a larger idea which includes them.

"Then I am bound to say I find great difficulty in under-"standing what is exactly meant by 'authorized person.' Any-"body who carries on a regular agency must be an authorized "person. One view is that an authorized person is meant to "indicate that he is to be a person of a somewhat superior scale "of importance in the agency, to which I rather incline; another "view is that 'authorized person' are merely colourless words "for agent, merely serving, for the convenience of grammar, as "a noun to which you can apply the words 'carrying on the "'regular agency of the non-resident person.' The use of the "word 'agent,' again, was what was sought to be avoided there "by the draftsman, and so he used the non-committal words "'authorized person' before he went on to say that he should "not be carrying on a regular agency of a non-resident person."

Further, Scrutton L.J. in *Nielsen, Andersen & Co.* v. *Collins*[3] says this: "The next point that is taken is, as I follow it, that "it is said that the person you are trying to tax is merely a "broker; he is doing just what an ordinary ship broker does—"that, of course, puts in 'ship' for the first time; a ship broker "is a very different thing from a broker—and consequently, "under" the section, "the non-resident person is not chargeable "in the name of a broker or general commission agent. Now "the language is," and the Lord Justice repeats it. "In my "view the words 'not being an authorized person carrying on "'the non-resident's regular agency' apply to the whole of the "preceding descriptions, and the contrast intended to be drawn

[2] (1926) 10 T.C. 698, 744; 42 T.L.R. 389.

[3] 13 T.C. 91, 121; [1928] A.C. 34; 44 T.L.R. 53.

"is between casual employment, temporary employment, for a "transaction or few transactions, and regular appointment of a "permanent agent who is there as representing the foreigner. "Though it was not necessary for Lord Cave to say so, I think "what Lord Cave says in the *Maclaine* v. *Eccott* case[4] as to "the meaning of subsection (6) expresses what I mean to express, "and is correct: 'A non-resident instructing a broker or other "'casual agent in this country shall not be chargeable.' I think "the distinction is between the casual agent and the authorized "person carrying on the non-resident's regular agency. It is "odd language, of course, because how you can carry on an "agency if you are not authorized I do not quite understand, "and what was the object of putting in the word 'authorized' "I do not follow. The emphasis I lay on the word 'regular.'"

Judged by these tests, it seems to me that if the appellants were authorized persons, they were carrying on the regular agency.

The case seems to me to turn, therefore, on the question of ratification. There is no doubt that after the war the French company by its proper representatives approved of what had been done by the appellants. Ratification, as we all know, has a retroactive effect. It is well stated by Tindal C.J. in *Wilson* v. *Tumman*[5] in these words: "That an act done *for another*, by "a person, not assuming to act for himself, but for such other "person, though without any precedent authority whatever, "becomes the act of the principal, if subsequently ratified by "him, is the known and well established rule of law. In that "case the principal is bound by the act, whether it be for his "detriment or his advantage, and whether it be founded on a "tort or a contract, to the same extent as by, and with all the "consequences which follow from, the same act done by his "*previous* authority." Lord Sterndale, in *Koenigsblatt* v. *Sweet*,[6] has words to the same effect.

The conditions precedent to a valid ratification are well stated by Wright J. in *Firth* v. *Staines*.[7] The facts of that case I need not rehearse. The passage reads as follows: "I think the case "must be decided upon the ordinary principles of the doctrine "of ratification. To constitute a valid ratification three condi-"tions must be satisfied: first, the agent whose act is sought to "be ratified must have purported to act for the principal; "secondly, at the time the act was done the agent must have "had a competent principal; and, thirdly, at the time of the "ratification the principal must be legally capable of doing the "act himself."

The first condition is satisfied: the appellants did hold themselves out as agents for the French company; so is the third.

[4] (1926) 10 T.C. 481, 577; 42 T.L.R. 416.

[5] (1843) 6 Man. & G. 236, 242.

[6] [1923] 2 Ch. 314, 324; 39 T.L.R. 576.

[7] [1897] 2 Q.B. 70, 75; 13 T.L.R. 394.

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At the time of the ratification the French company was capable of doing the kind of acts which they were purported to ratify. But I cannot think that the second condition is met. At the time the acts were done the French company was an alien enemy at common law. It was therefore not a competent principal because it could not have done the act itself. Moreover, to have accepted the mandate would have been an offence on the part of the appellants constituting trading with the enemy within the mischief of the Trading with the Enemy Act, 1939. Counsel for the Crown suggested that no such offence would have been committed having regard to the proviso to section 1 of that Act excepting from the mischief of the section acts done under the authority of a Secretary of State. I do not accept this. No doubt the Minister of War Transport licensed the ship, but he was not a Minister of State, and for aught I know had no knowledge of the supposed agency. If he or some other authorized person had appointed the appellants to be managers of the ship, as was apparently the usual course, the matter might have been different, but the case expressly states that this course was not taken. No doubt the appellants became accountable after the war to the French company for the profits made (see *Stevenson & Sons Ltd.* v. *Act. für Cartonnagen-Industrie* [8] and Lord Atkinson's speech [9] therein), but that does not seem to me to affect the matter. In *Sovfracht (V/O)* v. *Von Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)*[10] it was made clear that the relation of principal and agent is determined by war and such a relationship cannot exist during the currency of hostilities—see Lord Porter's speech,[11] where his Lordship says this: "Ordinarily, when the principal becomes an enemy the authority of "the agent ceases on the ground that it is not permissible to "have intercourse with an enemy alien, and the existence of the "relationship of principal and agent necessitates such intercourse. That the representatives, legal or non-legal, of a "litigant may require to have such intercourse with their "principal in the litigation is, I imagine, clear, and I do not "think it is an answer to say that in the event it may not be "found necessary for the one to communicate with the other. "At any moment the necessity may arise. The very relationship "requires it even if it is desired only to terminate the mandate "itself. If authority be required for the proposition that the "relationship of principal and agent is determined when the "parties to the agency agreement become enemies one to the "other, it is to be found in" *Stevenson & Sons Ltd.* v. *Act. für Cartonnagen-Industrie.*[12]

If this be right, it is enough to conclude the case in the

[8] [1918] A.C. 239; 34 T.L.R. 206.
[9] [1918] A.C. 256; 34 T.L.R. 206.
[10] [1943] A.C. 203, 254; 59 T.L.R. 101; [1943] 1 All E.R. 76.
[11] [1943] A.C. 203, 254.
[12] [1918] A.C. 239.

appellants' favour. I need not, therefore, consider Mr. Senter's further point that as income tax is a tax assessable year by year, it is not legitimate to tax by reason of the events of a subsequent year. The argument was that even though the principal was capable of ratifying in 1945, that did not make the agent taxable in previous years when no such authority could be given. I was referred in this connexion to *Dodsworth* v. *Dale* [13] and *Spence* v. *Commissioners of Inland Revenue*.[14]

I should add that the Crown abandoned a suggested alternative that the appellants could be charged as trustee for the French company. This suggestion was never made to the commissioners nor were the assessments made on the appellants in that capacity. Further, I do not think that the French company was an "incapacitated person" within All Schedules Rules, r. 4.

The result is that the appeal is allowed and the assessments discharged.

Appeal allowed.

Solicitors: *Theodore Goddard & Co., agents for A. M. Jackson & Co., Hull; Solicitor of Inland Revenue.*

[13] [1936] 2 K.B. 503; 52 T.L.R. 512; [1936] 2 All E.R. 440.

[14] (1941) 24 T.C. 317.

[QUEEN'S BENCH DIVISION.]

* INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY *v.* MANCHESTER CORPORATION.

1957
Oct. 9, 16.

Lord Goddard C.J., Donovan and Ashworth JJ.

Rates and Rating—"Social welfare"—Friendly Society—Oddfellows—Society providing benefits and assurance—Claim by society for rating relief—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8.
Friendly Society.

A society registered under the Friendly Societies Acts claimed to be entitled to the benefit of rating relief under section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1]

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to . . . "(*a*) any hereditament occupied for "the purposes of an organisation . . . "which is not established or conducted for profit and whose main "objects are charitable or are otherwise concerned with the advancement of religion, education or social "welfare. . . . (2) For the purposes "of the making and levying of rates ". . . for the year beginning with the "date of the coming into force of "the first new valuation list . . . the "amount of rates chargeable in respect of a hereditament to which "this section applies shall . . . be "limited as follows . . . (*a*) for the "first year of the new list, the "amount so chargeable shall not "exceed the total amount of rates "(including any special rates) which "were charged in respect of the "hereditament for the last year before "the new list came into force."

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in respect of premises occupied by the society. The objects of the society as set out in its rules was to provide by entrance fees, contributions, fines, donations, etc., for insuring a sum of money to be paid on the death of a member to the member's wife or husband or various members of the member's family; insuring against sickness or other infirmity; providing endowment of members, convalescent treatment and convalescent homes. A member who would otherwise be entitled as of right to payment of benefit under the rules could suffer suspension of benefit for misconduct:—

Held, that while the class of person eligible for benefit included non-members, this was not sufficient to convert the main objects of the society from being the carrying into effect of a business arrangement in the form of mutual insurance into the advancement of social welfare within section 8 (1) (*a*) of the Act of 1955.

National Deposit Friendly Society Trustees v. *Skegness Urban District Council* [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199 applied.

Per curiam. The Court of Appeal in the *Skegness* case ([1957] 3 W.L.R. at p. 558) did not purport to lay down any universal rule in regard to friendly societies, but adopted the view expressed in the Divisional Court in that case that, if friendly societies were to receive the relief conferred by section 8, it was remarkable that Parliament did not so provide in plain terms.

CASE STATED by Neville Laski Q.C., Recorder of Liverpool, a judge of the Crown Court at Manchester sitting as a court of quarter sessions.

At the session of the Crown Court at Manchester held on January 3, 1957, the Independent Order of Oddfellows Manchester Unity Friendly Society (hereinafter called "the "society") appealed against the rate by the Manchester Corporation as the rating authority for the City of Manchester (hereinafter called "the corporation") in respect of the hereditament situate at numbers 93/97, Grosvenor Street, Manchester, occupied by the society, in the sum of £1,197 for the year 1956/1957, on the ground that in making the rate the corporation had failed to allow to the society the relief from liability provided by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

The following facts, inter alia, were found by quarter sessions. Numbers 93/97, Grosvenor Street was the head office and registered office of the society. The rate was duly and correctly made by the corporation in respect of the hereditament provided that the society was not an organization within the meaning of section 8 of the Act of 1955. If the society was such an organization the rate should be reduced to the sum of £971 17s. 4d. The society was founded in 1851 and was first registered under the Friendly Societies Acts on August 8, 1851. The society had branches within the meaning of the Acts, such branches being either (i) Districts consisting of lodges registered as branches of the society or (ii) lodges consisting of an unlimited number of members of both sexes. The membership of the society consisted of ordinary members, registered members,

junior members, honorary members, U. I. & E. (Unity Insurance and Endowment) Fund members, unity members, and widow members, as defined in the rules of the society. At all material times the number of members of the society was approximately 600,000. The qualifications for the admission of persons to the society as ordinary members included a proposal in a lodge by a member, the completion and signing of a declaration, election by a majority of the members present and voting at a meeting of the lodge, and a ceremonial initiation administered with the object of maintaining the character of the society and preserving its traditions as a brotherhood.

The objects of the society as set out in rule 2 were "To "provide by entrance fees, contributions of the members, fines, "donations, levies, and interest on capital for (*a*) Insuring a sum "of money to be paid on the death of a member or of a member's "wife or husband or . . . of a parent, step-parent or grandparent "of a member or . . . for the funeral expenses of a member's "child or of the widow of a deceased member. (*b*) Insuring a sum "of money to be paid on the birth of a member's child. (*c*) The "relief or maintenance of the members . . . during sickness or "other infirmity. . . . (*e*) Providing proper medicine . . . for "members. (*f*) Granting temporary assistance to widows and "children of deceased members. . . . (*j*) The endowment of "members at any age. . . . (*l*) To provide convalescent treat-"ment and to provide and maintain convalescent homes. . . ."

The income and the capital funds of the society itself and of and through its branches included not only contributions of the members and interest from investments, but also monies received by way of fines donations and levies. The objects and the activities of the society included the provision of benefits both to members and to persons other than members, namely their wives, children, fathers, mothers, brothers, sisters, nephews, nieces, orphans, and wards being orphans, being benefits discretionary in character. A member who would otherwise be entitled as of right to payment of benefit under the rules and tables of the society could suffer a suspension of benefit or be fined or be expelled from membership by a resolution of the lodge if (inter alia) he or she had been imprisoned for any crime or guilty of serious personal misconduct or made known the secrets of the society, and a member so expelled could be required to accept a surrender value in respect of insurance effected by him or her. A member's wife who would otherwise be entitled as of right to payment of benefit under the rules and tables of the society, but who was living in adultery would have no claim on any fund of the society.

Persons joined the society and contributed to its funds in order to obtain for themselves or for their wives, etc., such benefits as the society disbursed under its rules as of right or by way of discretion. The benefits of the society payable to members as of right were only payable provided the contributions

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of such members have been paid or dealt with in accordance with the rules. In each quinquennial valuation except those made in the years 1870, 1894 and 1911, the society had always shown a surplus of assets over liabilities (both computed actuarially) and at the last such valuation in 1954 the surplus amounted to £3,801,000. That surplus was appropriable by the lodges and had been used at all material times for the provision of benefits for members or others, discretionary in character. Insofar as it was a question of fact the society was not established or conducted for profit, and was not a charity.

It was contended by the society that it was an organization not established or conducted for profit, whose main objects were concerned with the advancement of social welfare and that the hereditament was one to which section 8 of the Act applied.

It was contended by the corporation that the society was no such organization.

Quarter sessions was of the opinion that the hereditament was occupied for the purpose of the society and that the society was an organization not established or conducted for profit, and that the main objects of the society were concerned with the advancement of social welfare.

The question for the opinion of the High Court was whether, in the premises, the rate should be reduced to £971 17s. 4d. or remain unaltered in the sum of £1,197.

Michael Rowe Q.C. and *F. P. Hinchliffe* for the corporation. corporation.

Sir Andrew Clark Q.C. and *C. N. Glidewell* for the society.

The following case, in addition to those referred to in the judgment, was cited in argument: *Income Tax Commissioners* v. *Pemsel.*[2]

Cur. adv. vult.

Oct. 16. LORD GODDARD C.J. Ashworth J. will read the judgment of the court.

ASHWORTH J. This is an appeal from a decision of the Recorder of the City of Liverpool sitting at Manchester as a court of quarter sessions whereby he held that the Independent Order of Oddfellows Manchester Unity Friendly Society (hereinafter referred to as "the society") being conducted otherwise than for profit was entitled to the relief in respect of rates conferred by section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, as being a body of persons whose main object was the advancement of social welfare. It is only fair to mention

[2] [1891] A.C. 531, 583; 7 T.L.R. 657.

that this decision was given on January 3, 1957, before the decision of this court in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council* [1] which was affirmed by the Court of Appeal.[2]

In our view, unless there are valid reasons for distinguishing the present case from the *Skegness* case,[2] the present appeal must be allowed and as was to be expected, Sir Andrew Clark's argument on behalf of the society was largely directed to the establishment of such reasons.

The objects of the society are set out in rule 2, and Sir Andrew Clark's first point was that three at least and possibly six of these objects could properly be described as charitable, whereas none of the objects of the society involved in the *Skegness* case could be so described. The problem, however, is to ascertain the main objects of the organization, and even if it be the fact that some of its objects are charitable, the society is not within the subsection if its main objects are outside it.

Secondly, it was pointed out that in the present case benefits are not confined to members, whereas in the *Skegness* case they were. Although the rules do not appear to preclude the provision of benefit to persons who are unconnected with the society or its members, it seems to us that in substance the class of potential beneficiary may be described as comprising members and their families. Thirdly, it was said that in the present case the society's benefits are derived from a number of sources, including donations, whereas in the *Skegness* case they were derived only from members' contributions. In this connexion, however, our attention was drawn to a summary of income and expenditure for the year 1954 from which it appears that the society's total income for that year was approximately £2¼ million of which £550,000 was derived from contributions, £867,000 from interest, nearly £800,000 from other funds, and only £55,000 from "other income." It is in our view clear that the society's income is derived to a very large extent from contributions and accumulated funds and that the amount received by the society from sources other than members or past members is relatively small. Fourthly, it was contended by Sir Andrew Clark that in the present case benefits are discretionary whereas in the *Skegness* case they were calculated actuarially. In our view this contention cannot be maintained in the face of the elaborate tables of contributions and benefits included in the book of rules, all of which appear to have been prepared and certified by an actuary. While it may be true that in certain circumstances a discretion is conferred by the society's rules for the purpose of enabling a

[1] [1957] 1 Q.B. 531; [1957] 2 W.L.R. 322; [1957] 1 All E.R. 407.

[2] [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199.

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payment of benefit to be made to a person who would not otherwise be entitled to it, there cannot be any doubt but that the society's benefits are in substance calculated and paid on an actuarial basis.

The fifth point of distinction related to the effect of default in payment of contributions: in the present case a member in default may receive a discretionary benefit whereas in the *Skegness* case default appears to have disentitled a member to any benefits.

Lastly, Sir Andrew Clark cited the decision of Kekewich J. in *In re Buck*[3] as authority for the proposition that it is possible for a friendly society to be in law a charity. It was not contended that the society involved in this appeal is a charity, but the decision in question was relied upon as an answer to an impression, which might be created by the last paragraph of the judgment of the Court of Appeal in the *Skegness* case,[4] that friendly societies were altogether outside the scope of section 8 (1) (*a*). In the paragraph in question the court did not purport to lay down any universal rule in regard to friendly societies, but adopted the view expressed in this court that if friendly societies were to receive the relief conferred by the subsection it was remarkable that Parliament did not so provide in plain terms. That is still the view of this court.

In deference to Sir Andrew Clark's argument we have mentioned all the grounds on which he sought to distinguish the *Skegness* case, but in our view no valid distinction can be drawn between the two cases. Such differences as exist are insufficient to afford a distinction between the main objects of the respective societies, and the deciding factor in each case must be the main objects of the society. While it is true that in the present case the class of person who is eligible for benefit is wider than in the *Skegness* case and includes non-members, we do not think that this is sufficient to convert the main objects of the society from being the carrying into effect of a business arrangement in the form of mutual insurance into the advancement of social welfare.

For these reasons this appeal succeeds and the answer to the question raised in the Case Stated is that the rate should remain unaltered in the sum of £1,197.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for Philip B. Dingle, Manchester; Forsyte, Kerman & Phillips for John Gorna & Co., Manchester.*

J. D. P.

[3] [1896] 2 Ch. 727.

[4] [1957] 3 W.L.R. 550, 558.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* METROPOLITAN POLICE COMMISSIONER. *Ex parte* MELIA.

1957
Oct. 18.

Lord Goddard C.J., Donovan and Havers JJ.

Justices—Warrant—Indorsement—Warrant of arrest issued in Dublin for execution in London—Endorsement pinned on to warrant—Whether valid—Indictable Offences Act, 1848 (11 *&* 12 *Vict. c.* 42), *s.* 12.

"*Indorsement*"—*Meaning.*

Attaching a form of endorsement on to a warrant of arrest with a pin is not making "an endorsement on the warrant" within section 12 of the Indictable Offences Act, 1848.

APPLICATION for writ of habeas corpus.

On August 16, 1957, the Dublin District Court issued a warrant for the arrest of the applicant, Matthew Melia, alleging that he had wilfully neglected his child in a manner likely to cause her unnecessary suffering or injury to her health contrary to section 12 of the Children Act, 1908. On September 28, 1957, a Metropolitan magistrate, purporting to endorse the warrant in accordance with section 12 of the Indictable Offences Act, 1848,[1] as amended, signed a form authorizing the execution of the warrant, which form was then pinned on to the warrant.

On September 30, the applicant was arrested and detained at King's Cross Road Police Station to await an escort. On October 2, an ex parte application for leave to move for an order of habeas corpus was granted by the Divisional Court and the applicant was released on bail.

Henry Harris for the applicant. The ground for the application is that the warrant was not properly indorsed in accordance with section 12 of the Indictable Offences Act, 1848, as amended by section 131 of, and the fifth schedule to, the Magistrates' Courts Act, 1952. Before the applicant's arrest could be lawful, section 12 required the magistrate to make an indorsement signed with his name on the warrant; that should have been done on the warrant itself. Instead of writing on the warrant, the magistrate signed a form which was pinned on to the warrant.

F. H. Lawton Q.C. and *W. W. Stabb* for the Metropolitan Police Commissioner. The form which the magistrate signed

[1] Indictable Offences Act, 1848, s. 12 (as amended by s. 131 of, and Sched. V to, the Magistrates' Courts Act, 1952): ". . . if any person "against whom a warrant shall be "issued in any county or place in "Ireland, by any justice of the peace ". . . shall . . . reside, . . . in any "county . . . or place in that part "of the United Kingdom called "England or Wales, it shall and "may be lawful for any justice of "the peace in and for the county or "place . . . where he [such person] "shall reside or be . . . to make an "indorsement (K.) on the warrant, "signed with his name authorizing "the execution of the warrant within "the jurisdiction of the justice "making the endorsement . . ."

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is one which has been in use for some time at the Clerkenwell Magistrates' Court and the practice has been to attach it to the warrant in some way, either with a pin or a paper clip. At Bow Street the form is pasted on to the back of the warrant. The question is whether pinning the form on to the warrant is an indorsement on the warrant.

[DONOVAN J. Prima facie I would say No.]

From a practical point of view, a certain form of words has to be used when endorsing a warrant, and it would be convenient to stick the form on to the warrant, if pinning is considered insufficient.

[LORD GODDARD C.J. That could be done, or a rubber stamp with the form of words on it could be used and the magistrate could sign over it.]

Connolly Gage for the applicant's wife.

LORD GODDARD C.J. In this case the warrant has not been indorsed in the manner required by the Indictable Offences Act, 1848. It seems that a practice exists at Clerkenwell of having a form and pinning it to a document, but that is not an indorsement on the back of the document as required by law. Therefore, the applicant in this case was illegally in custody, and accordingly we have no option but to discharge him.

Application allowed.

Solicitors: *J. Dalton; Solicitor for the Metropolitan Police; Hempsons.*

C. J. E.

[QUEEN'S BENCH DIVISION.]

1957 *Oct.* 18.

Lord Goddard C.J., Donovan and Havers JJ.

* MAC FISHERIES (WHOLESALE & RETAIL) LTD. *v.* COVENTRY CORPORATION.

Food and Drugs — Food — Risk of contamination — Public health — Whether risk of contamination injurious to public health—Food and Drugs Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 16), *s.* 13 (1)—*Food Hygiene Regulations,* 1955 (*S.I.* 1955, *No.* 1906), *reg.* 8 (*a*).

Section 13 (1) of the Food and Drugs Act, 1955, provides: "The "Ministers may make such regulations as appear to them to be "expedient for securing the observance of sanitary and cleanly "conditions and practices in connexion with—(*a*) the sale of food "for human consumpfion, or (*b*) . . . exposure for sale, service "or delivery of food intended for sale or sold for human consump- "tion, or otherwise for the protection of the public health in "connexion with the matters aforesaid."

Regulation 8 of the Food Hygiene Regulations, 1955, provides: "A person who engages in the handling of food shall while so "engaged take all such steps as may be reasonably necessary to

"protect the food from risk of contamination, and in particular "... (*a*) shall not so place the food, or permit it to be so placed, "as to involve any risk of contamination; ..."

The defendants were charged that, being persons engaged in the handling of food, they permitted food to be so placed as to involve the risk of contamination contrary to regulation 8 of the Food Hygiene Regulations, 1955, made under section 13 of the Food and Drugs Act, 1955. The defendants owned a fish shop where many varieties of fish were placed on open plastic trays on counters, behind which stood assistants. The customers' clothing could, and did on occasions, come into contact with the food and they might have sneezed or coughed over it. The justices found that there was a risk of contamination although, if such contamination had in fact occurred, it was not of such a nature as to be injurious to health, and they convicted the defendants. On appeal:—

Held, that the object of section 13 of the Act of 1955 and therefore the object of the regulations was to procure the protection of the public health, and for an offence to be committed under the regulations the risk of contamination must be such as to be injurious to health, and therefore as the justices had, in effect, found that the contamination was not injurious to public health, no offence had been committed.

CASE STATED by Coventry justices.

The defendants, Mac Fisheries (Wholesale & Retail) Ltd., were charged on eight informations preferred by the Coventry Corporation, that they on February 1, 1957, at their shop in the Precint in the City of Coventry, being a person who engaged in the handling of food, did permit food to be so placed as to involve the risk of contamination, contrary to regulations 8 (*a*) and 32 (3) of the Food Hygiene Regulations, 1955,[1] made under sections 13 and 123 of the Food and Drugs Act, 1955.[2]

The justices heard the informations together and in respect of each found the following facts proved. The defendants, who engaged in the handling of food, while so engaged, failed to take all such steps as were reasonably necessary to protect the food from the risk of contamination, and permitted the food to be so placed as to involve the risk of contamination. The defendants were the largest multiple retail shop fishmongers in the world and in December, 1955, they opened a new shop in the Precint which was the new main shopping parade in the reconstructed centre of the City. The defendants spared no expense on equipment and fittings which alone cost £8,000. The shop was a

[1] Food Hygiene Regulations, 1955, reg. 8: "A person who engages in "the handling of food shall while so "engaged take all such steps as may "be reasonably necessary to protect "the food from risk of contamination, "and in particular (without prejudice "to the generality of the foregoing) "—(*a*) shall not so place the food "or permit it to be so placed, as to "involve any risk of contamination; "..."

[2] Food and Drugs Act, 1955, s. 13: "(1) The Ministers may make such "regulations as appear to them to be "expedient for securing the observ-"ance of sanitary and cleanly con-"ditions and practices in connexion "with—(*a*) the sale of food for human "consumption, or (*b*) the importa-"tion, preparation, transport, storage, "packaging, wrapping, exposure for "sale, service or delivery of food "intended for sale or sold for human "consumption, or otherwise for the "protection of the public health in "connexion with the matters afore-"said."

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closed fronted shop and was one of the most up-to-date of its kind in the country and in designing and constructing the premises the defendants acted in the best of good faith, adopting methods which in their judgment and experience were best suited to keeping fish fresh and to a shop of this description. On February 1, 1957, many varieties of wet, cured and shell fish and sausages were displayed in open plastic trays on the two tiers forming the main counter extending along the whole length of the shop, in the shop window, and on the shelf affixed to the wall on the customers' side of the counter. For the purpose of sale a selection of fish was put on view to prospective customers and comparatively small quantities were exposed in the trays at any one time. As this was a busy shop the food was not normally so exposed for more than half to three quarters of an hour before it was sold, the trays being refilled from bulk supplies kept fresh in cool and airy conditions at the rear of the shop. By paragraph 2 (*g*) of the case, the justices stated that on February 1, 1957, the clothing of the customers when at or moving along the front of the main counter could come in contact with food displayed, particularly when a purchase was made and the arm of the customer was extended over the food to the shop assistant at the rear of the main counter for the purpose of receiving the purchase, handing over the money or receiving change. Those actions could, and on a number of occasions did, carry the loose clothing of the customer against the food and cause bags looped over the arm or rested on the basket rail in front of the main counter, to come in contact with the food. Customers and children could touch the exposed food either accidentally or by way of appraising the food or, in the case of children, mischievously or out of curiosity. The position with regard to the food on the other counters and the glass shelves was the same except that the shop assistants did not serve from the rear. The faces of small children were level with and close to the exposed food. Customers and assistants spoke over and might have sneezed or coughed over the exposed food and some of them might have been carriers of infectious organisms. By paragraph 2 (*h*) of the case: By reason of the circumstances set out in paragraph 2 (*g*) there was a risk of contamination but, if such contamination had in fact occurred, it was not of such a nature as to be injurious to health. Fish had a natural and inevitable tendency towards putrefaction. That tendency was retarded by keeping the fish in conditions of low temperature, freely circulating fresh air and damp. In closed fronted shops there were greater difficulties in maintaining those conditions than in open fronted shops and it was therefore all the more important that nothing should be incorporated in the design and construction of the shop, save as was for other purposes reasonably necessary, which tended adversely to affect those conditions. There was no evidence to suggest that contamination of fish in a fish shop had ever resulted in food

poisoning but when ill effects had occurred after eating fish then probably they were caused from the fish having deteriorated from natural causes.

The public health inspector on behalf of the Coventry Corporation gave evidence that (inter alia) a screen along the front of the counter 18 inches high with a nine inch shelf on top would not restrict ventilation much as air travelled the length of the shop.

A director of the defendant company said (inter alia) in evidence that glass shields had been discussed on numerous occasions and there was a divergence of opinion between the theoretical inspectors and the defendants, the practical people. A closed fronted shop created a real difficulty. Deterioration set in rapidly when fish was housed. The defendants firmly believed that the prevention of the circulation of air was deleterious. They speeded up sales. Anything delaying that allowed bacteria to increase rapidly. Screens would interfere with the flow of air. If the fish touched the glass screens it would be messy. If a nine inch top were placed over the counter people would tend to put things on it. The screens would make the fish perish quicker. The metal ledge, which was 12 inches wide, was for shopping bags and kept people away from the counter.

It was contended by the defendants that the risk of contamination referred to in regulation 8 (*a*) of the Food Hygiene Regulations, 1955, was a risk of such contamination as was injurious to health and that unless such a risk of contamination was proved the defendants were not guilty of the offences charged; that paragraph (*a*) of regulation 8 was governed by the preceding words of the regulation and that an offence was committed only if it was proved both that there was a failure to take all such steps as might be reasonably necessary to protect the food from risk of contamination and that the food was so placed as to involve such risk; that there was no evidence to support a finding that the defendants had failed to take all such steps as were reasonably necessary to protect the food from contamination.

It was contended by the corporation that under regulation 8 the prosecution had to prove no more than a risk of contamination but that they did not have to prove (i) actual contamination or (ii) that such contamination if it did occur would be injurious to health; that the prosecution did not have to prove that all reasonable steps to prevent a risk of contamination had not been taken but that regulation 8 was absolute in that a person engaged in the handling of food must not place the food so as to involve risk of contamination; that there was evidence on which the court could conclude that actual contamination might have ensued.

The justices were of opinion that the risk of contamination referred to in the regulation was the risk of any contamination whether or not it was injurious to health. There was nothing

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in the regulations from which it could be implied that contamination, if it occurred, must be injurious to health; that the regulation was directed against the risk of any form of contamination defined in regulation 2 (1) as including contamination by odour, and that the regulations were directed to a standard hygiene. The justices appreciated that the regulations were made under section 13 of the Food and Drugs Act, 1955, and considered that the Ministers had power, in the words of the section, "to make such regulations as appear to them to be "expedient for securing the observance of sanitary and cleanly "conditions and practice in connexion with the sale of food . . .," that the regulations were made for those purposes and that the words "or otherwise for the protection of the public health" in section 13 did not govern the provisions of the regulations but gave power to make other regulations for the protection of the public health in connexion with the matters aforesaid; that exposing the fish in open trays in the way described was not taking all such steps as might be reasonably necessary to protect the food from risk of contamination. That some method such as suggested by the corporation was both reasonable and necessary for securing the observance of sanitary and cleanly conditions. Risk connoted possibility which, if applied too widely, would exist in almost any circumstances but the justices felt that in the present case the risk was just of sufficient reality that, having been brought to their attention by the prosecution, they could not say in law that the offences had not been proved. The justices, accordingly, convicted the defendants on each of the informations, and imposed a fine of £1 in respect of each of them.

The questions for the opinion of the High Court were whether the justices were correct (a) in holding that the risk of contamination referred to in regulation 8 (*a*) was a risk of any contamination, whether or not it was injurious to health; (b) in upholding the defendants' contention that an offence was committed only if it was proved both that there was a failure to take all such steps as might be reasonably necessary to protect the food from risk of contamination and that the food was so placed as to involve such risk; (c) in finding as a fact that the defendants had failed to take all such steps as were reasonably necessary to protect the food from risk of contamination; and (d) in convicting the defendants of the offences charged in the informations.

The defendants appealed.

Mervyn Griffith-Jones for the defendants.
Paul Wrightson for the Coventry Corporation.

No cases were cited in argument.

LORD GODDARD C.J. This is a case stated by justices for the City of Coventry, before whom Mac Fisheries (Wholesale

& Retail) Ltd. were charged on eight informations preferred by the local authority that the company "being a person who "engages in the handling of food did permit food to be so "placed as to involve the risk of contamination."

On the facts found by the justices, it seems that the company are the largest fishmongers in Great Britain. They have 418 shops. They serve a million and a quarter customers a week, and they have never had a single complaint for unwholesomeness or improper storing or keeping of fish during the history of the company. It seems that they have lately opened in the City of Coventry what looks to be a remarkably fine and modern fish shop, and on the fittings alone they have spent, so the justices find, a sum of £8,000, and I do not think anybody can say they have not taken every precaution to make this shop the most modern and up-to-date shop that can be imagined. Although I do not know that judges have any judicial knowledge of fish shops, we do have such knowledge as can be gained by walking about and using our eyes, and I should have thought the photographs show that the fish shop compares exceedingly favourably with other fish shops up and down the country. However, proceedings were taken, and we have to see what the proceedings were.

The proceedings were based upon regulation 8 of the Food Hygiene Regulations, 1955, which were made by the Minister of Health and the Minister of Agriculture, Fisheries and Food, under powers conferred on them by section 13 of the Food and Drugs Act, 1955.

[His Lordship read regulation 8 of the Food Hygiene Regulations, 1955, and section 13 (1) of the Food and Drugs Act, 1955, and continued:] It is quite obvious to my mind that the object of the Act of 1955, and therefore the object of the regulations, is to procure the protection of the public health. Those words must be kept in mind when one is construing the regulations and deciding whether an offence has been committed.

The justices in this case have obviously given great care and attention to the case. They have stated the case very fully in a way which enables the court to get a clear view of the reasons which moved them to decide as they did. They obviously did not think it was a serious case—they thought, I suppose, it was to raise some question of principle—because they only inflicted nominal fines. But for all that, I differ from the justices, and I do so because I think running right through the decision of the justices is a mistake which is vital, that is, they have taken a view of the construction of the section which I do not think is justified.

I think the case shows the extreme care Mac Fisheries Ltd. used to provide a sanitary and up-to-date shop, and I do not hesitate to say that if I had been sitting at first instance I should have come to a different decision from that of the justices, but that does not matter because if the justices have applied

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the right tests, this court does not interfere. The question is whether the justices have applied the proper tests. The justices among other things find in paragraph 2 (*h*): "By reason of the "circumstances set out in paragraph 2 (g) hereof there was a risk "of contamination but, if such contamination had in fact "occurred, it was not of such a nature as to be injurious to health." Later on they say: "We were of opinion:—(a) That the risk of "contamination referred to in the said regulation is the risk of any "contamination whether or not it is injurious to health." Then they ask the question of the court: "Were we correct in holding "that the risk of contamination referred to in the said regulation "is a risk of any contamination whether or not it is injurious to "health?" The answer to that, in my opinion, is that they were not correct in so holding. For the reasons I have pointed out it seems to me that the governing consideration in this case is the words of section 13, and therefore the whole task here is to see whether there was contamination which was injurious to health. If there was not contamination which was injurious to health, there was no offence. I do not know whether it is conceivably possible that you can have an article of food exposed for sale (unless you put it in some hermetically sealed vacuum or compartment) in which there cannot be some contamination. We are told that at various times there are epidemics and you catch the infection by simply being in a room or a place affected by the epidemic. I do not suppose the wit of man, short of putting things in hermetically sealed compartments, will ever prevent some form of contamination, which means touching the thing in some way to make it injurious. But what you have to look at is whether this food has been so exposed that there is a risk of contamination injurious to health, and it seems to me that the justices have found there is not. They thought that whether the risk of contamination was injurious to health or not was immaterial except no doubt for the purpose of penalty; but to my mind it is the one thing that is really material in the case, and as the justices have found here that any contamination to which this food was exposed in this very modern shop was not injurious, they ought to have found that no offence was committed. Therefore, I would allow this appeal and quash the conviction.

DONOVAN J. I entirely agree, and I add one or two observations of my own merely because of the importance of the matter and in deference to the argument of Mr. Wrightson.

Section 13 of the Act makes it clear that all these regulations are made for the purpose of protecting public health. Accordingly, the words "risk of contamination" in regulation 8 ought, in my view, to be construed as risk of such contamination as might be injurious to public health; not, I agree, whether in fact it is a risk which has damaged someone's health, since that would be locking the stable door after the horse had bolted.

and the regulations have in mind, as Mr. Wrightson says, prevention rather than cure.

On that construction, the question then in this case becomes: Was there a risk of contamination here to public health? In paragraph 2 (*h*) of the case the justices find: "By reason of "the circumstances set out in paragraph 2 (*g*) hereof there was "a risk of contamination but, if such contamination had in fact "occurred, it was not of such a nature as to be injurious to "health." Mr. Wrightson wants that read in this way: In fact the contamination had not been injurious to anybody's health. But that, as I have said, is not the question which the regulations pose, and in this particular context one is concerned with possibilities rather than what has in fact happened. So the question is: does this finding not rather mean: This contamination, if any, was not of the kind injurious to public health, "innocuous contamination," if one may use that term. I think that is what the finding clearly does mean. When the justices talk of the "nature" of the contamination they are referring to the kind of contamination, and when they say it is not of such a nature, and so on, they are saying it is not of the kind injurious to public health. To say it was not of such a nature as to be injurious is in other words saying more than that it has not hurt anybody; one is saying in effect it could not hurt anybody. Accordingly, upon the construction which we are giving to regulation 8 and section 13 of the Act, there was no risk of the kind of contamination referred to in regulation 8, and I agree that the appeal should be allowed. Of course, if a state of affairs should arise in any fish shop where customers were continually sneezing or coughing over the fish or continually handling it with dirty hands, a very different situation would arise and nothing in what the court is saying today would preclude a prosecution in such a case; but this case really turns on the construction of section 13 of the Act and the particular finding of the justices which I have already quoted.

HAVERS J. I agree with the conclusions to which Lord Goddard C.J. and Donovan J. have arrived and with the reasons on which they base their decision.

Appeal allowed.

Solicitors: *Simpson, North Harley & Co.; Sharpe, Pritchard & Co. for C. Barratt, Coventry.*

C. J. E.

[COURT OF APPEAL.]

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Jenkins, Parker and Pearce L.JJ.

* JOHN WALSH LTD. *v.* SHEFFIELD CORPORATION. TRANTER *v.* SAME.

Rates and rating—Assessment—Valuation list—Proposal in 1954 *by rating authority to add hereditament to list—Locus standi at that date of rating authority to make such proposal—Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 40 (1), 144 (1), (9)—*Rating and Valuation* (*Miscellaneous Provisions*) *Act,* 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 2 (1).

Statute — Construction — Subsequent enactments—Whether relevant in interpreting earlier one.

Before the coming into force of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which by section 2 (1) expressly confers such a power, a rating authority had no locus standi under section 40 (1) (*b*) of the Local Government Act, 1948,[1] to make a proposal for the alteration of the valuation list by the addition of a hereditament not included in the list.

APPEAL from the Lands Tribunal.

Certain shop premises in Sheffield, after having been damaged by enemy action, became unfit for occupation and in 1941 were deleted from the valuation list. After reconstruction they were re-occupied during the year of assessment 1953/1954. On March 27, 1954, the corporation, as the rating authority, made a proposal

[1] Local Government Act, 1948, s. 40 (1): "Any person who is "aggrieved—(*a*) by the inclusion of "any hereditament in the list; or "(*b*) by any value ascribed in the list "to a hereditament or by any other "statement made or omitted to be "made in the list with respect to a "hereditament; or (*c*) in the case of "a building or portion of a building "occupied in parts, by the valuation "in the list of that building or portion "of a building as a single heredita-"ment, may at any time make a "proposal for the alteration of the list "so far as it relates to that heredita-"ment."

S. 144: "(1) In this Act, except so "far as the contrary is expressly "provided or the contract otherwise "requires, the following expressions "have the meanings hereby respect-"ively assigned to them, that is to "say— . . . 'hereditament' [has "the meaning assigned to it by s. 68 "of the Rating and Valuation Act, "1925, i.e., 'any lands, tenements, "'hereditaments or property which "'are or may become liable to any "'rate in respect of which the valua-"'tion list is by this Act made "'conclusive'] . . . (9) Any reference "in this Act to the alteration of a "valuation list or draft valuation list "includes a reference to the insertion "in the list or draft list, or the "omission from the list or draft list, "of any hereditament, and references "to the alteration of the valuation list "with respect to a hereditament shall "be construed accordingly."

Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 2: "(1) In section 40 of the Act of "1948 . . . the following subsec-"tion shall be inserted after sub-"section (2):—'(2A) Without pre-"'judice to any right exercisable "'by rating authorities by virtue of "'subsection (1) of this section, "'where (*a*) it appears to a rating "'authority that a hereditament in "'their area, which is not included "'in the list, ought to be included "'therein, and (*b*) the valuation "'officer gives notice in writing to the "'rating authority that he does not "'intend to make a proposal for in-"'serting that hereditament in the "'list, the rating authority . . . may "'make a proposal for the alteration "'of the list by the insertion of that "'hereditament therein.'"

as persons aggrieved under section 40 (1) (*b*) of the Local Government Act, 1948, that the premises should be included in the valuation list for the year 1954/1955 with gross value £21,500, rateable value £17,913. This proposal was opposed by the ratepayers and the local valuation officer, who before the Lands Tribunal raised a preliminary point that under the provisions of the Act of 1948 then in force, before the amendment introduced by section 2 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, a rating authority had no locus standi to make a proposal for the inclusion in the valuation list of a hereditament wholly omitted therefrom. The Lands Tribunal ruled against this submission. The valuation officer appealed.

G. D. Squibb Q.C. and *Patrick Browne* for the valuation officer.

Michael Rowe Q.C. and *W. B. Harris* for the corporation.

The case cited in argument is referred to in the judgment.

JENKINS L.J. This is an appeal by the valuation officer from a decision of the Lands Tribunal on a preliminary question of law raised in two appeals from the decision of the local valuation court for the West Riding of Yorkshire.

The question of law, as stated in paragraph 2 of the case, is "whether under section 40 (1) (*b*) of the Local Government Act, "1948 (11 & 12 Geo. 6, c. 26), a proposal made by the respondents, "the Lord Mayor, Aldermen and Citizens of the City of Sheffield "(acting by the council of the said city) and the said council on "March 27, 1954, for the inclusion in the valuation list for the "City of Sheffield of the hereditament, occupied by the appellants, "John Walsh Limited, described as Shop, Stores and Appur-"tenances at High Street, Sheffield, with gross value £21,500, "rateable value £17,913, is a valid proposal."

To put it very shortly, the point is whether a rating authority such as the present respondents was entitled, upon the true construction of section 40 (1) of the Local Government Act, 1948, to make a proposal to the effect that a hereditament wholly excluded from the valuation list should be included therein. The Lands Tribunal, in the person of Mr. Erskine Simes, has decided this preliminary point in favour of the rating authority, holding that, upon the true construction of section 40 (1), read in conjunction with the definition of the word "alteration" in section 144 (9) of the Act of 1948, section 40 (1) did extend to a proposal by the rating authority for inclusion in the list of a hereditament wholly omitted. It was argued, quite properly, as a question of construction, and Mr. Erskine Simes accepted the view that the construction which he adopted was, as a matter of common sense, the proper construction, and that it was possible to get that construction out of the language used.

This is the shortest of short points, but, in order to deal with

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it, I must refer to certain provisions of the Local Government Act, 1948. Section 33 provides: "(1) Valuation lists shall, "instead of being prepared and amended by the bodies" charged with that duty previously, ". . . be prepared and amended by "valuation officers of the Commissioners of Inland Revenue." Section 33 (1) (*b*) says: "Save as hereafter provided in this Part "of this Act, rating authorities shall have no functions in relation "to the preparation and amendment of valuation lists."

Then comes section 40, which is the next section I need refer to. Subsection (1) says: "Any person who is aggrieved—(*a*) by "the inclusion of any hereditament in the list; or (*b*) by any value "ascribed in the list to a hereditament or by any other statement "made or omitted to be made in the list with respect to a here-"ditament; or (*c*) in the case of a building or portion of a building "occupied in parts, by the valuation in the list of that building "or portion of a building as a single hereditament, may at any "time make a proposal for the alteration of the list so far as it "relates to that hereditament." Subsection (2) says: "The "valuation officer may at any time make a proposal for any "alteration of a valuation list."

Then one has to look at some definitions. Section 144 provides inter alia by subsection (1) that "hereditament" has the sense assigned to it by section 68 of the Rating and Valuation Act, 1925. If one turns to section 68 of the Rating and Valuation Act, 1925, one finds that "hereditament" is there defined as meaning "any "lands, tenements, hereditaments or property which are or may "become liable to any rate in respect of which the valuation list "is by this Act made conclusive." Then, going back to section 144 of the 1948 Act, I must refer to subsection (9), to which considerable importance—indeed, primary importance—was attached by Mr. Erskine Simes. Subsection (9) reads: "Any reference "in this Act to the alteration of a valuation list or draft valuation "list includes a reference to the insertion in the list or draft list, "or the omission from the list or draft list, of any hereditament, "and references to the alteration of the valuation list with respect "to a hereditament shall be construed accordingly."

Returning to section 40 (1), and bearing in mind these definitions, I must now apply myself as best I can to the language of that subsection itself. It begins: "Any person who is aggrieved." It is not in dispute that the rating authority here could be, for the purposes of this section, a person aggrieved, and therefore a person entitled, in any case falling within the terms of the subsection, to make a proposal. Then subsection (1) goes on to state the grievances with which the section is dealing, and sub-paragraph (*a*) says "by the inclusion of any hereditament in the list." That is the first subject of grievance stated. If the subsection had been intended to cover the omission of any hereditament from the list, it seems to me plain that the framers of the enactment could not have failed to insert "or by the omission of any hereditament "from the list." Inclusion being expressly referred to, it cries

out for there being an express reference to exclusion if exclusion is to be covered by the subsection at all. Then (*b*) is: "by any "value ascribed in the list to a hereditament or by any other statement made or omitted to be made in the list with respect "to a hereditament." To my mind, particularly when it is looked at in the light of the immediately preceding reference to "the "inclusion of any hereditament in the list," that relates to the various particulars stated in the list with respect to a hereditament which is included in the list.

In that connexion, we were shown the form annexed to the Rating and Valuation Acts (Form of Valuation List) Rules, 1932 (S.R. & O., 1932, No. 395), and that, I think, well brings out the point. The Form of Valuation List is a form with 11 columns, beginning with "Assessment No.," and then "(2) Name of the "occupier," "(3) Name of the owner," "(4) Description of pro-"perty," "(5) Name or situation of property," and "(6) Esti-"mated extent." Then there are columns (7) to (11), dealing with the question of value.

It seems to me that sub-paragraph (*b*) of subsection (1) of section 40 is directed to cases in which the hereditament is included in the list, but the statements in the list about that hereditament are said to be inaccurate, or some statements about that hereditament being a hereditament in the list have been omitted to be made. I do not think the circumstance that the definition of "hereditament" in section 68 of the 1925 Act includes "hereditaments or properties which are or may become "liable to any rate in respect of which a valuation list by this "Act is made conclusive" is of any assistance to the rating authority here. To my mind, it is clear that, to bring section 40 (1) into action, there must be a hereditament which is not only *liable* to be included in the list but *has been* included in the list.

Then comes sub-paragraph (*c*), which relates to buildings occupied in part. I do not think I need trouble with that, except to point out that it clearly refers to a building actually in the valuation list, because the person referred to has to be aggrieved by the valuation in the list of the building concerned as a single hereditament. It is if, and only if, those conditions have been fulfilled—that is to say, if, and only if, the person making the proposal can show himself to be aggrieved by matters included in one or other of sub-paragraphs (*a*), (*b*), and (*c*)—that he can propose an alteration. To my mind, the grievances all relate, as I have endeavoured to state, quite clearly to matters of the kinds described concerning hereditaments in the valuation lists, and when there is a grievance of any of those kinds with respect to such a hereditament, the condition precedent is fulfilled. Given the fulfilment of that condition, and not otherwise, an alteration can be proposed.

The concluding words of the subsection, which I will read again, are "may at any time make a proposal for the alteration "of the list so far as it relates to that hereditament." The list

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must relate to that hereditament; that means, as I take it, that the hereditament must be on the list. Then the proposal which can be made is a proposal for an alteration of the list so far as it relates to that hereditament. One may contrast with subsection (1) of section 40 the unrestricted power of making a proposal for any alteration of a valuation list conferred on the valuation officer by subsection (2).

At this point, the argument for the rating authority dependent on section 144 (9) comes into play. Under subsection (9) the provision is: "Any reference in this Act to the alteration of a "valuation list or draft valuation list includes a reference to the "insertion in the list or draft list, or the omission from the list "or draft list, of any hereditament, and references to the altera-"tion of the valuation list with respect to a hereditament shall be "construed accordingly." It is said (and Mr. Erskine Simes accepted the argument) that reading into section 40 (1) that definition of "alteration," it follows that it is open to the person aggrieved to propose the inclusion of a hereditament wholly excluded. I cannot agree. The whole of the definition section, section 144, in the Act of 1948, I should have thought is subject to the overriding consideration stated in the first part of that section: "In this Act, except so far as the contrary is expressly "provided or the context otherwise requires, the following expres-"sions have the meanings hereby respectively assigned to them." It is true that, as a matter of strict construction, those words do not in terms govern subsection (9). Nevertheless, I think effect must be given to that principle, and in this context, for the reasons I have endeavoured to state, I cannot regard the right of the person who is aggrieved as extending, on the strength of the meaning of "alteration" as set out in the definition, to a proposal for inclusion in the list of a wholly omitted hereditament.

There was a subsidiary argument for the valuation officer based on the amendment of section 40 of the Act of 1948 which is effected by section 2 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Section 2 provides as follows in subsection (1): "In section 40 of the Act of 1948 (which enables proposals to be "made for the alteration of valuation lists) the following subsec-"tion shall be inserted after subsection (2):—'(2A) Without "'prejudice to any right exercisable by rating authorities by "'virtue of subsection (1) of this section, where (*a*) it appears to "'a rating authority that a hereditament in their area, which is "'not included in the list, ought to be included therein, and "'(*b*) the valuation officer gives notice in writing to the rating "'authority that he does not intend to make a proposal for "'inserting that hereditament in the list, the rating authority, at "'any time within 28 days after the date on which that notice was "'given, may make a proposal for the alteration of the list by the "'insertion of that hereditament therein': provided that this "subsection shall not apply for the purpose of altering any

"valuation list in force at the passing of this Act." I do not think I need to refer to subsection (2).

That amendment, or that addition to section 40 of a new subsection (2A), does not, owing to the dates, apply to the valuation list actually in question in the present case. But it is argued for the valuation officer that this new subsection throws light upon the construction of section 40 as it was originally framed. It is said that, if rating authorities already have power under section 40 to propose the inclusion of an omitted hereditament in the valuation list, there could be no object in putting in the new subsection (2A), and it is consistent, and consistent only, with the supposition that the legislature recognized that there was this omission from section 40.

There are many cases dealing with the question of the extent to which subsequent legislation on a given subject-matter can be used as an aid to the construction of previous enactments. We were referred to the discussion on this topic in the House of Lords in *Kirkness* v. *John Hudson, Ltd.*[1] There have been many other cases bearing on the point. I think the effect of those cases is that it is only legitimate to call in aid later legislation to resolve some real ambiguity in the enactment which falls to be construed. Even then, even when it is legitimate to look at such legislation, no assistance can be derived from it, unless it can really be said that the provisions of the subsequent legislation would be wholly otiose and inept unless a particular view of the earlier legislation was taken. I do not think that this case is one in which, on those principles, any assistance can be derived from the provisions of subsection (2A) of the Act of 1955.

I return to the language of section 40 (1), and, although I appreciate the possible inconvenience to rating authorities of the construction for which the valuation officer contends, I am constrained, by what I take to be the clear and unambiguous meaning of the language used, to hold that the construction placed on this section by Mr. Squibb is the right construction.

That being so, in my judgment, this appeal should be allowed.

PARKER L.J. This is a very short point, and I so entirely agree with what my Lord has said, and with his reasoning, that to give a separate judgment would be merely repetition. I would only observe that, in my judgment, section 40 (1) is perfectly clear and unambiguous, and I find it quite unnecessary—and, indeed, it would be wrong—to consider the later amendment in 1955.

PEARCE L.J. I agree. Under section 40 (1), the possession of one out of several grievances is a condition precedent to the making of any proposal for the alteration of the list. Section 144 (9) does not purport to enlarge the range of grievances; it merely enlarges the alterations which may be made. Since the list of

[1] [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345.

C. A.
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grievances does not embrace the grievance in this case, namely, the omission of a hereditament, I am reluctantly compelled to the conclusion that the rating authority cannot make the proposal which it desired to do in this case.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Sharpe, Pritchard & Co., for John Heys, Town Clerk, Sheffield.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

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Oct. 8, 9, 16.
Lord Goddard C.J., Donovan and Ashworth JJ.

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Rates and Rating—"Religion"—Moral virtue—United Grand Lodge of Freemasons — Collective body administering and governing masonic activities—Purpose of United Grand Lodge to promote masonry—Objects of administrative office of organization—Objects of organization itself—Objects of freemasonry to promote and advance certain virtues—Furtherance of religious attitude for fellowship and service common to civilized religions—Candidates required to declare belief in a Supreme Being—Whether main object "the "advancement of religion"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

Charity—Religion.

The United Grand Lodge of Freemasons in England claimed to be entitled to the rating relief conferred by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of a hereditament, Freemasons' Hall, occupied by them, on the ground that they were an organization "whose main objects are "charitable or are otherwise concerned with the advancement of "religion" within the meaning of section 8 (1) (*a*). The United Grand Lodge was a collective body formed by a general representation of private lodges of freemasons, the Grand Stewards and Grand Officers with the Grand Master at their head; its purpose was to promote masonry and it had two main functions, to administer and centrally govern masonic activities throughout its jurisdiction and to administer a fund of benevolence. Freemasonry itself was not a religion and there was no requirement in masonry that a candidate should have any particular religious belief but he was required to declare his belief in a Supreme Being. It was based on furthering a religious attitude to God and to one's fellow men for fellowship and service on a basis common to all or most civilized religions. The main objects of freemasonry were to carry out the objects set out in certain "Antient Charges"—in effect, to promote and advance the virtues which every mason was charged to cultivate: good citizenship, honest work, morality and wisdom, brotherly love, compassion, charity to the poor and belief in a Supreme Architect of heaven and earth — and in the solemn admonition to a mason on his initiation, in which the "Volume "of the Sacred Law" was recommended to him as the standard of

truth and justice and he was urged to regulate his conduct by it and to be reverent, honest, compassionate, loyal, temperate, benevolent and chaste. All ceremonies opened and closed with prayer and constant reference was made to the "Volume of the "Sacred Law" (in England, the Bible) which had to be open throughout the ceremony, the principles of (in England) the Bible and a belief in God being fundamental.

Quarter sessions dismissed the claim on the ground that the function of the United Grand Lodge was the co-ordination of the work of the lodges of freemasonry throughout England and that the work which that involved, being largely administrative in character, was not the advancement of religion. On appeal:—

Held, (1) that the purpose of an office where the clerical and administrative work of an organization was done was the purpose of the organization itself from which it could not be isolated. The functions of the United Grand Lodge to administer and govern masonry were only the ways in which its purpose of promoting masonry was carried out, and accordingly, in order to determine whether the United Grand Lodge came within section 8 (1) (*a*) it was necessary to consider the objects of masonry itself.

(2) That on a consideration of the constitution and work of freemasonry its main objects, laudable though they might be, were not for the advancement of religion: there was no religious instruction, no programme for the persuasion of unbelievers, no religious supervision to see that its members remained constant in the various religions which they might profess, no holding of religious services and no pastoral or missionary work of any kind; nor did it seem that a mason need practise any religion, for provided that he believed in a Supreme Being and lived a moral life he might be and remain a mason. The United Grand Lodge, therefore, were not entitled to the relief claimed.

Per curiam. To advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary.

CASE STATED by County of London Quarter Sessions.

By a notice of appeal given under section 4 of the Poor Relief Act, 1743, the appellants, the United Grand Lodge of Ancient Free and Accepted Masons of England (hereafter referred to as the Grand Lodge), appealed against a rate made on March 8, 1956, by the respondent rating authority, the Holborn Borough Council, in respect of a hereditament, Freemasons' Hall, Great Queen Street, in the Borough of Holborn, occupied for the purposes of the appellants, on the grounds that they were an organization within section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1] and that accordingly the

[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to . . . "(*a*) any hereditament occupied for "the purposes of an organisation . . . "which is not established or con- "ducted for profit and whose main "objects are charitable or are other- "wise concerned with the advance- "ment of religion, education or social "welfare. . . . (2) For the purposes "of the making and levying of rates ". . . for the year beginning with the "date of the coming into force of "the first new valuation list . . . the "amount of rates chargeable in re- "spect of a hereditament to which "this section applies shall . . . be "limited as follows . . . (*a*) for the "first year of the new list, the

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rate made, levied and charged on them as the occupiers was in excess of the amount permitted by the section.

The following were among the facts found by quarter sessions.

Freemasons' Hall, built as a memorial to masons killed in the 1914–18 war and paid for by voluntary contributions of masons, comprised a Grand Temple for the meetings of Grand Lodge, 17 lodge rooms which were let for the meetings of masonic lodges in the London area, a museum, a library and administrative offices for the clerical staff of 50 persons. It was occupied for the purposes of the appellants. The Grand Lodge was not established or conducted for profit but was formed as an organised body in 1717 by the lodges of masons then existing in London and was unincorporated.

The position of the Grand Lodge in Freemasonry was comprehensively described in the following rules of the "General "Laws and Regulations for the Government of the Craft" contained in the book of "Constitutions," a copy of which was annexed to the case. "2. The interests of the fraternity are "managed by a general representation of all private lodges on "the register, the Grand Stewards for the year and the Grand "Officers, present and past, with the Grand Master at their head. "This collective body is styled The United Grand Lodge of "Antient Free and Accepted Masons of England, and is herein-"after referred to as 'The Grand Lodge.' 4. The Grand Lodge "possesses the supreme superintending authority, and alone has "the inherent power of enacting laws and regulations for the "government of the craft, and of altering, repealing, and abro-"gating them, always taking care that the antient landmarks of "the Order be preserved. 5. The Grand Lodge has also the "power of investigating, regulating, and deciding all matters "relative to the craft, or to particular lodges, or to individual "brothers, which power it may exercise either of itself or by such "delegated authority as in its wisdom and discretion it may "appoint; but the Grand Lodge alone has the power of erasing "lodges and expelling brethren from the craft, a power which it "does not delegate to any subordinate authority."

The number of lodges represented in the Grand Lodge was some 7,000. It met in the Grand Temple at Freemasons' Hall with the appropriate ritual and the average attendance at quarterly meetings was about 1,500 although membership of the Grand Lodge was many times that number and all were entitled to attend. The total number of practising masons in this country was roughly 500,000.

The purpose of the Grand Lodge in so far as it had any separate existence was to promote masonry. It had only two main functions; one was to administer and centrally govern masonic activities throughout its jurisdiction and the other was

"amount so chargeable shall not "exceed the total amount of rates "(including any special rates) which "were charged in respect of the "hereditament for the last year before "the new list came into force."

concerned with the administration of a fund known as the "Fund "of Benevolence." The former function was exercised in part directly by the Grand Lodge and in part on its behalf under delegated powers by the Grand Master, the Grand Secretary and a body known as the "board of general purposes"; the constitution and functions of the "board of general purposes" were laid down in rules 216 to 238 in the book of "constitutions." The Grand Lodge had power under rule 192 to make grants for charitable purposes out of the Fund of Benevolence, but otherwise the fund was administered by a body known as the Board of Benevolence, to which the Grand Lodge had delegated its powers; the board was an autonomous body, but always reported at the quarterly meetings of the Grand Lodge. The constitution and functions of the Board of Benevolence were laid down in rules 191 to 215. In the year ending December 31, 1955, the total income of the fund of general purposes amounted to £168,020 and of the fund of benevolence to £67,619. The Grand Lodge controlled the 7,000 lodges under its jurisdiction; it kept records of every lodge year by year and issued to every mason after his initiation a certificate which was his "mason's passport." The formation of any new lodge had to be sanctioned by the Grand Master on behalf of the Grand Lodge; all by-laws of lodges (and any alteration thereof) had to be approved by him on behalf of the Grand Lodge and his dispensation or consent had to be obtained for the holding of a regular meeting of any lodge upon a day other than the specified day or for the permanent or temporary removal of a lodge. Various returns had to be made and fees and contributions paid by all lodges to the Grand Lodge. The Grand Master and other officers of the Grand Lodge had power to visit any lodge as part of the general supervisory jurisdiction of the Grand Lodge. The Grand Lodge decided and legislated upon questions of policy and any other questions appertaining to the Order of Masonry, including questions of masonic ritual, practice and procedure and occasionally of finance. Lodges sought the advice of the Grand Lodge in any matters of difficulty which might arise. The Grand Lodge was the ultimate disciplinary authority. It had power to erase a lodge for misconduct or to expel an individual mason, though that power was very seldom invoked. It also had powers to admonish, fine, or suspend a lodge or individual mason, to review decisions of lodges excluding any of their members and to decide masonic questions, disputes or differences.

The board of benevolence was a registered charity. The income of the fund of benevolence was derived substantially from contributions from lodges and from income from investments bought out of past surpluses of such contributions. In the year ending December 31, 1955, the Grand Lodge made out of the fund donations of £575 to the Westminster Abbey Appeal and £1,100 to certain masonic institutes. In the same year the board disbursed from the fund a total of £45,642, made up of

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£40,838 voted and paid to petitioners, and the following donations: £1,300 to the Royal Masonic Benevolent Institution, £365 to sundry local charities and £3,151 to Flood and Hurricane Relief (New South Wales, West Indies, India). In accordance with the rules there was paid from the fund of benevolence to the fund of general purposes in each year 10 per cent. of the contributions received by the former from lodges, to cover the voluminous administrative and clerical work, including inquiries into all applications for relief, which was done by the staff of the Grand Lodge in connexion with the administration of the fund of benevolence. The actual cost of the work exceeded that amount. In the year ended December 31, 1955, a sum of £4,869 was so paid.

The petitioners to whom grants were made by the board of benevolence were all masons or their widows or dependent children under the age of 21, and no other persons were eligible for such benefits. The grants or help given were based solely on need, and bore no relationship to what the petitioners or their relatives might have contributed to masonic funds, but in accordance with the rules a petitioner did not in general (subject to certain discretionary exceptions) become eligible to receive the benefits of the fund of benevolence until he had paid all subscriptions and dues to a lodge for at least five years. All relief to petitioners was given in the form of monetary grants, and covered distress in every form, including besides grants for subsistence grants for, e.g., holidays, convalescence or training a boy for a trade or profession. No mason had any right to receive any relief from the fund, but he knew that he could apply for relief and that if he made an application the decision would rest in the discretion of people in whom he had confidence. In so far as it was a question of fact, the two main functions of the Grand Lodge were (1) to administer the fund of benevolence and (2) to administer and centrally govern masonic activities.

The main objects of freemasonry were to carry out the objects set out in the "Antient Charges" reproduced at pp. 3–15 of the book of "Constitutions" and in an extract from a solemn admonition which formed part of the ritual of the ceremony of initiation of a mason and was regarded by masons as being in substance exactly the same as the "Antient Charges," but put into a modern form. The "Antient Charges" were directed to promoting principles of social conduct founded on a moral or ethical basis. The extract above referred to was as follows:—

"As a freemason, let me recommend to your most serious "contemplation the Volume of the Sacred Law, charging you "to consider it as the unerring standard of truth and justice, "and to regulate your actions by the Divine precepts it contains; "therein, you will be taught the important duties you owe to "God, to your neighbour, and to yourself. To God, by never "mentioning His name but with that awe and reverence which "are due from the creature to his Creator, by imploring His

"aid in all your lawful undertakings, and by looking up to Him "in every emergency for comfort and support. To your neighbour, by acting with him on the square, by rendering him "every kind office which justice or mercy may require, by "relieving his necessities and soothing his afflictions, and by "doing to him as in similar cases you would wish he would "do to you. And to yourself, by such prudent and well-"regulated course of discipline as may best conduce to the "preservation of your corporeal and mental faculties in their "fullest energy, thereby enabling you to exert those talents "wherewith God has blessed you, as well to His Glory as the "welfare of your fellow-creatures.

"As a citizen of the world, I am to enjoin you to be exemplary "in the discharge of your civil duties; by never proposing, or at "all countenancing, any act that may have a tendency to subvert "the peace and good order of society; by paying due obedience "to the laws of any State which may, for a time, become the "place of your residence, or afford you its protection; and above "all, by never losing sight of the allegiance due to the sovereign "of your native land, ever remembering that nature has im-"planted in your breast a sacred and indissoluble attachment "towards that country whence you derived your birth and infant "nurture.

"As an individual, let me recommend the practice of every "domestic as well as public virtue. Let prudence direct you, "temperance chasten you, fortitude support you, and justice be "the guide of all your actions. Be especially careful to maintain, "in their fullest splendour, those truly masonic ornaments which "have already been amply illustrated: benevolence and charity."

Freemasonry was not itself a religion. There was no requirement in masonry that a candidate should have any particular religious belief, but he was required to declare his belief in a Supreme Being. Masons might not in the lodge discuss religion other than universal religion and belief in God. Freemasonry had a religious foundation or basis and freemasons were actuated by religious motives in joining the craft and carrying on its activities. The principles of freemasonry were brotherly love, relief and truth which formed the subject of the solemn admonition to every person being initiated into freemasonry quoted above. At an earlier stage of the initiation ceremony the virtues of benevolence and charity, which followed as a consequence from those principles, were emphasized in an address to the candidate as a distinguishing characteristic of a freemason's heart. All ceremonies opened and closed with prayer and constant references were made to the "Volume of the Sacred Law" which in English lodges was the Bible, but elsewhere might be some other sacred book (e.g., the Koran) which had to be open throughout the ceremonies. Lodges were entitled to appoint an officer designated as a chaplain, whose function was to recite the prayers, but not every lodge did so. While there was no

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limitation regarding religion or religious sects, the principles of (in England) the Bible and a belief in God were fundamental. As a general description of the basis of freemasonry, it was an organization devoted to advancing the acceptance and practice of basic religious principles which might be particularized as man's relations to God, to his neighbour and to himself. It was based entirely on a belief in God and a reverence for his work which was fundamental in its tenets; while not itself a religion, its objects and practices were religious in that they were directed to furthering a religious attitude to God and to one's fellow men for fellowship and service, on a basis common to all or most civilized religions.

There were four main masonic benevolent institutions, the Royal Masonic Institution for Girls (a girls' school), the Royal Masonic Institution for Boys (a boys' school), the Royal Masonic Benevolent Institution (for the welfare of aged poor) and the Royal Masonic Hospital, the benefits of which were available only to masons or their dependants. Each of those institutions was a separate and self-governing legal entity. In the case of the first two bodies no fees were paid and only orphans were eligible. They might either be admitted to the schools or be given external grants to educate them at other schools. The Benevolent Institution had homes, but for the greater part granted outside relief in the shape of some 2,000 annuities. The Masonic Hospital was not confined to the poor; patients who could afford to pay full fees did so, and otherwise the fees varied according to the patient's means, down to nothing. Those institutions were supported entirely by voluntary contributions almost wholly from freemasons, the bulk of which did not come through the Grand Lodge but direct from lodges and individual masons. The Grand Lodge through the board of general purposes itself subscribed (the amount so subscribed in the year ended December 31, 1955, being £1,100, with a further £1,300 from the board of benevolence), but the support of those institutions was not a main object of the Grand Lodge.

The appellants contended that they were entitled to the relief from rates given by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, by reason of being an organization not established for profit whose main objects were charitable or were otherwise concerned with the advancement of religion, education or of social welfare.

The rating authority contended that the main objects of the Grand Lodge were not charitable nor otherwise concerned with the advancement of religion, education or social welfare; that the main objects of freemasonry were not charitable nor otherwise concerned with the advancement of religion, education or social welfare, and that, accordingly, they were not entitled to the relief from rates given by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Quarter sessions decided that the Grand Lodge was mainly

concerned with the co-ordination and administration of freemasonry in England and, as such, the section did not apply to a hereditament occupied for the purpose of the Grand Lodge; that it therefore became unnecessary to consider various other matters argued before them as to whether the main objects of freemasonry were charitable or otherwise concerned with the advancement of religion, education or social welfare, those being matters which it was unnecessary to discuss or determine in view of the judgment at which they arrived; and that, as in their view the Grand Lodge was not directly concerned with those objects but was concerned with the co-ordination or administration of various lodges it did not in their judgment itself fall within the protection given by the section. They therefore dismissed the appeal.

The Grand Lodge appealed.

Milner Holland Q.C., *W. L. Roots* and *Trustam Eve* for the appellants.

Patrick Browne for the rating authority.

The following cases were referred to in argument: *Keren Kayemeth Le Jisroel Ltd.* v. *Commissioners of Inland Revenue* [2]; *In re Porter* [3]; *Re Thackrah* [4]; *Oxford Group* v. *Commissioners of Inland Revenue* [5]; *Gilmour* v. *Coats* [6] and *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council.* [7]

Cur. adv. vult.

October 16. Lord Goddard C.J. Donovan J. will deliver the judgment of the court.

Donovan J. This is an appeal by way of case stated from a decision of the appeals committee of London Quarter Sessions dismissing an appeal by the United Grand Lodge of Masons of England (hereinafter called the appellants) against a rate levied upon them by the Holborn Borough Council. The appellants claimed the benefit of the partial relief from rates conferred in certain cases by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The Holborn Borough Council refused the claim and quarter sessions upheld the refusal.

Section 8 (1) is in these terms: "This section applies to "the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether "corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or

[2] [1931] 2 K.B. 465; 47 T.L.R. 461, C.A.; [1932] A.C. 650; 48 T.L.R. 459, H.L.

[3] [1925] 1 Ch. 746.

[4] [1939] 2 All E.R. 4; [1939] W.N. 113.

[5] [1949] W.N. 343; [1949] 2 All E.R. 537.

[6] [1949] A.C. 427; 65 T.L.R. 234; [1949] 1 All E.R. 848.

[7] [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199.

"are otherwise concerned with the advancement of religion, "education or social welfare." Section 8 (2) then goes on to confer partial relief from rates.

The hereditament here in question is the building known as Freemasons' Hall in Holborn. It is occupied by the appellants. The appellants make no claim to be a charity in the legal sense of the words. But they do not conduct their affairs for profit, and they claim that their main object is to advance religion, otherwise than as a charity. Quarter sessions dismissed their claim to the benefit of section 8 on the ground that whether or not the objects of masonry came within the section, the function of the appellants was the co-ordination of the work of the 7,000 lodges of freemasonry throughout England: and that the work which this involved, being largely administrative in character, was not the advancement of religion, education or social welfare. Accordingly, the claim failed. This made it unnecessary, in the appeal committee's view, to decide whether the objects of masonry as such came within the section.

This short cut to the solution of the problem is, in our view, unsound. It confuses the purpose of the appellants with the manner in which they seek to effect it. Indeed, paragraph 4 (*f*) of the case finds that the *purpose* of the appellants is to promote masonry: but that its *functions* are to administer and govern masonic activities including a benevolent fund. The appeal committee did not look beyond such "functions." But these are simply the ways in which the purpose of promoting masonry is pursued; and accordingly when the problem to be solved is the nature of the appellants' purpose, or object, one must find out what is the purpose or object of masonry itself. Every organization setting out to advance some cause must, if it is of any size, have an office where the necessary clerical and administrative work is done. But one cannot isolate this, and say that the purpose of the office is different from that of the organization itself. To do so is to confuse ends with means. There is only one purpose, which is that of the organization as a whole; though the different units within it may be working out that purpose in different ways. Accordingly, we think that the appeal committee were wrong to dismiss the appeal on the ground they did; and that it is essential to consider the nature of the objects of masonry itself.

Since the appeal committee came to no finding upon this matter there were two courses open to us: either to remit the case for such a finding or to come to a conclusion ourselves upon the facts which are set out in the case. Both sides asked us to take this second course, which is obviously more convenient.

The contention of the appellants was that the facts found established that their main object was the advancement of religion. It is not claimed on their behalf that their main object is the advancement of education or social welfare; nor is any contention rested upon the well-known and admirable

benevolent work done by the appellants through the board of benevolence mentioned in the case. It is said that this is simply one consequence of the pursuit by the appellants of their main object, namely, the advancement of religion; and accordingly all we have to decide is whether such a main object has been established. The respondent council deny that it has.

The objects, main and otherwise, of any body of persons, corporate or unincorporate, are usually to be discovered from its written constitution, if it has one. Otherwise one must discover from the available evidence what it is that the particular body does, and infer from that what its main object is. In the present appeal there is exhibited to the case a book called "United Grand "Lodge of England. Constitution"; and the case finds that the main objects of freemasonry are to carry out the objects set out in the "Antient Charges" particularized at pages 3 to 15 of this book, and also in a solemn admonition to newly initiated masons which is reproduced in the case. Accordingly, one turns to these sources to see what those objects are, and whether the main one is the advancement of religion. The "Antient "Charges" set out at pages 3 to 15 of the "Constitution" begin by saying that a mason is obliged to obey the moral law, and to act according to the dictates of his conscience. They go on as follows: "Let a man's religion or mode of worship be "what it may, he is not excluded from the order, provided he "believe in the glorious architect of heaven and earth, and "practice the sacred duties of morality. Masons unite with the "virtuous of every persuasion in the firm and pleasing bond of "fraternal love: they are taught to view the errors of mankind "with compassion, and to strive, by the purity of their own "conduct, to demonstrate the superior excellence of the faith "they may profess. Thus masonry is the centre of union "between good men and true and the happy means of con-"ciliating friendship amongst those who must otherwise have "remained at a perpetual distance." The rest of the "Antient "Charges," save those dealing with such matters as the running of the lodge, admission of new members, and election of officers, may be sufficiently summarized thus:—masons are charged to be good citizens, to work honestly, to act as moral and wise men, to relieve a brother mason in want in preference to other poor, and to cultivate brotherly love, "so that all may see the "benign influence of masonry."

In form, therefore, these "Antient Charges" are not "objects" but, as the name implies, exhortations to masons. When the case finds, therefore, that the main objects of free-masonry are to carry out the objects set out in these charges, what presumably is meant is that freemasonry's main object is to promote and advance those virtues which every mason is charged to cultivate: good citizenship, honest work, morality and wisdom, brotherly love, compassion, charity to the poor, and belief in a supreme architect of heaven and earth.

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The solemn admonition to a mason on his initiation follows the same lines. The "Volume of the Sacred Law" is recommended to him as the standard of truth and justice, and he is urged to regulate his conduct by it, that is, his conduct towards God, his neighbour and himself. In particular he is urged to be reverent, honest, compassionate, loyal, temperate, benevolent and chaste.

Admirable though these objects are it seems to us impossible to say that they add up to the advancement of religion. Indeed, as already stated, the first "Antient Charge," headed "Concerning "God and religion" says, among other things, this: "Let a "man's religion, or mode of worship" (the contrast is not perhaps without significance) "be what it may, he is not "excluded from the order provided he believe in the glorious "architect of heaven and earth, and practice the sacred duty of "morality." Thus it would seem that no mason need practise any religion: provided he believes in a Supreme Being and lives a moral life, he may be and remain a mason.

Accordingly, one cannot really begin to argue that the main object of freemasonry is to advance religion, except perhaps by saying that religion can be advanced by example as well as by precept, so that the spectacle of a man leading an upright moral life may persuade others to do likewise. The appellants did not in fact advance this argument, but even if it were accepted, it leads to no useful conclusion here. For a man may persuade his neighbour by example to lead a good life without at the same time leading him to religion. And there is nothing in the constitution, nor, apparently, in the evidence tendered to the appeals committee, to support the view that the main object of masonry is to encourage masons to go out in the world and by their example lead persons to some religion or another.

When one considers the work done by organizations which admittedly do set out to advance religion, the contrast with masonry is striking. To advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary. There is nothing comparable to that in masonry. This is not said by way of criticism. For masonry really does something different. It says to a man, "Whatever your religion or your mode of worship, "believe in a Supreme Creator and lead a good moral life." Laudable as this precept is, it does not appear to us to be the same thing as the advancement of religion. There is no religious instruction, no programme for the persuasion of unbelievers, no religious supervision to see that its members remain active and constant in the various religions they may profess, no holding of religious services, no pastoral or missionary work of any kind.

Mr. Milner Holland relied strongly, however, on the following finding in the case. "As a general description of freemasonry,

"it is an organization devoted to advancing the acceptance and "practice of basic religious principles, which may be particu-"larized as man's relations to God, to his neighbour and to "himself." Without wishing to be pedantic, it is not easy to understand the term "basic religious principles." Had the appeals committee said "basic moral principles" their meaning would have been clear; and indeed when they go on to give particulars it would seem that this is really what they do mean. But in any event the main object of freemasonry must be discovered from a consideration of its constitution and its work; and such consideration leads us to the view that its main object is clearly not the advancement of religion.

We think, therefore, that the appeals committee came to the right decision, though not for the right reason, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Blundell, Baker & Co.; Town Clerk, Holborn.*

J. F. L.

[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* THOMAS.

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Oct. 7, 21.
Lord Goddard C.J., Hilbery and Donovan JJ.

Criminal Law—Practice—Previous convictions—Erroneously attached to back page of abstract of indictment handed to jury—Foreman's assurance that page not seen by jury—Possibility of jury suspecting previous convictions.

Criminal Law—Court of Criminal Appeal—Proviso to section 4 (1) *of Act—No rule for application—Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1), *proviso.*

During the course of a trial for false pretences it was found that the abstract of the indictment in the hands of the jury contained, on the back page, a list of the accused's previous convictions. The judge accepted the assurance of the foreman that none of the jury had in fact seen what was on that particular page, and after certain discussion had ensued between the judge and the accused (who was not represented) the trial proceeded and the accused was convicted. On an application for leave to appeal against conviction, on the ground that the jury were prejudiced and must or might have come to the conclusion from the remarks of the judge that the accused had previous convictions:—

Held, that on the assumption that such a suspicion had arisen in the minds of the jury, in any appeal the court had to consider whether or not to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.[1] There was no hard and fast rule upon that

[1] By s. 4 (1) of the Criminal Appeal Act, 1907, the Court of Criminal Appeal on any appeal against conviction shall allow the appeal on certain grounds, "Provided "that the court may, notwithstanding "that they are of opinion that the "point raised in the appeal might be "decided in favour of the appellant, "dismiss the appeal if they consider "that no substantial miscarriage of "justice has actually occurred."

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matter; each case had to be considered separately. If, in the present case, the court were to conclude that the jury did suspect that the accused had previous convictions they would, in an appeal, have applied the proviso as the case against him was overwhelming. Accordingly, the application was refused.

Reg. v. *Flower* (1956) 40 Cr.App.R. 189 considered.

APPLICATION for leave to appeal against conviction.

The applicant, Bernard Isaiah Thomas, was convicted at Leicester Assizes on May 30, 1957, of various offences of false pretences, fraudulent conversion, and obtaining credit without disclosing that he was an undischarged bankrupt, and was sentenced by Hallett J. to four years' imprisonment in all. The applicant conducted his own defence. The case was begun on Thursday, May 23. The summing-up began on May 29 and concluded on May 30. The jury considered their verdict for 27 minutes before finding the applicant guilty on all counts. On the second day of the seven-day trial the jury was handed an abstract of the indictment. It consisted of four pages, and on the fourth page were particulars of the applicant's previous convictions. Counsel for the prosecution, when the fact came to his notice, drew the attention of the judge to the matter. The judge then asked the jury to return the document to him, saying: "You have given it back to me open at page 3; may I take it "you did not turn on to the next page?", to which the foreman of the jury replied: "I had charge of the document and I did "not look at page 4." The applicant then asked to see the document and the judge said to him: "They have satisfied me "they have not seen it. The document was given to one member "of the jury and I observed where he opened it—to the count "we were dealing with, which was count eight on the third page. "I observed he had not turned over to the next page, and he "assures me he did not do so. I think I am entitled to act upon "that as it confirms both my own observation and that of counsel "prosecuting. What was on page 4 was a matter they ought "not to have seen."

The applicant: "May I see the document at some time?" Hallett J.: "You may see the fourth page, certainly. Nothing "that appears on page 4 is relevant for the present purposes and "if I had any idea they had seen what was on there this case "would have to be tried again by another jury." The applicant: "According to this information, I am very concerned with the "information passing . . ." Hallett J.: "You had better be "careful what you say. What is on that sheet is no concern of "the jury, and they will never know anything about it until "after they have returned their verdict. That I shall be careful "of. If they had known about it I should have had to take a "different step, and the less we say about it the better."

The trial then proceeded without further discussion of the matter and concluded some six days later.

The applicant applied for leave to appeal against conviction on

the ground that the jury were prejudiced and that by reason of the discussion which ensued between the judge, the jury, prosecuting counsel and himself which followed the discovery of the fact that the list of convictions was attached to the abstract of the indictment, the jury must or might have come to the conclusion or suspected that he was a person who had been previously convicted and that the judge should have ordered a new trial before a different jury.

W. A. L. Raeburn Q.C. and *Henry Harris* for the applicant.

Reg. v. *Flower* [2] was cited in argument.

On October 7 the court refused the application. Donovan J. said that in view of the importance of the matter and the authority cited the court would put its reasons into writing.

Cur. adv. vult.

October 21. DONOVAN J. We now proceed to give our reasons for refusing this applicant leave to appeal.

[His Lordship stated the facts as set out above and continued:] The applicant contends that, accepting that the jury did not see page 4 of the abstract, nevertheless the replies of the judge must have caused the jury to suspect that he had previously been convicted: and as he did not put his character in issue, that the conviction should accordingly be quashed. He stresses particularly the remark: "They will never know any-"thing about it until after they have returned their verdict."

One cannot, of course, be sure what significance the jury attached to this remark. As laymen there were other conclusions they might have drawn; for example, that page 4 simply recited his antecedents without there being any previous convictions, or that it referred to further charges to be preferred against the applicant and tried on the conclusion of the present case, if need be. On the other hand, it may be that one or more of the jury suspected, as a result of the colloquy between the judge and the applicant, that the applicant had previous convictions.

Assuming for the moment the existence of such a suspicion the question would obviously arise on any appeal whether the court would apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, for the case against the applicant was overwhelming. It was argued that the court should not do so, having regard to the decision in *Flower's* case.[1] There the jury were handed the indictment and retired with it in their possession. On the back of it appeared the applicant's previous convictions. There could hardly be room for doubt, therefore, in that case, that the jury knew of them before arriving at its verdict. The

[2] (1956) 40 Cr.App.R. 189.

[1] (1956) 40 Cr.App.R. 189.

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conviction was quashed; and though the court apparently thought there was no miscarriage of justice, there is no discussion in the judgment as to applying the proviso to section 4 (1). In fact it was not applied.

On the other hand, in *Reg.* v. *Vello Smith*[2] a somewhat similar situation arose. There the appellant was tried at Essex Quarter Sessions on a charge of receiving stolen property, and did not put his character in issue. Three other men tried with him at the same time did so. Two of these three had previously been convicted, and accordingly their previous convictions were put to them. In summing up, the chairman, per incuriam, said to the jury: "The defendant Hilton is brought before you as a "person of clean, upright and sound character. Unfortunately, "in a way, the other defendants are brought before you as "persons who have been in trouble before." This should not have been said of Vello Smith, who had previous convictions, but who had not put his character in issue. It was not certain whether the jury in fact drew an inference from this remark adverse to Vello Smith, but Lord Goddard C.J., giving the judgment of the court, dismissing Vello Smith's appeal on the point, said this: ". . . the case was an overwhelming one, and "if we thought the point ought to be decided in favour of the "prisoner, it is certainly a case in which we should apply the "proviso."

There are two earlier similar cases, one where the court applied the proviso and one where it did not: see *Rex* v. *Williams and Woodley*[3] and *Rex* v. *Lane*.[4]

There is thus no hard and fast rule upon the matter. Each case has to be separately considered. In the present case, if we were to conclude that the jury suspected from what was said that Thomas had previous convictions we should certainly apply the proviso. The application for leave to appeal was accordingly refused.

Application refused.

Solicitors: *Lesser & Co.*

E. M. W.

[2] October 3, 1956, unreported.
[3] (1920) 14 Cr.App.R. 135; 36 T.L.R. 251.
[4] (1920) 15 Cr.App.R. 26.

[COURT OF APPEAL.]

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Oct. 10.
Lord Evershed M.R., Romer and Ormerod L.JJ.

* JOEL *v.* SWADDLE AND ANOTHER.

[Plaint No. 479.]

Landlord and Tenant — Business premises (Security of tenure) — Landlord's intention to reconstruct — "Substantial work of reconstruction"—Meaning—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*).

A tenant had a lease of business premises consisting of a ground floor shop, with two rooms used for storage purposes at the rear, which were separated from the shop and each other by brick walls. At the rear of the premises was a yard over which the tenant had rights of access to a water closet. The landlord opposed the tenant's application for a new lease on the ground that, on the termination of the tenancy, he intended "to carry out substantial work of "reconstruction on the holding" within section 30 (1) (*f*) of the Landlord and Tenant Act, 1954. The landlord proposed to turn the ground floor of the premises together with the yard at the rear into a single enclosed space to be used as an amusement arcade. To do this, he proposed to make a new front, do away with the passage and to remove all the partition walls and the back wall, substituting steel girders and pillars to support the upstairs premises in place of the walls. He also proposed to lower the floor by 8 inches. The county court judge allowed the tenant's application for the grant of a new lease on the ground that the proposed works did not amount to "a substantial work of recon-"struction":—

Held, that to ascertain whether what a landlord proposed to do to the demised premises would amount to a "reconstruction" of them it was necessary to look at the position as a whole and to compare the results of carrying out the proposed work with the condition and state of the premises before the work was done, and each item of work should not be considered separately; on the facts, the county court judge had under-emphasized the importance of the means of support to be substituted for the walls which were to be demolished, and what was intended to be done by the landlord involved a "substantial work of reconstruction" within paragraph (*f*).

Percy E. Cadle & Co. Ltd. v. *Jacmarch Properties Ltd.* [1957] 1 Q.B. 323; 2 W.L.R. 80; [1957] 1 All E.R. 148 distinguished.

APPEAL from Judge Charlesworth sitting at North Shields County Court.

The applicant, David Joel, was tenant of the ground floor of 3, Marine Avenue, Whitley Bay, at a rent of £150. The premises consisted of a shop, with a passage at the side and at the rear of two storerooms separated by brick walls from the shop. There was a yard at the rear of the premises over which the tenant had rights of access to a water closet. The landlord, Henry Edward Swaddle, had purchased the premises in 1956. He desired to obtain possession in order to turn them into an amusement arcade. He had had prepared a scheme of development for this purpose which involved the removal of all the internal walls and the back wall, the whole ground floor area, including the yard, being turned into one large room with a new front. The floor was to be lowered by eight inches. The upper floor was not affected by the scheme. Steel girders and pillars were to be substituted for the interior supporting walls. The side walls were not to be affected. The estimated cost of the work was £1,402. The nature of the work is fully considered in the judgment of Lord Evershed M.R.

The tenant applied under Part II of the Landlord and Tenant Act, 1954, for the grant of a new lease for a term of three or five

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years at a rent of £250. The landlord opposed the application on the ground that the proposed works amounted to "substantial "works of reconstruction" within section 30 (1) (*f*) of the Act of 1954.[1]

The county court judge found that the landlord genuinely intended to carry out the proposed works, but he made an order for the grant of a new lease for three years at a rent of £265, holding that the proposed works did not satisfy the requirements of paragraph (*f*).

The landlord appealed.

J. F. Cobb for the landlord.
R. A. Percy for the tenant.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Atkinson* v. *Bettison*[2]; *Fleet Electrics Ltd.* v. *Jacey Investment Ltd.*[3]

LORD EVERSHED M.R. The question in this appeal is one arising upon paragraph (*f*) of section 30 (1) of the Landlord and Tenant Act, 1954, which already, on more than one occasion, has been before the courts. [His Lordship read subsection (1) (*f*) of section 30 and continued:] In the present case the holding consists of a certain portion only of the ground floor of premises situate at No. 3, Marine Avenue, Whitley Bay; the parts to which I have referred consist, first, of an open shop front whereon the tenant had for some time carried on the business of offering to the inhabitants of Whitley Bay candy or rock. In addition, the holding comprised two separate rooms behind, which were used for storage unconnected with the confectionery business; they are rooms approximately 16 ft. square and they are separated one from the other and from the rest of the premises by brick walls.

At the relevant date it appears that the tenant also occupied a water closet at the very rear of the premises, and separated from the nearest storage room by a yard over which it is said, and indeed it is conceded, that he had some right of access.

Reference to the tenancy agreement shows that in point of fact neither the water closet nor the yard nor the right over the yard was referred to in the agreement, although it is said by

[1] Landlord and Tenant Act, 1954, s. 30 (1): "The grounds on which a "landlord may oppose an application "under subsection (1) of section 24 of "this Act are such of the following "grounds as may be stated in the "landlord's notice under section 25 of "this Act or, as the case may be, "under subsection (6) of section 26 "thereof, that is to say:— . . . (*f*) "that on the termination of the "current tenancy the landlord intends "to demolish or reconstruct the pre-"mises comprised in the holding or "a substantial part of those premises "or to carry out substantial work of "reconstruction on the holding or part "thereof and that he could not "reasonably do so without obtaining "possession of the holding; . . ."

[2] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.

[3] [1956] 1 W.L.R. 1027; [1956] 3 All E.R. 99.

Mr. Cobb—and I think rightly having regard to the form of the judgment—that for the purposes in hand it was deemed that the rights of the tenant as regards the shop and storage rooms were not exhaustive of his rights, and that his holding must also be taken to have comprehended whatever rights he possessed as regards the yard and the water closet.

The landlord, having acquired the premises only in 1956, was disabled from relying, as he might otherwise have done, on subsection (1) (*g*); he was therefore bound to establish, in order to succeed (the onus being upon him) that what he was proposing to do and intending at the relevant date to do, was work of demolition or reconstruction or of construction within the language of paragraph (*f*).

The work which he proposed to do and was in a position indeed to do, as he had obtained the necessary planning permission, involved, putting it quite generally, that the separate entity of which the tenant was the holder would disappear and become wholly merged in a single room or space which would cover the entire ground floor of the premises from north to south. He proposed to use that single hall or space as an amusement arcade.

Such a transfiguration of the premises—and for the moment I mean the whole premises; I am not confining it to the tenant's holding only—involved the removal of all the intervening partitions and walls; but it involved also the substitution for the walls of whatever support was requisite to bear the superincumbent first floor of the building.

But of course, as Mr. Percy points out with some force, we are bound to confine our attention for this purpose to the holding itself—to that part of the premises of which the tenant was and is the tenant. The work as regards that part none the less required that the walls—which, I think I am right in saying, run broadly east and west across the premises—separating the shop from the first storage room, the first storage room from the second storage room, and from the passage on the east, and the second storage room behind, from the yard in the north and the passageway to the east, should all be removed. But it is not merely a question of removal of those walls; in lieu of them and in order that the ground floor might perform its structural purpose vis-à-vis the first floor, it is necessary that there should be substituted steel rolled joists across the roof of the ground floor premises, supported upon substantial pillars which would be built into the ground, capable of bearing the girders and enabling the structural support to be given to the rooms above. I hope I have sufficiently stated that aspect of the matter, because in my judgment it is of real importance.

The judge, as we were informed, felt a degree of sympathy with the landlord; so much so that apparently his conclusion was reached with some reluctance. But he came to the conclusion to which he did, as I follow his judgment, on the view that he felt compelled apparently by authority to take of the meaning of

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the relevant words in paragraph (*f*). This is not a case in which, as I read the judge's judgment, his conclusion was that the work, although it might be described as work of reconstruction, was not sufficiently substantial. If that had been his view, then I think that this court might have been compelled to say, whatever view it might have taken itself, that the question was one of degree and fact, in respect of which the county court judge's judgment must be treated as final. But I read this judgment as not being of that nature. I read it as involving a statement of principle to be applied, namely, that of the meaning and effect of the language of the paragraph in the section.

The judgment reads as follows: "It was contended that these "works amounted to (a) a demolition of a substantial part of the "holding. Where the holding is entirely on the ground floor with "another floor, not part of the holding, above it I held that it "was very difficult to demolish a substantial part of the holding "when the floor above is substantially undisturbed unless the "main walls or a substantial part of them are removed. I do "not regard a demolition of the internal division walls as "demolition of a substantial part of the premises comprised in "the holding. In this case the back wall, which is of 14-in. "brickwork, is to be removed and the division walls between the "rooms marked 'storage' and the passage are also to be "removed but, in my view, this was not substantially to demolish "the premises comprised in the holding. The premises remain "substantially what they were, the same area with the same "boundaries with the same party wall dividing them from the "premises next door and the same ceiling dividing them from "the premises on the first floor above."

It will be observed that in the passage I have read the judge says nothing at all about the substitution for the party walls of the pillars and the rolled steel joists, which, as I have indicated and as I think, are structurally of significance, and indeed of necessity, to the upkeep of the building as a whole.

The judge goes on: "It was next contended that the pro-"posed works showed (b) an intention to reconstruct a substantial "part of the premises comprised in the holding. The meaning "of reconstruct was recently considered by the Court of Appeal "in *Percy E. Cadle & Co. Ltd.* v. *Jacmarch Properties Ltd.*[1]"

Having read the judgments in that case, the county court judge proceeds: "I do not regard the provision of a new front "of the kind contemplated in this case"—and that means the new shop front—"as an act of reconstruction, because it does "not substantially affect the structure of the premises; it is "more in the nature of a fitting annexed to or fitted into the "structure. Again, a new floor is in the nature of a repair or a "replacement and is not, in my view, a structural alteration "much less a reconstruction. The roof over the yard and the "adjoining part of the holding is a reconstruction, or more

[1] [1957] 1 Q.B. 323; 2 W.L.R. 80; [1957] 1 All E.R. 148.

"literally a work of construction, but I held that by itself or "even in connexion with the other works proposed it did not "amount to a reconstruction of a substantial part of the premises "comprised in the holding, it was merely an auxiliary part of "the work to be carried out."

Finally the county court judge deals with the question whether there was an intention to carry out substantial work of construction, which he held was to be determined on the same grounds and for the same reasons in substance as determined his view as to reconstruction, which I have just read.

Again it will be observed that he omits altogether in his enumeration of the several items of the work proposed any reference to the substitution of the existing east and west walls by rolled steel joists resting upon pillars—work which I venture to think is certainly structural in the sense that it is an essential part of the structure, not only of the whole building, but (which is more important) of the holding of the tenant.

On the whole, therefore, it seems to me that the judge has misdirected himself by giving too narrow a view of the meaning of the words in the paragraph, and that he has perhaps emphasized by his omission to take account of the work connected with the steel joists upon the pillars.

I think that in cases of this kind it is apt to be dangerous to take each individual item entirely in isolation, and then to say that each item so taken cannot itself be a work of reconstruction or a substantial work of reconstruction. One must look at the whole work which is proposed, and then say, in regard to it: Does it amount to a substantial work of reconstruction? I think that what is here proposed—and there is no question as to the facts—does, when you view it in that way, amount, within the meaning of the paragraph, to a work of reconstruction of a substantial part of the premises. I lay considerable emphasis on that part of the work which consists of the substitution of the transverse walls by the proposed girders resting on pillars; I also think, with respect to the county court judge, that he also gave somewhat too little emphasis to the floor; because what is proposed is not merely the making of a new floor, but the sinking of the floor, not a great deal, but by a distance of some eight inches, which produces an appreciable increase in the total space of what was, and is at present, the tenant's holding.

I come back now to the citations which the county court judge made from *Percy E. Cadle* v. *Jacmarch Properties Ltd.*[1] That was a case in which the work the landlord intended to carry out consisted substantially of making internal staircases where previously there had been external means of access only, to the basement on the one hand and to the upper floor or floors on the other. The view that the county court judge had taken was that the putting in of an internal staircase was rather a matter of

[1] [1957] 1 Q.B. 323.

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improvement than of reconstruction—than of interference, that is to say, with the structure, as such, of the building.

It is in that context that Denning L.J. and Hodson L.J., in the course of their judgments, used the phrases which the county court judge quotes—"the word 'reconstruct' here is best "expressed . . . by the synonym 'rebuild.'"

When the facts of *Percy E. Cadle* v. *Jacmarch Properties Ltd.*[1] are considered, what the county court judge was intending to express will be apparent; the putting in of a staircase did not amount in any ordinary use of the phrase to any "rebuilding" of the premises. On the other hand, I think, with respect to the county court judge, that you do not fail to rebuild in the structural sense because you do not substitute for a wall another and different wall, but leave a space, if you substitute girders resting on pillars for the wall, performing the structural function which the wall previously performed.

So far as the earlier case is concerned, I would respectfully adopt as being helpful in this case the rather more extensive exposition used by Ormerod L.J., which was also quoted by the county court judge in this case. Ormerod L.J. said[2]: "the word "'reconstruction' must mean . . . in the first place, a sub-"stantial interference with the structure of the premises and "then a rebuilding, probably in a different form, of such part "of the premises as has been demolished by reason of the "interference with the structure."

I have not in the present case said anything about demolition, or what the county court judge said about demolition, because I am content for my part to rest my conclusion upon the other words in the paragraph, namely, that "the landlord intends to "reconstruct a substantial part of the premises." In construing those words I adopt the language I have cited from Ormerod L.J.'s judgment. I think that what is here intended to be done does in a real sense involve an interference with the structure of the whole, or of a substantial part, of the premises, and involves a "rebuilding," in the ordinary sense of the word, of the premises or a substantial part, by substituting structurally something different from that which was there before.

I think, therefore, in the present case that the judge should have decided it, as I gather he would have liked to have done, in the landlord's favour. We are not in so finding departing from the rule that we cannot interfere with a judge who, as a matter of fact in these cases, reaches a conclusion; for example, as to whether what is proposed is "substantial." But the county court judge was constrained, by the interpretation he gave to the section and by the view he took of *Percy E. Cadle & Co. Ltd.* v. *Jacmarch Properties Ltd.*,[3] to give, in my judgment, too narrow a meaning to the paragraph, and thus, if I may respectfully say so, he has misdirected himself.

[1] [1957] 1 Q.B. 323.
[2] Ibid. 323, 329.
[3] Ibid. 323.

In those circumstances, therefore, I am of the opinion that this appeal must be allowed.

ROMER L.J. I agree. It seems to me that the proper way of ascertaining whether what is proposed to be done will be work of "reconstruction" of premises is to look at the position as a whole and compare the results on the premises of carrying out the proposed work with the condition and state of the premises before the work was done; in other words, you want to regard the whole position as one total or entire picture.

One of the criticisms which has been levelled against the county court judge is that he did not make that approach to the matter, but that he really took each item of work, which was involved in the proposed alterations, and said: "This is not "reconstruction; that is not reconstruction; this is mere improve-"ment," and so on; and in so doing, as the Master of the Rolls has pointed out, he does appear to have very much overlooked, or at all events under-emphasized, the importance of the substituted means of support which was going to be introduced by the demolition of the walls and the introduction in their place of the girders.

If that criticism be justified, as in my view it is, it means that the county court judge has really gone wrong in law in this matter, because he has not construed paragraph (*f*) in the way in which it should be construed. When one looks, as I think one should look, at the position as it will be when all the proposed work has been done, I am quite satisfied that it will result in the reconstruction of the tenant's premises within the meaning of the language of Ormerod L.J. in *Percy E. Cadle & Co. Ltd.* v. *Jacmarch Properties Ltd.*,[3] which the Master of the Rolls has cited.

Indeed, it is difficult to imagine any way in which the premises could be reconstructed, if the proposed works fall short of that expression. I am clear that in fact every single feature of the premises is going to be radically altered, and the result on the whole will be the provision of entirely new premises differing in every material respect from those which the tenant now occupies.

Accordingly, I agree with the Master of the Rolls that this appeal should be allowed.

ORMEROD L.J. I agree. In *Percy E. Cadle & Co. Ltd.* v. *Jacmarch Properties Ltd.*[3] the real issue was whether the fact that the identity or character of the premises had been entirely changed amounted to a reconstruction of the premises, although the actual structural work which had to be done was very little indeed, being little more than the putting in of an internal staircase. The court in that case came to the conclusion that the mere changing of identity or character of the premises was not in itself a reconstruction.

[3] [1957] 1 Q.B. 323.

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Here, of course, the intention is undoubtedly to change the identity or character of the premises by changing this holding from a small shop with two storage rooms into part of a large hall intended to become an amusement arcade. But it does appear that in order to do this a considerable amount of alteration will have to be done, consisting, as has already been said, of demolishing walls which serve as partitions, and also serve to support the ceiling above, and putting in their place other forms of support which require considerable structural work to be done.

In these circumstances it would appear to me that if I had to decide this case on those facts, I should have probably come to the conclusion that there was here a reconstruction of a substantial part of the premises.

That, of course, is a question of fact for the judge, but it has been argued here that the judge has misdirected himself on the proper construction of paragraph (*f*) of section 30 (1). I agree that he has so misdirected himself. He has taken certain parts of the work which are to be done, such as the putting in of a new shop front; he has taken the alteration to the floor and has decided that neither of these things in themselves amount to reconstruction. But he appears to have failed to consider at all the demolition of the walls and the necessity to put new supports in their place, and, as Romer L.J. has said, he has failed to consider the effect of the work as a whole on the premises and the respects in which it could or might amount to a substantial reconstruction.

In those circumstances, therefore, I agree that this is a case where we may, and should, interfere with the decision of the county court judge, and I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Hyde, Mahon & Pascall for J. W. Mitchell, Dodds & Co., Newcastle-upon-Tyne; Gibson & Weldon for Bittermann & Wood, North Shields.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

1957
Oct. 17.
Lord Goddard C.J., Donovan and Havers JJ.

*DUNLOP & RANKEN LTD. *v.* HENDALL STEEL STRUCTURES LTD. PITCHERS LTD. (GARNISHEES).

Practice—Garnishee proceedings—Attachable debt—Building contract—Materials ordered by garnishee from judgment debtor—Architect's certificate not yet received by garnishee—Whether attachable debt—R.S.C., Ord. 45, *r.* 1.

Building—Contract—R.I.B.A. form—Architect's certificate—Garnishee proceedings—Whether debt due from contractor to sub-contractor until issue of certificate.

By a building contract in the standard R.I.B.A. form, which provided for interim payments of the contractor by the employer on presentation of the architect's certificate, clause 21 (*a*) (3)

provided: ". . . payment in respect of any work, materials or "goods comprised in the sub-contract shall not be due until "receipt by the contractor of the architect's certificate . . ." The contractor placed an order with a sub-contractor nominated by the architect under the contract to supply certain labour and materials. On completion of the work under the contract one certificate applied for by the contractors from the architect had not been issued. Judgment for a sum of money having been obtained against the sub-contractors which they had failed to satisfy, a garnishee order was obtained by the judgment creditors against the contractors in respect of any debt owing by them to the judgment debtors. The garnishees claimed that when the final certificate was issued there would be a sum included therein as being due to the judgment debtors which would be sufficient to meet the judgment debt, but that until the final certificate was issued the garnishees were not indebted to the judgment debtors:—

Held, that the issuing of the architect's certificate was just as much a necessity for investing a cause of action in sub-contractors as it was in the main contractors, and the judgment debtors had no right to be paid, and therefore there was no debt, until the architect had certified the amount to be paid for the work ordered by the garnishees. Accordingly, the garnishee order should not have been made.

O'Driscoll v. *Manchester Insurance Committee* [1915] 3 K.B. 499 applied.

APPEAL from the Leeds district registrar.

By a contract dated June 2, 1955, between M. P. L. Investments Ltd. and Pitchers, Ltd., Pitchers Ltd. agreed to erect certain factory premises at Waltham Cross, Hertfordshire. The contract was in the standard R.I.B.A. form which by clause 24 provided for interim payments of the contractor by the employer on presentation of the architect's certificate. By clause 21 (*a*) (3), payment in respect of any work comprised in a sub-contract would not be due until receipt by the contractor of the architect's certificate. On May 27, 1955, Pitchers Ltd. had placed an order with Hendall Steel Structures Ltd., who, in accordance with the terms of the contract, had been nominated by the architects in charge of the building works to supply and erect the steelwork for the factory. A number of interim certificates had been issued by the architects to Pitchers, who had received payment in respect thereof from the employer, but a final certificate which had been applied for by Pitchers had not been issued. On May 14, 1957, Dunlop & Ranken Ltd. obtained judgment against Hendall Steel Structures Ltd. for £332 4s. 3d. and £10 costs which remained unsatisfied. On June 28, 1957, a garnishee order nisi was made against Pitchers Ltd. attaching all debts owing or accruing due from Pitchers Ltd. to the judgment debtors. The garnishees contended that until the final certificate was issued they were not indebted to the judgment debtors in any sum.

Frank Whitworth for Pitchers Ltd., garnishees.

E. D. Sutcliffe for Dunlop & Ranken Ltd., judgment creditors.

The judgment debtors did not appear and were not represented.

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The following cases in addition to that referred to in the judgment were cited in argument: *Webb* v. *Stenton* *; *Eaglesham* v. *McMaster* †; *Dawson* v. *Preston*.‡

LORD GODDARD C.J. This is an appeal against an order of the district registrar at Leeds, who made absolute a garnishee order nisi which had been obtained by the judgment creditors, Dunlop & Ranken Ltd., against Hendall Steel Structures Ltd., the judgment debtors, in respect of a sum of money which it is said was owed by Pitchers, Ltd. to the judgment debtors, the facts being that the judgment debtors were sub-contractors under a building contract of June 2, 1955, under which they were erecting a factory for another firm. Pitchers, Ltd. were the main contractors and the judgment debtors were nominated sub-contractors, and the debt that was alleged to be due from Pitchers Ltd. to the judgment debtors was a debt for goods supplied by the judgment debtors who worked on the main contract.

The question is to be determined with reference to the well-known form of contract known as the R.I.B.A. form, which has constantly been before the courts, and yet the precise point that arises in this case has never been decided, although it is treated in the Annual Practice, and I think has generally been regarded in the profession, as one about which there is no doubt where the building owner and the main contractor are concerned. It is well known that garnishee proceedings, that is to say, execution by way of attachment for debts, only applies where there is a debt which is due or which is accruing due, though it may not be immediately payable. It is very often difficult to distinguish between a case where a debt has not accrued—where there is no actual debt—and the case where there is a debt debitum in praesenti solvendum in futuro. That point was dealt with by Bankes L.J. in *O'Driscoll* v. *Manchester Insurance Committee* [1] when he said [2]: "It is well established that 'debts owing or "'accruing' include debts debita in praesenti solvenda in futuro. "The matter is well put in the Annual Practice, 1950, p. 808: "'But the distinction must be borne in mind between the case "'where there is an existing debt, payment whereof is deferred, "'and a case where both the debt and its payment rest in the "'future. In the former case there is an attachable debt, in "'the latter case there is not.' If, for instance, a sum of money "is payable on the happening of a contingency, there is no debt "owing or accruing. But the mere fact that the amount is not "ascertained does not show that there is no debt."

First of all we have to consider the form of contract which existed between the building owner and the contractor, who, in

* (1883) 49 L.T. 432.
† [1920] 2 K.B. 169.
‡ [1955] 1 W.L.R. 1219; [1955] 3 All E.R. 314.
[1] [1915] 3 K.B. 499.
[2] Ibid. 516.

the present case, is the garnishee. By clause 24 it is provided: "(*a*) At the period of interim certificates named in the appendix "to these conditions interim valuations shall be made wherever "the architect considers them necessary, and the contractors "shall subject to clause 21 of these conditions be entitled to "receive within ten days of his written application for the same "a certificate from the architect stating the amount due to the "contractor from the employer, and shall on presenting any "such certificate to the employer be entitled to payment therefor "within the period named in the appendix." That is dealing with a case where there is a lump sum contract and interim payments are to be made. A contractor who has all the expense of the materials and labour wants money from time to time, and it is clear, and I do not think that it can nowadays be disputed, although there has never been a precise decision to this effect, that until the architect has given a certificate the builder has no right to receive any sum of money from his employer by what I may call a drawing on account. He must get a certificate from the architect, and it is generally left entirely to the discretion of the architect as to when he certifies, though some contracts provide for him to certify at a particular time, and for the proportion he shall certify, but until the contractor can produce to the building owner a certificate he cannot receive anything. Accordingly, the following statement appears in the Annual Practice (1957) under the notes to R.S.C., Ord. 45, r. 1, on p. 811: "In "the case, for example, of a building contract in the R.I.B.A. "form, where the builder is paid on the certificate of the "architect, it is plain that money in the hands of the building "owner cannot be attached until a certificate is issued, and then "only for the amount mentioned in that certificate." In other words, the authors think, and, as I think, rightly, that there is no doubt that with regard to the relationship between the building owner and the main contractor there is nothing due until the contractor has a certificate, and so no sums can be attached until that has been obtained.

The point in the present case arises, not between the building owner and the contractor, but between the contractor and sub-contractor, and clause 21 of the contract provides: "(*a*) . . . "Provided that no nominated sub-contractor shall be employed "upon or in connection with the works against whom the con-"tractor shall make reasonable objection or (save where the "architect and contractor shall otherwise agree) who will not "enter into a sub-contract providing . . . (3) That payment in "respect of any work, materials or goods comprised in the "sub-contract shall not be due until receipt by the contractor "of the architect's certificate under clause 24 of these con-"ditions which includes the value of such work, materials or "goods, and shall when due be subject to a discount for cash of "2½ per cent. (*b*) The sums directed by the architect to be paid "to nominated sub-contractors for work, materials or goods

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"comprised in the sub-contract shall be paid by the contractor "within 14 days of receiving from the architect a certificate "including the value of such work, materials or goods less only "(i) any retention money which the contractor may be entitled "to deduct, and (ii) a cash discount of 2½ per cent."

That clause contemplates that a written contract will be entered into between the contractor and the sub-contractor, but what happened in this case, and I dare say it happens in very many cases, was that there was no formal sub-contract put into writing which incorporated in terms the provisions of clause 21 and made the conditions clear with regard to certificates.

The garnishees sent to the judgment debtors an order form which read: "Please execute the following order subject to the "terms and conditions below which form part of this order." Then they set out the goods they want and the work which they require, and then: "Please:—(*a*) Submit your invoice in dupli-"cate. (*b*) Quote this order number on your invoice. "(*c*) Advise both us and the architect immediately of any "increase or decrease in cost of labour and materials which may "be adjustable under the terms of the contract." That shows that the price which is quoted in this contract is not a firm price, but depends on the rise or fall of prices both in the material and the labour market. Then there come the conditions on the first of which Mr. Whitworth has, in my opinion unsuccessfully, attempted to rely, which reads: "The party to whom this order "is given shall observe and perform the conditions contained in "the contract held by Pitchers, Ltd. (which can be inspected "at their office), and this order shall be deemed to be supple-"mental thereto." That is obliging the sub-contractors to observe and perform the conditions in the contract. No question arises here as to whether they have performed or observed the conditions. What the sub-contractors are saying is: "So far as "payment is concerned, pay us." Then comes the question whether they are only to be paid in accordance with the terms of the contract, but that is not I think observing or performing the conditions. There is no question here about the work which they undertook to do and no suggestion they have not performed it in accordance with the contract. Then condition 3 provides: "Payment for this order is to be made—(*a*) As to the amount "(if any) provided or specified in Pitchers said contract for the "works in this order"—they are the works specified in the order and not extras—"in accordance with the certificates and the "times provided in the said contract." People engaged in these matters in the trade know the terms of these contracts quite well and, in my opinion, it is reasonably clear that the parties meant in this case to put the sub-contractors with regard to payment into the same position as the contractors, that is to say, they were to be paid on certificates and, for the reasons I have tried to show with regard to the certificates which passed between the contractor and the building owner, there is a very good

reason for it. This was a contract, so far as the garnishees were concerned with the judgment debtors, of £19,000, and if the architects certified for some of this steelwork, making out their interim certificates as between the building owner and the contractor, and was including some of this in the certificates, the garnishees would have to pay the judgment debtors. So it is to the advantage of the garnishees to have the contract providing for certificates in this way because otherwise they would have to deliver everything and do all the work before they would be entitled to anything. Under this provision in my opinion it is clear that if the architects issued certificates from time to time and included any of the sub-contractors' work, they would have under the terms of the main contract to show what was due to sub-contractors, and the sub-contractors would then be able to get the money. Therefore I hold that the issuing of a certificate by the architect is just as much a necessity for investing a cause of action in the sub-contractors as it is in regard to the main contractors, and I think it is not the case of debitum in praesenti solvendum in futuro. It is not a mere case of putting off payment; it is that judgment debtors have not a right to be paid, and therefore there is no debt, until there is a certificate certifying the amount which is to be paid for this steelwork which was the subject of the order given by the garnishees to the judgment debtors.

For these reasons, I am of opinion that the order of the district registrar was wrong, and this appeal must be allowed.

Donovan J. I agree and for the same reasons, to which I can add nothing.

Havers J. I agree. The real difficulty arises from the fact that the garnishees did not require the judgment debtors to enter into a written agreement with them as was clearly contemplated under clause 21 of the contract between Pitchers, Ltd. and the building owners. Instead of doing that, Pitchers, Ltd. used a form of order of their own, in which they said: "Please execute the following order subject to the terms and "conditions below which form part of this order: . . . Deliver "to site and erect complete . . .," and specifying what they are to do. But lower down are these words: "Advise both us and "the architect immediately of any increase or decrease in cost "of labour and materials which may be adjustable under the "terms of the contract." It is clear, therefore, that both parties contemplated that that specified sum was not a fixed sum, but might fluctuate up or down in accordance with the provisions for fluctuation in the contract. Then certain conditions are printed below, the first of which is: "The party to whom this "order is given shall observe and perform the conditions con-"tained in the contract held by Pitchers, Ltd. (which can be "inspected at their office), and this order shall be deemed to be

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"supplemental thereto." I share the doubts of my Lord as to whether that is sufficient in itself to incorporate the conditions with regard to the right to payment in clause 21 between the contractors and the building owner; but the third condition provides: "Payment for this order is to be made (*a*) As to the "amount (if any) provided or specified in Pitchers said contract "for the works in this order; in accordance with the certificates "and the times provided in the said contract." The real question therefore arises as to the true interpretation of those words "in accordance with the certificates." I share the view of my brethren that those words really mean if and when a certificate is given. If that is the true construction, it is clear that there was no debt owing or accruing at the time the garnishee order nisi was made.

Appeal allowed.

Solicitors: *Clark, Patterson & Herring; Haslewood, Hare & Co. for R. C. Moorhouse & Co., Leeds.*

J. D. P.

[COURT OF APPEAL.]

C. A.

1957
June 21;
July 17.

Jenkins, Romer and Sellers L.JJ.

* COLLIER *v.* STONEMAN.

[Plaint No. 242.]

Landlord and Tenant—Rent restriction—Death of tenant—"Residing "with"—Grand-daughter and her husband occupying one room of three-roomed flat and sharing use of kitchen—Grand-daughter not subtenant—Whether member of tenant's family "residing with" her—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*).

L., who was the grandmother of the plaintiff, was the statutory tenant of a flat consisting of two rooms and a kitchen on the first floor of a dwelling-house. In 1950 L. allowed the plaintiff and her husband, who had no matrimonial home, to live in the back room of the flat, in which they had been allowed to store their furniture since 1947. The arrangement was that the plaintiff and her husband had the back room to themselves. L. had the front room to herself and the kitchen was shared between them. L., who was 94 at the time of her death in October, 1956, kept very much to her own room and did most of her own shopping and cooking and only occasionally shared a meal in the kitchen with the plaintiff and her husband.

In an action by the plaintiff against the defendant landlord claiming a declaration of her title to a statutory tenancy of the flat on the same terms as that held by L. at the time of her death, the county court judge held that, on the facts as found, the plaintiff was not "residing with" L. at the time of her death within the meaning of section 12 (1) (*g*) [1] of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and dismissed the action.

[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*g*) [as amended by s. 1 of the Increase of Rent, etc., Act, 1935]: ". . . the expression 'tenant' in- "cludes the widow of a tenant who

On appeal:—

Held, that inasmuch as L. had not granted a sub-tenancy of the back room to the plaintiff, the plaintiff was at all material times "residing with" her grandmother within the ordinary meaning of those words, which was the meaning to be placed upon them for the purposes of section 12 (1) (*g*), and that, accordingly, she was entitled to the relief claimed.

Edmunds v. *Jones*, infra, p. 1118, n. distinguished.

APPEAL from Judge Bensley Wells sitting at Marylebone County Court.

The plaintiff, Mrs. Gladys Lilian Collier, claimed that she was by virtue of section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the statutory tenant in succession to her late grandmother Mrs. Langshaw of a dwelling-house consisting of two rooms and a kitchen on the first floor of No. 192, Portnall Road, W.9.

The defendant landlord, W. F. G. Stoneman, disputed the plaintiff's claim on the ground that the facts of the case were not such as to entitle her to the benefit of section 12 (1) (*g*) and in furtherance of this contention had purported to resume possession of the front room of the premises in question formerly used by Mrs. Langshaw as her bedroom.

The plaintiff brought an action against the defendant in the Marylebone County Court claiming, inter alia, a declaration of her title to a statutory tenancy of the premises upon the same terms as that held by Mrs. Langshaw at the time of her death. The judge found for the defendant on the ground that the plaintiff was not "residing with" Mrs. Langshaw at the time of her death within the meaning of section 12 (1) (*g*).

The plaintiff appealed.

The facts are fully set out in the judgment of Jenkins L.J.

J. J. Davis for the plaintiff.

J. R. Phillips for the defendant.

Cases cited in argument which were not referred to in the judgment: *Middleton* v. *Bull* [2]; *Evans* v. *Evans* [3]; *Wheatley* v. *Wheatley*.[4]

Cur. adv. vult.

"was residing with him at the time "of his death, or, where a tenant "leaves no widow or is a woman, "such member of the tenant's family "so residing as aforesaid as may be "decided in default of agreement by "the county court."

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 13 [as amended by s. 1 of the Act of 1935]: "So much of s. 12 (1) (*g*) "of the Act of 1920 as enacts that "that expression 'tenant' shall, in "the case of a tenant leaving no "widow or being a woman, include "such member of the tenant's family "residing with him at the time of "his death as may be decided in "default of agreement by the county "court shall not, as respects tenants "dying after the passing of this Act, "apply to any such member unless "he was residing with the tenant for "not less than 6 months immediately "before the death."

[2] [1951] W.N. 517; [1951] 2 T.L.R. 1010, 1012.

[3] [1948] 1 K.B. 175, 178–180; 63 T.L.R. 638; [1947] 2 All E.R. 656.

[4] [1950] 1 K.B. 39; 65 T.L.R. 602; [1949] 2 All E.R. 428.

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July 17. The following judgments were read.

JENKINS L.J. In this case the plaintiff, Mrs. Gladys Lilian Collier, claims that she is by virtue of section 12 (1) (*g*) of the Rent Act of 1920 the statutory tenant in succession to her late grandmother Mrs. Langshaw of a dwelling-house (which I will call "the flat") consisting of two rooms and a kitchen on the first floor of No. 192, Portnall Road, W.9.

The defendant landlord, W. F. G. Stoneman, disputes the plaintiff's claim on the ground that the facts of the case are not such as to entitle her to the benefit of section 12 (1) (*g*), and in furtherance of this contention has purported to resume possession of the front room in the flat formerly used by Mrs. Langshaw as her bedroom. In these circumstances the plaintiff brought the present action against the defendant in the Marylebone County Court claiming a declaration of her title to a statutory tenancy of the flat upon the same terms as that held by Mrs. Langshaw at the time of her death and damages for trespass. There was a counterclaim upon which nothing turns.

The judge held that the plaintiff was not "residing with" Mrs. Langshaw at the time of her death within the meaning of section 12 (1) (*g*). Accordingly he gave judgment on the plaintiff's claim for the defendant with costs, and from that judgment (dated March 12, 1957) the plaintiff now appeals to this court.

The relevant part of section 12 (1) (*g*) of the Act of 1920 is in these terms:—" . . . the expression 'tenant' includes the "widow of a tenant who was residing with him at the time of "his death, or, where a tenant leaves no widow or is a woman, "such member of the tenant's family so residing as aforesaid "as may be decided in default of agreement by the county court."

I have read this provision as amended by section 1 of the Act of 1935, and should note that by section 13 of the Act of 1933 the claiming member of the deceased tenant's family must have been residing with the tenant for not less than six months immediately before the death.

It appears that Mrs. Langshaw, who had been living in the flat with her sister-in-law Mrs. Twyford since about 1941, was granted a new contractual tenancy of the flat after Mrs. Twyford's death in 1943, and later became a statutory tenant by reason of a notice of increase of rent.

For some years the back room was empty and in 1947 Mrs. Langshaw allowed the plaintiff and her future husband, to whom she was then engaged, to store their furniture in it.

The plaintiff and Mr. Collier were anxious to get married and set up house together, but had to postpone their marriage because they could find nowhere to live. According to Mr. Collier it was suggested by one of Mrs. Langshaw's daughters (who lived in the neighbourhood) that they might go to No. 192 and have the vacant room in the flat. This they did with the

permission of Mrs. Langshaw, getting married in March, 1950. In due course they had a son, born in July, 1951.

The arrangement between the Colliers and Mrs. Langshaw was that the Colliers had the back room to themselves, Mrs. Langshaw had the front room to herself, and the whole party shared the kitchen. Mrs. Langshaw was 94 years of age when she died on October 14, 1956.

In her examination-in-chief the plaintiff said:—"We went "to live at No. 192 so that I could help grandmother. We "had a bedroom of our own. Mrs. Langshaw slept in the other "room. We all had our meals together in the kitchen. Mrs. "Langshaw and I both did the cooking. We both did the "shopping. I used to hand the rent to Mrs. Stoneman down-"stairs to hand to the landlord. I also handed her the rent "book which my grandmother kept. Rent was 17s. 1d. when "I went to 192. We paid Mrs. Langshaw 12s. 6d. to help "her out with the rent. The rent was 18s. when Mrs. Langshaw "died. At the date of her death I was paying her 13s. 3d. "per week." In cross-examination she said:—"I carried up "her coals. Her coal was kept separate from ours. Bought "separately. My husband made a box for her coal. She was "a very independent old lady. She had her own windows "cleaned by a cleaner. We made our own arrangements for "window cleaning. We had separate food cupboards. She "thought it was fairest that way. We had our meals together. "She usually cooked for herself. She sometimes had meals "in her own room. She had an oilstove in her room and she "sometimes cooked on it", and at the end of her cross-examination:—"I was not on bad terms with Mrs. Langshaw during "the last two years of her life. We did move some of her "things out of the kitchen into her room. She never complained "to me about it. It is a fact that for one reason or other "she didn't go into the kitchen much as she got older." In re-examination she said: "I cooked her dinner the day before "she died. I cooked more for her than she cooked for us. The "furniture we had in our room was our own. We never had "a rent book."

Mr. Collier in his examination-in-chief said:—"We had our "evening meal at 5.30 or 6 p.m. when my wife was working. "Mrs. Langshaw usually cooked it for us. Mrs. Langshaw had "her evening meal with us usually. Sometimes in the evenings "I went to sit in the front room with Mrs. Langshaw. I made "a coal box for her in about 1953. Before that our coal was "kept with her coal. We only had a coal fire occasionally. I "never brought her coal up—it was brought up while I was not "in the house." In cross-examination he said:—"My working "hours—8 a.m. to 5.30 p.m. On Sundays Mrs. Langshaw "invariably went out to her two daughters who lived in the "same road. She would leave at about 12 noon and get back "between 8 and 10 p.m. Sometimes she would stay for 2 to 3

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"days at a time with her daughters or one of them. The "armchair of Mrs. Langshaw's which was in the kitchen was "moved into her room at her request. This was 4 to 5 years "before she died. I put an armchair in the kitchen to take "its place out of our room. Mrs. Langshaw stored our furniture "for three years before we went to live there."

The defendant's wife, Mrs. Edna Stoneman, said in her examination-in-chief:—"I knew Mrs. Langshaw very well. Mrs. "Langshaw did most of her own work. If she wasn't well I used "to go and fetch her youngest daughter who lived at No. 102. "I often went up to Mrs. Langshaw's room before and after "Colliers arrived. I have several times seen Mrs. Langshaw "cooking her own meals on her own oil stove in her own room. "I went up to her room six days out of seven. She was "invariably in her own room sitting by the window."

In the course of his judgment the judge said:—"Mrs. "Langshaw consented to their, that is the Colliers, making "their matrimonial home in her back room where their furniture "was still being stored. The plaintiff and Mr. Collier were "married and went to live in Mrs. Langshaw's back room in "March, 1950, and were allowed to share the kitchen with "Mrs. Langshaw. There they have remained ever since, and "a child was born to them in July, 1951. The only evidence "of the arrangement arrived at between the Colliers and Mrs. "Langshaw in March, 1950, was that they paid Mrs. Langshaw "12s. 6d. each week regularly when Mrs. Langshaw's rent was "17s. per week and later 13s. 3d. when Mrs. Langshaw's rent "was increased to 18s. per week. According to the Colliers "they never had a rent book. In fact, in return for their "weekly payment, the Colliers had an unfurnished room, which "they furnished with their own furniture, and the use of the "kitchen in common with Mrs. Langshaw. On these facts I "was of opinion that I might well draw the inference that the "Colliers had been given a sub-tenancy by Mrs. Langshaw; "but in the absence of any evidence as to what was said at "the time, I came to the conclusion that perhaps I ought not "to go quite as far as that. I was satisfied that Mrs. Langshaw "was an old lady of independent habits and way of life. She "would not share anything. She insisted on her own house-"keeping arrangements; she bought and ate her own food and "had her own larder. She had the window of her own room "cleaned by a cleaner. She may have had an occasional meal "with the Colliers but mostly not. She was too old to get "up to breakfast with them; they were both working and were "out most of the day; in the evenings she usually had something "in her own room. On Sundays she invariably went to spend "the day with her youngest daughter, Mrs. Child (or to another "daughter), who lived in the same street, and was away from "12 noon until about 10 p.m. On these facts it seemed to me "to be difficult to say that the plaintiff was residing with Mrs.

"Langshaw at the time of her, Mrs. Langshaw's, death; in my "view she was residing with her husband and their child in "their matrimonial home which certainly did not include Mrs. "Langshaw's room. I was of opinion that as far as was "physically possible in one flat, the Colliers and Mrs. Langshaw "were living totally separate and independent lives, as indepen-"dent households. I therefore came to the conclusion, though "not without some doubt, that the plaintiff had failed to make "out her case."

In reaching his conclusion to the effect that the plaintiff had failed to establish her claim to have been "residing with" Mrs. Langshaw within the meaning of section 12 (1) (*g*) the judge must, I think, have been considerably influenced by certain observations of this court in *Edmunds* v. *Jones*.[1] We have had the advantage of seeing the full transcript of the judgments in that case from which it appears that a daughter was her mother's subtenant in respect of two rooms in a house of which her mother was tenant, together with the use of the kitchen jointly with her mother. On the mother's death her landlords claimed possession of the premises against the daughter, who resisted their claim on the ground that she was entitled to the protection of the Rent Acts in respect of her subtenancy. That claim failed on the principle of *Neale* v. *Del Soto*[2] by reason of the sharing of the kitchen. The daughter then raised a contention to the effect that she was entitled to succeed to her mother's tenancy as a member of the mother's family "residing "with" the mother within the meaning of section 12 (1) (*g*).

In rejecting this contention the Master of the Rolls said:—"I think that the words 'residing with' must be given their "ordinary popular significance. They do not, I think, involve "any technical import or have some meaning only to be defined "by lawyers. Giving them, then, the ordinary sense of the "language it is, to my mind, necessary in order that paragraph "(*g*) may be satisfied, that the person claiming to succeed to "the tenancy of the particular premises must fairly and truly "be said to have been residing with the predecessor in those "premises in the sense that the successor lived and shared for "living purposes the whole of the premises to which he or she "claims to have succeeded."

Later he said:—"As I have already said, I think that what "is contemplated is the case of a dependent child, or whoever "it may be, being one of the household of the predecessor quo "ad the particular house, and that, as it seems to me, the "appellant in this case cannot prove. She was the tenant at "law of two rooms to the exclusive possession of which she "was entitled. And all she can further say was that she shared "the kitchen with her mother. She had no right to go in any "other part of the house beyond the confines of her own tenancy.

[1] Post, p. 1118n.

[2] [1945] K.B. 144; 61 T.L.R. 145; [1945] 1 All E.R. 191.

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"She was in no sense residing in any part of the house other "than the two rooms of which she was the tenant, and the "kitchen to the extent to which she used it. She, therefore, "in my judgment, cannot be said to have been residing with "her mother at the time of the latter's decease as regards the "premises to which she now claims to have succeeded; in other "words, I share the view which the learned county court judge "took, and I think that for those reasons this appeal fails."

I myself said: "I agree with my Lord that the words "'residing with' in section 12 (1) (*g*) mean residing with the "deceased tenant quo ad the whole of the premises comprised "in the tenancy in question. It is with reference to that tenancy "that the expression 'residing with' is used, and I do not "think in the context the words 'residing with' can be regarded "as appropriate to a member of a tenant's family who is in "the premises and lives on the premises under a subletting which "gives that member of the family the right to possession of part "of the premises to the exclusion of the tenant, and I do not "think the position is altered by the mere circumstance that "in addition to the exclusive right to part of the premises under "such a subtenancy a right of user in common with the tenant "is given over some other part such as the kitchen."

That case differed from the present case in that the daughter claiming to have been "residing with" her mother was a subtenant legally entitled to exclusive possession of the two rooms comprised in her subtenancy. I should have thought it reasonably plain that quo ad those two rooms she could not be said to be residing in them with her mother, for she was in fact residing in them to the exclusion of her mother by virtue of the subtenancy. I should have also thought it reasonably plain that she could not claim to have been "residing with" her mother in the rest of the house merely on account of the fact that her subtenancy included the right to share the kitchen with her mother.

In the present case the judge has held that there was nothing amounting to a subletting of the back room in the flat to the plaintiff or her husband, and notwithstanding the doubt which he expressed on this point I think he was clearly right in so holding.

That seems to me to be a vital point of distinction between *Edmunds* v. *Jones*[3] and the present case. Here the position was that Mrs. Langshaw had her own bedroom to herself, allowed the Colliers the use to themselves of the other bedroom, and further allowed the Colliers to use the kitchen in common with herself. The flat comprised only the two rooms and the kitchen. The arrangement being of this nature, it seems to me that the Colliers were plainly residing with Mrs. Langshaw according to the ordinary meaning of that expression. It is

[3] Post, p. 1118n.

argued against that conclusion that the Colliers had de facto the exclusive use of one of the two bedrooms while Mrs. Langshaw retained the exclusive use of the other. It is said that this is enough to negative residence with Mrs. Langshaw on the part of the Colliers on the strength of the Master of the Rolls' observation in *Edmunds* v. *Jones* that the claimant "must "fairly and truly be said to have been residing with the pre-"decessor . . . in the sense that the successor lived in and "shared for living purposes the whole of the premises to which "he or she claims to have succeeded." But this passage does not mean that it must be shown that the claimant used in common with the predecessor every room in the premises. If that were so, then a case of residence with the deceased tenant could rarely be made out. In almost every case (other than those concerning husband and wife) it would be found that the tenant and the claimant respectively occupied separate bedrooms.

In the present case quite obviously the only way in which the flat could be shared for living purposes between Mrs. Langshaw and the Colliers was the arrangement in fact made by which the Colliers had one of the two bedrooms to themselves, Mrs. Langshaw had the other bedroom to herself, and the kitchen was shared. In the passage just quoted the Master of the Rolls is contrasting a subletting of part of the premises to a member of the tenant's family with a sharing of the entire premises between a tenant and a member of the tenant's family, and is saying in effect that the latter state of affairs amounts to residence with the tenant on the part of such member, while the former state of affairs does not.

As to the later passage in the Master of the Rolls' judgment "what is contemplated in the case of a dependent child or "whoever it may be being one of the household of the pre-"decessors quo ad the particular house" I think a member of a tenant's family living in the tenant's house otherwise than as a subtenant answers this general description.

As the Master of the Rolls said in the first of the passages quoted above "the words residing with must be given their "ordinary and popular significance." Given that significance, it seems to me that they clearly apply to the plaintiff's position in the present case. If Mrs. Langshaw had been asked whether anyone resided with her in the flat I do not see how she could consistently with the facts have answered the question otherwise than by saying: "Yes, my grand-daughter, her husband and "their son reside with me. They have one of the two bedrooms "to themselves, I have the other, and we share the kitchen."

I cannot think that the independence of Mrs. Langshaw in matters such as catering, cooking, and window cleaning displace this conclusion, any more than the fact that as she grew older she tended to keep increasingly to her own room. Obviously her periodical visits to her daughters cannot affect the case one way or the other.

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In founding himself on matters such as these and deciding the case against the plaintiff on the ground that "the Colliers "and Mrs. Langshaw were living totally separate and independent "lives as independent households" the judge seems to me to have given the words "residing with" a restricted meaning which does not accord with "their ordinary and popular signifi-"cance." In so doing I think he misdirected himself, possibly through reading more into the Master of the Rolls' reference to the household of the predecessor than that reference in its context can properly be made to bear.

It would, as I think, be in the highest degree inconvenient if the investigation of claims by members of tenants' families to have been "residing with" the tenants concerned came to involve consideration of the extent to which the parties acted jointly or independently in matters such as the purchase and cooking of food or in fact made use of rooms available for their common use.

In my opinion the correct conclusion here, and the only conclusion possible on the facts of this case, is that the plaintiff was "residing with" Mrs. Langshaw within the meaning of section 12 (1) (*g*) from 1950 until Mrs. Langshaw's death in 1956 and is entitled accordingly to the relief claimed in her action.

For these reasons I am of opinion that this appeal should be allowed.

ROMER L.J. I agree. On the assumption, which Mr. Phillips did not challenge, that two persons could be regarded as residing together in the somewhat limited accommodation of which Mrs. Langshaw was tenant it is difficult to see what use and occupation of the premises could constitute co-residence with the tenant if that enjoyed by Mrs. Collier did not. The first floor of No. 192, Portnall Road was undoubtedly the residence of the plaintiff and had been for upwards of six years prior to her grandmother's death; she had no contractual right to live there but she made a home there for herself and her husband by the permission of Mrs. Langshaw. Accordingly, I should have thought that in ordinary parlance it could be said, and indeed it could not be denied, that the plaintiff was residing with Mrs. Langshaw in the accommodation of which Mrs. Langshaw was tenant. Mr. Phillips' contention to the contrary was based on the view that although the plaintiff certainly resided at 192, Portnall Road the evidence shows that she did not reside there with Mrs. Langshaw, and is therefore not within section 12 (1) (*g*) of the 1920 Act. The argument is that Mrs. Langshaw lived such a detached and independent life of her own that the true state of affairs was that two separate homes existed on the first floor of the house, namely, Mrs. Langshaw's and that of Mrs. Collier and her family, and that there was therefore no such sharing of the total accommodation as is envisaged by section

12 (1) (*g*). Mr. Phillips submitted that in cases arising under that subsection the legislature was not concerned so much with the legal relationship as with the family relationship which exists between the parties and he said that in the present case there was no family relationship at all between Mrs. Langshaw and her grand-daughter. I am unable to accept this interpretation of section 12 (1) (*g*) which seems to me to attribute to the word "with" in the expression "residing with" a weight and significance which it cannot properly bear. Such an interpretation would involve in many cases a detailed inquiry into the way of life of persons, who were sharing accommodation, for the purpose of ascertaining what degree of personal or family association existed between them. Such an inquiry would very much complicate applications under the subsection. Nor is there, in my judgment, anything in its language which warrants investigations of this character. The question which has to be decided, in my opinion, is whether a tenant and a member of his family were, according to ordinary notions, residing together and not how they lived their respective lives. According to those notions Mrs. Collier and Mrs. Langshaw were, in my judgment, residing together and none the less so because Mrs. Langshaw, in the various ways indicated by the evidence, isolated herself from the Colliers. In my opinion the conclusion which I have expressed is in no way at variance with the decision of this court in *Edmunds* v. *Jones*.[4] The crucial element in that case which prevented the tenants' daughter from successfully relying on section 12 (1) (*g*) was that her mother had granted her a subtenancy of two rooms in the house in which they lived and the daughter was in possession of those rooms by virtue of the subtenancy at and previous to her mother's death. This contractual right of the daughter to the possession of a part of the house clearly negatived the view that the house was the joint residence of herself and her mother; for her own residence was a part only of the house and that part was, in law, exclusive to herself. This difficulty does not confront Mrs. Collier in the present case for the judge has held that there was no subletting to her by Mrs. Langshaw and the contrary was not contended before us. The decision, therefore, in *Edmunds* v. *Jones* has no application here. There may be a passage or two in the judgments in that case (and more particularly in the judgment of the Master of the Rolls) which, if taken in isolation, lend some support to the defendants' case and it is clear, I think, that the learned judge himself thought so. The judgments have, however, to be read in the light of the particular circumstances which were before the court; and I agree with Jenkins L.J. in thinking, and for the reasons which he has stated, that there is nothing in *Edmunds* v. *Jones* which really assists the defendant in the present case. In my opinion the appeal should be allowed.

[4] Post, p. 1118n.

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SELLERS L.J. I agree with the judgments which have been delivered.

If the plaintiff had had a subtenancy of part of Mrs. Langshaw's premises (whether a protected one or not) it could not be said that she "resided with" her grandmother, the tenant: (*Edmunds* v. *Jones*).

But no subtenancy was found or established. From 1951 the plaintiff and her husband (and eventually also their child) lived in the flat, occupying the back room, using and sharing the kitchen and making a substantial contribution towards the rent Mrs. Langshaw had to pay her landlord.

It seems to have been an informal arrangement such as might commonly exist within a family and one perhaps not untypical of the case of a child or grandchild living with a parent or grandparent in very limited accommodation.

The grandmother, as tenant, had control of the premises, and I find it difficult to see how, without a tenancy of their own, the plaintiff and her husband, making their home there, could be said not to be residing with the grandmother up to the date of her death.

If the grandmother on the one hand and the grand-daughter on the other had lived wholly separate lives without mutual meetings or domestic co-operation—which is very far from the case here—a finding of a subtenancy might have been justified. But short of that, differing habits of living or independence with regard to coal, food or cooking do not seem to me to be criterions by which to judge whether a person was residing with another. I would allow the appeal.

Appeal allowed.

Solicitors: *D. W. Plunkett; Wright, Son & Pepper.*

J. A. G.

NOTE.

[COURT OF APPEAL.]

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Jan. 14.
Evershed M.R., Jenkins and Hodson L.JJ.

*EDMUNDS *v.* JONES.

Landlord and Tenant—Rent restriction—Death of tenant—"Residing "with"—Daughter subtenant of two rooms with joint use of kitchen—Whether member of tenant's family "residing with" her —Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*).

The daughter of a deceased tenant of a dwelling-house within the Rent Restrictions Acts was subtenant of two rooms in the house and shared a kitchen with the deceased tenant at the time of the deceased's death. She claimed to be statutory tenant of the whole house under section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:—

Held, that the words "residing with" in section 12 (1) (*g*) must be given their ordinary popular meaning. In order that paragraph (*g*) might be satisfied, the person claiming to succeed to the tenancy of the particular premises must fairly and truly be said to have been residing with the predecessor in the sense that the successor lived and shared for living purposes the whole of the premises to which that person claimed to have succeeded. That, accordingly, since in the circumstances the daughter had no right to go into any part of the house beyond the confines of her own tenancy and the kitchen, she could not be said to have been residing with her mother at the time of the latter's death as regards the premises to which she claimed to have succeeded.

APPEAL from Judge Temple Morris, sitting at Aberdare County Court.

The plaintiffs, owners of a dwelling-house to which the Rent Restrictions Acts applied, claimed possession of it from the defendant, a daughter of the deceased tenant, who at the time of the death of the tenant was a subtenant of two rooms in the house with joint use of the kitchen. The defendant claimed to be "residing with" her mother at the time of her death within the meaning of section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and that, accordingly, she was entitled to a statutory tenancy of the whole house.

The county court judge gave judgment for the plaintiffs.

The defendant appealed.

Phillip Wien for the defendant.

Roderic Bowen for the plaintiffs.

EVERSHED M.R. This appeal raises a question of the meaning of the words "residing with" him or her in section 12 (1) (*g*) of the Rent and Mortgage Interest (Restrictions) Act, 1920, as applied to the facts (and they are a little unusual) of this particular case.

The premises with which the proceedings are concerned are known as No. 91A, Gadlys Road, Aberdare. Of those premises the two plaintiffs are, and have at all material times been, the owners; but prior to her death in January, 1950, the tenant of the whole premises (that is, the person who was a tenant of the whole house from the owners) was a Mrs. Taverner, the mother of the present appellant.

Looked at physically and without regard to any legal relationships which, as it subsequently emerged, had been created, it might have appeared that this case was the not uncommon one of an old lady (for such was Mrs. Taverner) living in a dwelling-house and having residing with her, in the ordinary sense of that phrase, her own daughter, the daughter looking after her mother in the latter's old age; and, indeed, it would appear that the proceedings began on the hypothesis that such had been the facts. But during the trial in the county court it became evident that the true facts were not quite as simple as I have stated them; for it was proved quite clearly that the defendant, Mrs. Taverner's daughter, was not merely living with her mother (again in the ordinary sense of that term) in her mother's house, but was in truth a subtenant of her mother of two rooms in that house, together with the added privilege or advantage of having with her mother the joint use for cooking of the kitchen in the house. The two rooms which were the subject of the subtenancy were identified as the middle room upstairs and the middle room downstairs.

The result of the proof of those facts was, as Mr. Wien says, this: According to the principle laid down by this court in the well-known

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case of *Neale* v. *Del Soto*,[1] the daughter was not the tenant of a dwelling-house within the meaning of the rent restriction legislation, for, as to one room, which was an essential part of any dwelling-house, to wit the kitchen, she was not the tenant at all. From that premise, according to Mr. Wien, it must follow that in truth there was but a sharing of the whole house. Put somewhat differently, it follows, according to the argument, that the daughter, at least quo ad the kitchen (which, as I have said, was an essential element in any dwelling-house), was residing with her mother, and if she was residing with her mother at all so far as concerns No. 91A, Gadlys Road, then she has satisfied the language of paragraph (*g*) of the subsection which I have cited, and so is now entitled to succeed to the tenancy of the whole premises previously vested in Mrs. Taverner.

The argument is attractive, and was attractively put, if I may say so, but, in my judgment, it is not sound. I think that the words "residing with" must be given their ordinary popular significance. They do not, I think, involve any technical import or have some meaning only to be defined by lawyers. Giving them, then, the ordinary sense of the language it is, to my mind, necessary in order that paragraph (*g*) may be satisfied, that the person claiming to succeed to the tenancy of the particular premises must fairly and truly be said to have been residing with the predecessor in those premises in the sense that the successor lived and shared for living purposes the whole of the premises to which he or she claims to have succeeded.

If an extreme case is taken, it may, perhaps, illustrate my meaning better. I myself indeed put to Mr. Wien in the course of the argument that you may have a considerable block of flats, and a parent may live in one flat and a child in another. No one would suggest that the mere fact that both parent and child were living in the same building produced the result for the purposes of this section that the child was residing with the parent; but Mr. Wien says, accepting that example, the present case is distinct because here there was the sharing of one essential room; but that consideration, to my mind, obscures what this section is designed to achieve. As I have already said, I think that what is contemplated is the case of a dependent child, or whoever it may be, being one of the household of the predecessor quo ad the particular house, and that, as it seems to me, the appellant in this case cannot prove. She was the tenant at law of two rooms to the exclusive possession of which she was entitled. And all she can further say was that she shared the kitchen with her mother. She had no right to go in any other part of the house beyond the confines of her own tenancy. She was in no sense residing in any part of the house other than the two rooms of which she was the tenant, and the kitchen to the extent to which she used it. She, therefore, in my judgment, cannot be said to have been residing with her mother at the time of the latter's decease as regards the premises to which she now claims to have succeeded; in other words, I share the view which the county court judge took, and I think that for those reasons this appeal fails.

JENKINS L.J. I agree. The defendant's case, as originally formulated, was to the effect that her tenancy of the two rooms at No. 91A, Gadlys Road, Aberdare, on which possession was sought in the action, was a tenancy to which the protection of the Rent Restriction Acts applied. The defence based on the Rent Acts quo ad that subtenancy of the two rooms failed on the principle of *Neale* v. *Del Soto*[2] so soon as it appeared that the tenancy in fact included a sharing of the kitchen by the defendant with her mother. The point argued before us emerged in the course of the hearing before the county court judge

[1] [1945] K.B. 144; 61 T.L.R. 145; [1945] 1 All E.R. 191.

[2] [1945] K.B. 144.

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by way of an afterthought. To my mind the first impression, as a result of which the defence took the form it originally took, was in truth an impression which embodied the correct view of the law.

It is, no doubt, true that a tenancy of some rooms in a house, including a right to share an essential room such as the kitchen, is not a tenancy to which the protection of the Acts applies, because there is no letting of any part of the house as a separate dwelling. The question here is whether it follows from that that a daughter to whom part of the premises occupied by her mother is let with the use of a kitchen resides with the mother within the meaning of section 12 (1) (*g*) of the Act of 1920. I agree with my Lord that the words "residing with" in section 12 (1) (*g*) mean residing with the deceased tenant quo ad the whole of the premises comprised in the tenancy in question. It is with reference to that tenancy that the expression "residing with" is used, and I do not think in the context the words "residing with" can be regarded as appropriate to a member of a tenant's family who is in the premises and lives on the premises under a subletting which gives that member of the family the right to possession of part of the premises to the exclusion of the tenant, and I do not think the position is altered by the mere circumstance that in addition to the exclusive right to part of the premises under such a subtenancy a right of user in common with the tenant is given over some other part such as the kitchen. The question is not whether the member of the family has a subtenancy to which the protection of the Rent Acts applies, but whether, having regard to that subtenancy and the rights which it confers, the subtenant can be said to be residing with the tenant within the meaning of section 12 (1) (*g*), and in my judgment, for the reasons my Lord has given, and those which I have myself endeavoured to state, that question should in the present case be answered in the negative.

HODSON L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Collyer-Bristow & Co. for D. Granville West & Chivers, Newbridge, Mon.; Marchant, Harries & Co., Aberdare.*

[NORWICH AND NORFOLK SUMMER ASSIZES.]

* PIGNEY *v.* POINTER'S TRANSPORT SERVICES LTD.

1957
June 5, 6, 7, 19.
Pilcher J.

Damages — Remoteness of damage — Novus actus interveniens—Suicide after personal injuries—Head injuries—Neurosis.
Public Policy—Suicide—Claim for damages by personal representatives and dependants—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41)—*Fatal Accidents Acts,* 1846–1908 (8 *Edw.* 7, *c.* 7).
Criminal Law — Insanity — M'Naughten Rules — How to spell "M'Naughten."

In July, 1955, P. sustained head injuries as the result of an accident, in the course of his employment, as a servant of the defendants. Three months later P. instituted proceedings against the defendants alleging that the accident was caused through their negligence. On January 15, 1957, before his action had come on

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[Reported by DAVID CALCUTT, Esq., Barrister-at-Law.]

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for trial, P., as the result of neurosis induced by his injuries, committed suicide: he was not, at the time, insane under the M'Naughten † Rules.

P.'s widow continued P.'s action. She also brought a second action under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, and under the Fatal Accidents Acts, 1846–1908. In a consolidated trial, the judge, after finding the defendants guilty of negligence:—

Held, (1) that the damage which the widow had sustained was directly traceable to the negligent act of the defendants, and was not due to the operation of independent causes.

In re Polemis and Furness, Withy & Co. [1921] 3 K.B. 560; 37 T.L.R. 940 applied.

(2) That although it was against public policy to allow the personal representative of a suicide to succeed in a derivative claim (for to do so would permit a felon, by his crime, to benefit his own estate), it was not against public policy to allow a widow of a suicide to prosecute a statutory cause of action under the Fatal Accidents Acts, 1846–1908, since no benefit accrued thereby to the estate of the deceased husband.

Beresford v. *Royal Insurance Co. Ltd.* [1938] A.C. 586; 54 T.L.R. 789; [1939] 2 All E.R. 602 distinguished.

ACTION.

On July 28, 1955, Reginald Pigney, a lorry driver, sustained head injuries, as the result of an accident, in the course of his employment, as a servant of the defendants. The injuries induced a condition of acute anxiety neurosis, from which Mr. Pigney never recovered.

On October 26, 1955, Mr. Pigney instituted proceedings against the defendants alleging that the accident was caused through their negligence. On January 15, 1957, before his action had come on for trial, Mr. Pigney deliberately hanged himself.

Mr. Pigney's widow continued her husband's action. She also brought a second action under the Law Reform (Miscellaneous Provisions) Act, 1934, and under the Fatal Accidents Acts, 1846–1908. The two actions were consolidated.

It was conceded that, subject to liability, the widow, as the administratrix of her husband's estate, was entitled to recover in

† EDITOR'S NOTE.—*The spelling of M'Naughten.*—There has been some confusion as to the spelling of the name of Daniel M'Naughten who was tried for murder on March 3 and 4, 1843. The name is spelt in the indictment (now in the custody of the Central Criminal Court) "MacNaughton"; and the Clerk of the Court so spelt it in his return of prisoners committed for trial there (now at the Public Records Office). That is obviously wrong—no other contemporary authority so spelt it. *The Times* of March 4, 1843, refers to "the assassin Daniel M'Naughten" and has so spelt the name ever since, having published it on innumerable occasions. The other contemporary authorities, with one exception, appear so to spell it—see, e.g., 1 Car. & Kir. 130, n.; 8 Scott N.R. 595; Sessions Papers, Central Criminal Court (Minutes of evidence taken in shorthand). Clark and Finelly (10 Cl. & Fin. 200), however, adopted the more sophisticated M'Naghten. They even use this spelling, plainly inaccurately, when quoting from the indictment. According to general contemporary usage it seems clear that "M'Naughten" was and is the correct standard spelling. Many later variations exist, and may be ignored.

the original action, brought by the husband in his lifetime and continued by her after his death.

Martin Jukes Q.C. and *John Hayman* for the plaintiff.
F. H. Lawton Q.C. and *Michael Havers* for the defendants.

The following case, in addition to those appearing in the judgment, was referred to in argument: *Withers* v. *London, Brighton and South Coast Railway Co.*[1]

No argument was advanced respecting the claim under the Act of 1934.

Cur. adv. vult.

June 19. PILCHER J., having determined liability in favour of the plaintiff, continued: The next question I had to consider was whether there was, in law, a sufficient nexus between the injury which the deceased received at the time of the accident in July, 1955, and his suicide in January, 1957, to enable the plaintiff, that is to say, the widow, to succeed in the claims which she put forward under the Fatal Accidents Acts, 1846–1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. [His Lordship referred to the evidence and continued:] It is reasonably clear that when the deceased hanged himself he was not insane under the M'Naughten Rules. I should infer that the deceased must have known what he was doing when he took his own life and must have known that what he was doing was wrong. To put the matter in ordinary language, the deceased took his life in a fit of depression brought about by a condition of acute anxiety neurosis induced by the accident and injury which he had sustained 18 months earlier.

On these facts I have to make up my mind whether the suicide of the deceased constituted a novus actus interveniens which serves to break the chain of causation between his injury and his death, or whether upon the ordinary principles which govern remoteness of damage in cases of tort, the death of the deceased man was caused by the injury he received due to the defendants' lack of care for his safety. I have no doubt on the evidence that the deceased would not have committed suicide if he had not been in a condition of acute neurotic depression induced by the accident. In this sense the injury which he sustained in the accident was a causa sine qua non of the accident. It is equally clear that the immediate cause of his death was that he hanged himself in a fit of acute depression. That he might do this was clearly a matter which could not reasonably have been foreseen by the defendants.

The deceased was a man who was, before the accident, inclined to worry over certain matters, and it may be that this

[1] [1916] 2 K.B. 772; 37 T.L.R. 124.

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fact contributed to some extent to the development of this state of acute anxiety neurosis which was brought about by his accident and physical injury. This, however, is a matter which does not assist the defendants, because they must take the man as they find him. If the deceased had been rendered insane in law, as judged by the standard laid down in the M'Naughten Rules, and had then committed suicide, no difficulty would arise on the assumption that his state of insanity was attributable to the accident. The chain of causation would then be complete. The medical evidence in the present case would not, however, justify a finding that the deceased was insane in this sense.

[His Lordship reviewed the medical evidence and continued:] The situation would seem to be that, owing to the acute depressive neurosis from which he was suffering, he magnified his trivial worries and his powers of resistance were sapped, so that, life having become intolerable to him, he hanged himself.

In *In re Polemis and Furness, Withy & Co.*[1] Scrutton L.J. said[2]: "The fact that the damage [the negligent act] in fact "causes is not the exact kind of damage one would expect is "immaterial, so long as the damage is in fact directly traceable "to the negligent act, and not due to the operation of indepen-"dent causes having no connexion with the negligent act except "that they could not avoid its result."

The damage sustained by the plaintiff in her action under the Fatal Accidents Acts was damage due to the death of her husband whereby she lost his support. Whilst the death of the deceased was not the kind of damage one would expect to result from the injury he received, I am satisfied that his death was, to use Scrutton L.J.'s words, "directly traceable" to the physical injury which he sustained, due to the lack of care of the defendants for his safety.

Whilst each case must depend upon its own facts, I should mention *Cavanagh* v. *London Transport Executive*.[3] Devlin J. awarded damages under the Fatal Accidents Acts to the widow of a man who, having received head injuries in a street accident, lived for 16 months and then committed suicide. That case was complicated by the fact that the deceased himself had been contributorily negligent in a substantial degree. Devlin J. held that the chain of causation between the negligent act for which the defendants were liable, and the man's subsequent death, was not broken by the fact that he took his own life whilst apparently sane in law. Moreover, it would appear that the evidence of the deceased man's mental condition between the accident and his suicide went no further, if indeed as far as the evidence in the case with which I am dealing, to show that the suicide was causally connected with the injuries received in the accident.

That a sane man's death by suicide can in law "result" from an injury previously sustained, even though the suicide may not

[1] [1921] 3 K.B. 560; 37 T.L.R. 940.

[2] [1921] 3 K.B. 560, 577.

[3] *The Times*, October 23, 1956.

occur until some time after the injury, is clear from a large number of cases decided under the Workmen's Compensation Act. As I have said, every case must depend upon its own facts. I am satisfied, upon the evidence called in the case before me, that the cause of the deceased's death was the injury which he sustained which, in its turn, induced a state of acute anxiety neurosis with depressive features, which persisted for 18 months and caused him to take his own life.

I have next to consider whether the fact that the deceased took his own life at a time when he was, as I find, sane under the M'Naughten Rules debars his widow and administratrix from successfully prosecuting her claim against the defendants under the Fatal Accidents Acts on the ground of public policy. It was submitted on behalf of the defendants that inasmuch as the immediate cause of the deceased's death was that he feloniously took his life by his own hand at a time when he was sane in law, public policy should step in and debar the plaintiff in her capacity as a dependent widow, suing under the Fatal Accidents Acts, from recovering any benefit in proceedings brought by her under these Acts.

The material portion of section 1 of the Fatal Accidents Act, 1846, is in the following terms: "Whensoever the death of a "person shall be caused by wrongful act, neglect, or default, and "the act, neglect, or default is such as would (if death had not "ensued) have entitled the party injured to maintain an action "and recover damages in respect thereof, then and in every "such case the person who would have been liable if death had "not ensued shall be liable to an action for damages, notwith-"standing the death of the person injured, and although the "death shall have been caused under such circumstances as "amount in law to felony."

On my findings, the deceased's death was caused by the wrongful neglect of the defendants and that wrongful neglect was such as would have entitled the deceased, had he survived, to maintain an action and recover damages against the defendants for the injury which he sustained. Indeed, the deceased, during his lifetime, brought such an action and this action is still being prosecuted before me on the deceased's behalf by his widow, as his administratrix. In this action, moreover, it is conceded that the defendants are liable to pay compensation.

It will be observed that the last words which I have quoted from section 1 of the Act of 1846 are: "notwithstanding the "death of the person injured, and although the death shall "have been caused under such circumstances as amount in law "to felony." It is, I think, quite clear that the Fatal Accidents Act, 1846, created a new cause of action. Section 1 of the Act sets out the circumstances in which such new cause of action may be maintained, and the concluding words of the section to which I am referring were no doubt introduced in order to ensure that the rights of dependants to maintain their actions

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should not be defeated by the fact that no criminal proceedings had been instituted in cases where the act, neglect, or default resulting in the death of the deceased amounted to a felony.

It was argued on behalf of the plaintiff that these concluding words of section 1 also made it clear that even if it could properly be said that the death of the deceased in the present case was "caused under such circumstances as amounted in law to "felony," the words of the section in terms made it clear that such an event was not to be allowed to defeat a dependant's claim under the Act. This may be so, but I prefer to base my decision on the grounds already stated, namely, that the deceased's irrational and, no doubt, felonious act in taking his own life did not break the chain of causation between his accident and his death.

As Erle C.J. said in *Pym* v. *Great Northern Railway Co.*,[4] referring to the Fatal Accidents Act, 1846: "The statute . . . "gives to the personal representative a cause of action beyond "that which the deceased would have if he had survived, and "based on a different principle." Under the Act the dependants of the deceased, upon proper proof, are awarded statutory compensation to which they would not, apart from the Act, have been entitled. The compensation so granted forms no part of the estate of the deceased and is in no sense a derivative from the estate of the deceased so as to be a "benefit" derived from his estate.

The argument, advanced on behalf of the defendants, that it would be against public policy on the facts of the present case to permit the plaintiff to succeed, is based upon the decision of the House of Lords in the well-known case of *Beresford* v. *Royal Insurance Co. Ltd.*[5] That case was tried before Swift J. and a jury, with the result that the plaintiff, who was the personal representative of a Major Rowlandson, was found entitled to recover, from the defendant insurance company, a large sum of money on a life policy taken out by him some years before his death. Major Rowlandson shot himself three minutes before a substantial premium on his life policy fell due, and it was clear that he committed this felonious act deliberately and because he was in financial difficulty, and was satisfied that the defendants were not prepared to give him any further extension of time in which to pay the premium which was overdue. Accordingly, he deliberately shot himself in order that the policy moneys might be collected by his personal representative for the benefit of his creditors. Although the policy on Major Rowlandson's life granted by the defendants contained a clause which, on its true construction, and on the facts of the case, bound the insurers to pay even if the assured committed suicide whilst sane, the Court of Appeal held that in the circumstances of that case it was against public policy that the assured's personal representative

[4] (1863) 4 B. & S. 396, 406.

[5] [1938] A.C. 586; 54 T.L.R. 789; [1938] 2 All E.R. 602.

should be entitled to recover on the policy. Against this decision the plaintiff appealed, unsuccessfully, to the House of Lords.

Having carefully considered the speeches in *Beresford's* case [6] I am well satisfied that that case is readily distinguishable from the case which I am considering. The fact that *Beresford's* case [6] concerned an insurance policy, whilst not directly relevant where public policy is in question, should not, I think, be lost sight of. Major Rowlandson deliberately took his own life in circumstances which he had reason to believe would have enabled his personal representative to collect the money due under his life policy. Lord Atkin said [7]: "On ordinary principles of "insurance law an assured cannot by his own deliberate act "cause the event upon which the insurance money is payable. "The insurers have not agreed to pay on that happening. The "fire assured cannot recover if he intentionally burns down his "house, nor the marine assured if he scuttles his ship, nor the "life assured if he deliberately ends his own life. This is not "the result of public policy, but of the correct construction of "the contract. In the second place this doctrine obviously does "not apply to insane suicide, if one premises that the insanity "in question prevents the act from being in law the act of the "assured."

Lord Atkin went on to say that on a true construction of the policy Major Rowlandson's executors were entitled to recover the sum due under the policy. He then proceeded to consider whether in all the circumstances Major Rowlandson's executors ought to be debarred from recovering on grounds of public policy. He cited a number of insurance cases: *Cleaver* v. *Mutual Reserve Fund Life Association*,[8] *Amicable Insurance Society* v. *Bolland*,[9] and *Moore* v. *Woolsey*.[10] He then referred to a passage from the judgment of Evans P. in *In the Estate of Crippen*,[11] and also to other cases in the Probate Court. The principle which he extracts from these cases would seem to be, put quite shortly, that it is against public policy to allow any man to benefit himself by his own felonious act.

Lord Atkin went on to say [12]: "The remaining question is "whether the principle applies where the criminal is dead and "his personal representative is seeking to recover a benefit which "only takes shape after his death. It must be remembered that "the money becomes due, if at all, under an agreement made "by the deceased during his life for the express purpose of "benefiting his estate after his death. During his life he had "power of complete testamentary disposition over it. I cannot "think the principle of public policy to be so narrow as not to "include the increase of the criminal's estate amongst the "benefits which he is deprived of by his crime. His executor

[6] [1938] A.C. 586.
[7] [1938] A.C. 586, 595.
[8] [1892] 1 Q.B. 147; 8 T.L.R. 139.
[9] (1830) 4 Bli.N.S. 194.
[10] (1854) 4 E. & B. 243.
[11] [1911] P. 108; 27 T.L.R. 258.
[12] [1938] A.C. 586, 599.

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"or administrator claims as his representative, and, as his "representative, falls under the same ban."

In *Beresford's* case,[13] if the plaintiff had succeeded, Major Rowlandson's felonious act in shooting himself would have benefited his estate in that the plaintiff as his executor would have received the money payable under the policy. Lord Macmillan, who was the only other member of the House who gave his own reasons for dismissing the appeal, clearly felt some doubt about the matter, although he did not dissent. He said [14]: "The first question must always be—what is the principle of "public policy which would be infringed by the enforcement of "the contract? In the present instance, the principle which, it "is said, would be infringed is the principle that no court ought "to assist a criminal to derive benefit from his crime; it has also "been put in this form—that no court ought to enforce stipula-"tions tending to induce the commission of a crime. That there "are such principles of public policy to which the courts ought "to give effect, I do not doubt. But in the present case would "the enforcement of the respondents' obligation enable a criminal "to take benefit from his crime? Or can it be said that the "obligation now sought to be enforced was one which held out "an inducement to commit a crime, to wit, the crime of felo "de se?"

Lord Macmillan went on [15]: "I feel the force of the view "that to increase the estate which a criminal leaves behind him "is to benefit him. To enforce payment in favour of the assured's "representative would be to give him a benefit, albeit in a sense "a post-mortem benefit, the benefit, namely, of having by his "last and criminal act provided for his relatives or creditors. "And no criminal can be allowed to benefit in any way by his "crime. I return to the simple question—ought the courts to "enforce a contract to pay a sum of money to a person's repre-"sentatives in the event of his committing felo de se? In my "opinion I am bound to answer this question in the negative, "both on principle and, so far as the courts of this country are "concerned, by authority. I should add that I desire to reserve "my opinion as to the position of third parties who have bona "fide acquired rights for value under such policies."

It will thus be seen that the noble Lords in *Beresford's* case [16] all took the view that the claim of Major Rowlandson's personal representative failed because it was against public policy to allow the plaintiff as personal representative of the deceased to succeed in his derivative claim, for to do so would involve permitting a felon by his crime to benefit his own estate.

In the case before me the plaintiff widow and administratrix is prosecuting a statutory cause of action under the Fatal Accidents Acts which does not benefit the estate of her deceased husband. The damages awarded under the Acts form no part

[13] [1938] A.C. 586.
[14] Ibid. 603.
[15] Ibid. 605.
[16] [1938] A.C. 568.

of her husband's estate. This seems to me to afford a short answer to the submission that the case with which I am concerned is covered by *Beresford's* case.[17] I am clearly of opinion that it is not. I am equally of opinion that public policy does not require that a right of action granted by statute to a dependant should be barred simply because the immediate cause of the death of the breadwinner was that he took his own life whilst sane.

I have assumed so far that the plaintiff was in law sane when he took his own life, on the assumption that the test to be applied is that laid down in the M'Naughten Rules. The matrimonial case of *White* v. *White* [18] was cited as authority for the proposition that in all branches of the law, when sanity is in issue, the test must be that laid down in the M'Naughten Rules. It is, however, to be observed that in the case of *Swan* v. *Swan* [19] Somervell L.J. appears to have thrown some doubt upon the accuracy of this proposition. It is, moreover, clear that in many cases decided under the Workmen's Compensation Acts widows of workmen have recovered under the Acts when their husbands, having sustained injuries for which they were entitled to recover compensation under the Acts, later committed suicide when suffering from depressive neurosis or kindred affections of the mind which did not amount to insanity under the M'Naughten Rules.

When public policy is in question it is incumbent upon the court to raise the point even if it is not taken by a party, and I merely refer to these cases decided under the Workmen's Compensation Acts, of which *Dixon* v. *Sutton Heath and Lea Green Colliery* [20] is an example, to remark that it is at least odd that the point based upon public policy which was argued before me was not raised by the court or a party in any of these cases, nor does it appear to have been raised by Devlin J. or the defendants in *Cavanagh's* case [21] to which I have already referred. I conclude that this was so because the point did not commend itself either to the interested party or to the court.

This brings me to the question of damages. Whilst the physical injury suffered by the deceased in the accident was not a serious one, it is clear from the widow's evidence that during the remainder of his life her husband suffered from sleeplessness and headaches. It is also clear that as a result of the accident he was miserable and depressed and the measure of this misery and depression may be gauged by the fact that for no rational cause he was moved to take his own life.

The widow is entitled to recover a proper sum in respect of this pain and suffering endured by her late husband between the time of the accident and his death. I accordingly award her the

[17] [1938] A.C. 568.
[18] [1950] P. 39; 65 T.L.R. 524; [1949] 2 All E.R. 339.
[19] [1953] P. 258; [1953] 3 W.L.R. 591; [1953] 2 All E.R. 854.
[20] (1930) 23 B.W.C.C. 185.
[21] *The Times*, October 23, 1956.

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sum of £500 in this action, such sum to include the special damage agreed at £243 14s. 6d.

In regard to the widow's claim under the Fatal Accidents Acts, the deceased man was 55 years of age at the time of his death and his widow was 53. I find that her dependency, after giving credit for what it cost her to feed her husband, amounted to between £5 and £6 per week. It seems probable that the deceased would not have continued to hold his job as a lorry driver with the defendants for very many more years. He had worked for the defendants for 26 years and his work was of an arduous character. He was, however, a hard-working man and would no doubt have found other employment, either with the defendants or with some other firm at a lesser wage. I accordingly award the plaintiff the sum of £1,800 under the Fatal Accidents Acts. I assess the claim under the Law Reform (Miscellaneous Provisions) Act at £200. The plaintiff is also entitled to the agreed funeral expenses of £48 17s. 6d. There will be judgment for the widow in the original action for £500 with costs, and in the second action for £2,048 17s. 6d. with costs.

Judgment for the plaintiff.

Solicitors: *John Holt; Mills & Reeve, Norwich.*

[QUEEN'S BENCH DIVISION.]

1957
Oct. 15.

Lord Goddard C.J., Donovan and Havers JJ.

* SYRETT *v.* EGERTON AND OTHERS.

Mortgage — General charge — Enforceability — "All . . . income and "estate from whatsoever source" charged to secure payment of annuity — After acquired property — Whether charge divisible — Royalties.

Contract—Public policy.

A grantor by deed of covenant charged "all his income and "estate from whatsoever source the same may be derived and of "whatsoever nature respectively" with the payment of certain sums of money to the trustee of the deed during the life of a named beneficiary. Subsequently in consideration of certain loans and of future loans to be made to him the grantor entered into a mortgage deed whereby as beneficial owner he assigned to the lenders moneys accruing to him in respect of agreements under which he had the right to receive royalties. The grantor defaulted in making repayments under the mortgage deed, and both the trustee and the lenders claimed a sum of £143 15s. royalties which had become due to the grantor; the trustee on the ground that he had the first charge upon the income of the grantor, and the lenders on the ground that the charge in favour of the trustee was void as being contrary to public policy and too wide and too vague to be enforced:—

Held, that the charge in favour of the trustee was enforceable on the income of the grantor, for the charge was divisible and

whether or not a charge on the whole of a man's property and estate was enforceable, equity would enforce a charge on identifiable property. The royalties formed part of the grantor's income and the trustee's claim, accordingly, was good.

In re Clarke, Coombe v. *Carter* (1887) 36 Ch.D. 348; 3 T.L.R. 818 followed.

Tailby v. *Official Receiver* (1888) 13 App.Cas. 523; 4 T.L.R. 726 considered.

APPEAL from Master Lawrence.

By a deed of covenant made on May 8, 1953, between one Frederick Curzon [the grantor], Reginald Alan Syrett, the present claimant [the trustee], and a named beneficiary, the grantor for consideration covenanted with the trustee and the beneficiary "that he, the grantor and his personal representatives "will pay to the trustee during the life of the beneficiary such "sum as after deduction therefrom of income tax, at the current "rate for the time being would amount to the quarterly sum of "£250, such payments to commence as from the date of the "deed and to be paid on each of the usual quarter days." Clause 2 of the deed provided: "The grantor hereby charges all "his income and estate from whatsoever source the same may "be derived and of whatsoever nature respectively with the pay-"ment to the trustee of the said payments." On April 8, 1954, a supplemental deed was entered into between the same three parties, by which the deed of covenant was varied in a manner immaterial for the purpose of this report. By clause 5 of the deed so varied it was provided that "should default be made by "the grantor in payment of any of the sums hereby covenanted "to be paid, the trustee shall be at liberty to give notice to any "person, firm or company concerned to pay to the trustee suffi-"cient of the estate or income of the grantor to provide for the "payment of the periodical sums covenanted to be paid by the "grantor . . .", and by clause 6 the terms and conditions contained in the principal deed as set out above were acknowledged ratified and confirmed by the grantor.

On March 27, 1956, the grantor entered into a mortgage deed made, inter alia, between himself and another person and the present defendants, Robert Egerton and Clive Coulson Nicholas (therein described as the lenders) to secure to the lenders "the "payment of the sums which now are or from time to time shall "be owing to them by the borrowers or either of them" whereby the grantor "as beneficial owner . . . assigns to the lenders" moneys accruing to him under various agreements under which the grantor assigned performing rights and copyright in musical works of which he was the author and received royalties from the music firm, Boosey & Hawkes, which published them. The agreements included one under which at the material time a sum of £143 15s. in royalties was due to him.

The grantor defaulted in making repayments under the mortgage deed, and both the trustee and the lenders made claim to

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the sum of £143 15s. royalties. The music publishers paid that sum into court and took out a summons by way of interpleader. Master Lawrence considered that the charge in the deed of covenant was a valid charge which took precedence over the charge contained in the mortgage deed, and allowed the claim of the trustee.

The lenders appealed.

Harry Lester for the lenders.
Michael Kempster for the trustee.

The following cases were cited in argument. *In re Count D'Epineuil* *; *In re Clarke* †; *Tailby* v. *Official Receiver* ‡; *In re Turcan* §; and *In re Kelcey*.¶

LORD GODDARD C.J. stated the facts and continued: The question is which of the claimants under these respective deeds is entitled to the money. The trustee claims as having the first charge on this income.

The point raised is that the charge in favour of the trustee is too vague to be enforced, and that, as it purports to be a charge on the whole of the "estate" of whatsoever nature, it is so wide that equity will not enforce it. It is also alleged to be contrary to public policy, because it is said that it might deprive a man of the whole of his assets and his power to maintain himself.

Several cases, including *In re Clarke* [1] and *Tailby* v. *Official Receiver*,[2] a very well known case, were cited to us. In my opinion, it is perfectly clear that equity will recognize a charge and enforce it if it is on identifiable property. In *In re Clarke* [3] the court considered whether the charge could be enforced and said that the assignment in that case was divisible; and the court held that the charge was effective on part of the property charged, although the question was left open as to whether or not a general assignment of all property to which the mortgagor might become entitled was too wide. In *Tailby* v. *Official Receiver* [4] that view of the Court of Appeal was approved.

As a matter of construction, there is no doubt from the terms of this particular deed that the grantor was not only charging his present income, but also his future income, but I find it enough to say here—where a man charges his present income and his future income and in addition the rest of all his estate—we need not decide the rather larger question, which never has been specifically decided, whether the charging of the whole of a man's property and estate may be regarded with such

* (1882) 20 Ch.D. 758.
† (1887) 36 Ch.D. 348; 3 T.L.R. 818.
‡ (1888) 13 App.Cas. 523; 4 T.L.R. 726.
§ (1888) 40 Ch.D. 5.
¶ [1899] 2 Ch. 530.

[1] (1887) 36 Ch.D. 348; 3 T.L.R. 818.
[2] (1888) 13 App.Cas. 523; 4 T.L.R. 726.
[3] 36 Ch.D. 348.
[4] 13 App.Cas. 523.

disfavour by equity that it will not be enforced. I can see no reason at all why a man is not entitled to charge his income. His income is distinct from the rest of his estate. No doubt it is part of his estate, but it is a definite thing. It is that on which he pays tax, among other things. He pays tax on his income. He does not pay tax on the whole of his estate. In this case there can be no doubt that the royalties which the grantor Curzon receives from Boosey & Hawkes are part of his income, and he has charged those with the payment of this annuity.

It is interesting to notice that in the last of the cases cited to us, *In re Kelcey*,[5] Kekewich J. pointed out that there was no decision to the effect that a general charge on the whole of a man's property could not create a specific lien of any sort or kind, and said [6] (and I entirely agree with him) that that was a point which could now only be decided by the House of Lords.

Some reliance was placed on an expression of Lord Macnaghten in *Tailby* v. *Official Receiver*,[7] but I think that Lord Macnaghten's speech in that case, when it is understood, is a direct authority in favour of saying that if one can point a finger to a particular property and say "That property is charged," the charge takes effect on it.

For these reasons, in my opinion the master came to a proper decision; and I would dismiss this appeal.

DONOVAN J. Mr. Lester says that we should not treat this charge and the deed of covenant as divisible between "income" and "estate." The word "estate," of course, is wide enough to cover receipts of income as well as receipts of capital; but, in its context, the covenantor here clearly intended, in my view, to use the word "estate" as meaning capital. That is in contradistinction to the income which he had already specified. That being so, it seems to me that it is just as proper to treat those two things separately for this purpose as it was to treat separately possible receipts under a will in *In re Clarke* [8]; separately, that is, from the other kinds of property which were specified in the assignment in that case, which included any property to which the mortgagor might thereafter become entitled.

On the footing that it is proper to divide in this way, it is not contended, as I understand, that a man may not charge all his future income by way of mortgage without contravening public policy; and, of course, when the charge comes to be enforced, it should not be difficult to ascertain what his income is. So no question of vagueness will arise at the material time, which is the time when the charge comes to be enforced.

I agree with Lord Goddard C.J. that it is not necessary to

[5] [1899] 2 Ch. 530.
[6] Ibid. 535.
[7] 13 App.Cas. 523, 544, 545.
[8] 36 Ch.D. 348.

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decide the larger question in this case; and, for these reasons, I agree that the appeal should be dismissed.

HAVERS J. I agree. I do not think that it is necessary for us to decide the larger question raised by Mr. Lester as to whether, when a man charges the whole of his income and assets present and future, such charge is void, either on the ground that it is contrary to public policy or because it is too wide to be enforceable by a court of equity. As Cotton L.J. said in *In re Turcan*[9]: "The first point that was made before us was that "the whole covenant was against public policy and void, as "being a covenant to dispose of the covenantor's whole means of "livelihood. We do not think that is so, there being no question "of restraint of trade." Nor was there any question of restraint of trade in this case. "But it is a different question whether "the covenant is not so wide that a court of equity would refuse "to enforce it, and would leave the trustees to prove against the "estate of the covenantor for breach of the covenant like "ordinary creditors. Possibly the court would refuse to enforce "this covenant as a general covenant to assign all the settlor's "property; but it is not necessary to decide that point, because "another question arises here, namely, whether a court of "equity will not enforce the covenant with regard to the policies "on the ground that the covenant is divisible, and that the "policies are within one of the classes of property specially "mentioned. That is really the question in this case. It has "been decided in *Official Receiver* v. *Tailby*,[10] approving the "decision in *In re Clarke*,[11] that where a covenant is divisible, "and the property in question can be brought within any par-"ticular class mentioned in the covenant, the covenant may be "enforced as to that property, although it may not have been "in existence at the time of making the covenant, and although "it may not be assignable at law."

Here, in my view, the covenant is divisible, and it seems to me it is beyond dispute that the sum of money involved, £143 15s., was money payable by Boosey & Hawkes to the grantor and clearly came within the definition of "income" within the meaning of the covenant. In those circumstances, I think that the master was right and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hall, Brydon, Egerton & Nicholas; Ernest W. Long & Co.*

J. F. L.

[9] (1888) 40 Ch.D. 5, 9.
[10] 13 App.Cas. 523.
[11] 36 Ch.D. 348.

[CHANCERY DIVISION.]

* *In re* HASLUCK, DECD. SULLY *v.* DUFFIN.

1957
Oct. 3, 4.

Wynn-Parry J.

[1956 H. 2998.]

Town and Country Planning — Compensation — Capital or income — "Unexpended balance of established development value"—Part of residuary estate consisting of land purchased by county council—Whether attributable to capital or income of estate — Town and Country Planning Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 72), *s.* 17.
Capital or Income.

As the result of the acquisition by a county council of trust land under an agreement by which the purchase price was to be determined, as on a compulsory acquisition, by adding to the existing value the unexpended balance of established development value, a question arose whether the one-seventh increase in the value of the claim holding attributed to that land made by section 17 of the Town and Country Planning Act, 1954, was income or capital under the trusts of the will of the testator:—

Held, (1) that, there being no mention of interest in section 17 of the Act, this one-seventh was capital.

(2) That on the construction of the agreement (treated as a voluntary agreement), it was not therein provided that the one-seventh should be treated as income and there must be a declaration accordingly.

ADJOURNED SUMMONS.

By his will dated June 14, 1900, Percy Pedley Hasluck, who died on October 20, 1920, gave a power of appointment of a share of his residue to his daughter Edith Margaret Eleanor Hasluck. By her will, dated September 27, 1954, she exercised her power of appointment. She died on May 2, 1955.

A portion of the testator's residuary real estate was purchased by the Hertfordshire County Council under a voluntary agreement dated January 31, 1955, and, as a result of that transaction, a sum of £2,614 5s. 9d. became available as "an unexpended "balance of established development value" under section 17 of the Town and Country Planning Act, 1954.[1]

[1] Town and Country Planning Act, 1954, s. 17: "(1) For the purposes of this Act land shall be "taken to have an unexpended "balance of established development "value immediately after the commencement of this Act if there are "then subsisting one or more claim "holdings whose area consists of "that land, or includes that land "together with other land, and there "is not then subsisting any claim "holding whose area consists of part "only of that land, whether with or "without other land.

"(2) Where subsection (1) of this "section applies, there shall be "attributed to the land referred to "in that subsection—(*a*) the value "of any claim holding having an "area consisting of that land; and "(*b*) such fraction of the value of "any claim holding whose area "includes that land as attaches to "that land; and the unexpended "balance of established development "value of that land immediately "after the commencement of this "Act (hereafter in this Act referred "to in relation to that land as its "'original unexpended balance of "'established development value') "shall be taken to have been an "amount equal to eight-sevenths of "the amount or aggregate amount "so attributed."

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In 1956, the trustees of the will of the testator and one of the executors and trustees of the will of the testatrix took out a summons to determine, inter alia, whether the balance above referred to was attributable to capital or income.

A. A. Baden Fuller for the plaintiffs.

E. Milner Holland Q.C. and *P. W. E. Taylor* for beneficiaries under the will of the testator.

J. A. Plowman Q.C. and *E. I. Goulding* for beneficiaries interested under an appointment made under the will of the testatrix.

C. D. Myles for an annuitant under the will of the testatrix.

No cases were cited in argument on this question.

WYNN-PARRY J. The land in question was the subject of a contract for sale, and it is clear from the terms of that contract that it was a voluntary contract entered into between the Hertfordshire County Council and the then trustees, and that the contract provided machinery by which the price to be paid by the county council was to be ascertained; and it is clear from the evidence—I do not propose to review it in any detail—that the price was in fact quantified by using the provisions of section 17 of the Town and Country Planning Act, 1954. That section provides that what is there defined as the "unexpended balance "of established development value" shall be taken to have been an amount equal to eight-sevenths of the amount or aggregate amount so attributed, and that factor, it is quite clear, was taken into consideration in quantifying the price under the agreement.

Two points have been sought to be made. The first is that, assuming that section 17 applies, in the sense that it governs the parties whether they wanted it to do so or not, the eighth seventh is to be treated as interest when received by the trustees. That conclusion, if it is a sound conclusion, can only be arrived at by a study of the Act itself, and it does appear that there was, as counsel submitted, a gap of seven years from July 1, 1948, until the Act of 1954 came into operation, and it may well be that the intention of the framers of this Act in producing this fraction of eight-sevenths was to compensate by the eighth seventh the person interested in the land for the period of seven years; but that it not what the Act by its language does: it merely says that, where it applies and the unexpended balance of the established development value of the particular land has to be ascertained, then it is to be ascertained in the manner provided at the end of section 17 (2), which I have read. Where the legislature in this Act designs to provide for the payment of interest, it clearly knows how to do so, because there is an express provision for the payment of interest on a capital sum in section 14 of the Act, namely, in the provision part. Section 17.

as has been admitted, is of general application throughout the Act, and it seems to me, therefore, that the argument that one can extract from the language of the Act that the eighth seventh is to be treated as interest is not a sound argument.

I then turn to the second point which is that, when the agreement, treated as a voluntary agreement, is fairly construed in the light of the surrounding circumstances as proper to be taken into consideration, the conclusion must be that of the price, this one-seventh, one of the eight-sevenths, representing the factor of unexpended balance of established development value, should be regarded as interest. It is first relevant to observe that no such express provision is to be found in the agreement, and the only reference to interest is the provision in clause 4 that "interest is to be paid on the purchase price as agreed or "awarded at the rate of 4½ per cent. per annum from the date "of such entry"—that is the council's entry—"until the "completion of the purchase."

Therefore, pausing there, I have no material as yet on which I could properly, as between capital and income, split up this price and attribute part of it to those interested in income.

Then it is finally contended that there is evidence that it was the intention of the then trustees, in entering into this contract, that the one-seventh in question should be treated as being paid in lieu of interest, and in support of that contention reference is made to the following statement contained in an affidavit by the present trustees, namely: "The price was agreed "at £24,484 5s. 9d., made up as follows: Existing use value "£1,977 0s. 0d.; Timber £1,593 0s. 0d.; Development value "£18,300; one-seventh in lieu of interest £2,614 5s. 9d." I, for my part, cannot regard that as satisfactory evidence on which I could act, but, even if it were, even if it did amount to satisfactory evidence, I come back to the agreement, and the only conclusion at which I can arrive is that, however it may have been a matter of indifference to the county council as to how the price was expressed, and however interested the then trustees may have been in seeing that there was a differentiation so that those entitled under income would receive an amount equal to the one-seventh in question, that has not been provided in the contract. Much as I may sympathize with those interested in income, there is no ground on which I can interfere with the plain language of the contract. I propose to make the necessary declaration accordingly.

Declaration accordingly.

Solicitors: *Pedley, May & Fletcher; Waltons & Co.; Peacock & Goddard.*

J. L. D.

[COURT OF APPEAL.]

C. A.

1957
Oct. 22.

Lord Evershed M.R., Romer and Ormerod L.JJ.

* WILSON *v.* PILLEY.

[Plaint No. W. 451.]

Damages—Personal injuries—Permanent injury—Quantum of damages—Award of £75 for fairly serious injury—Whether adequate.
Court of Appeal — County court — Appeal from — Damages — Personal injuries—Power of appellate court to interfere.

The plaintiff received fairly serious injury to her right ankle and a lesser injury to her left leg. She had made a good recovery but there was evidence that she was always likely to have some discomfort in cold and wet weather in her right ankle. In a claim for damages against the defendant, the county court judge found the injury to her ankle to be "a very nasty" one, and he awarded the plaintiff £75 general damages. She appealed against the quantum of damages.

Held, that, having regard to the modern scale in awarding damages, £75 was a wholly erroneous estimate for general damages and that sum would be appropriate only to compensate for pain and suffering and damages generally in cases which, if not trifling, could be properly classed as slight, and such as would be likely to have no future effects of a lasting nature, still less of a permanent character; accordingly, the plaintiff should be awarded £200 in lieu of the sum of £75.

Per curiam. Interference by the Court of Appeal with an award of damages by the trial judge must be a rare thing, particularly in relatively small cases, and the onus on an appellant seeking to interfere with an award of damages was a very heavy one.

APPEAL from Judge Reid, sitting at Kingston-upon-Thames County Court.

The plaintiff, Mrs. Margot Winifred Wilson, claimed damages for personal injuries suffered by her as the result of an accident which occurred in Kingston Road, Staines at 6.15 p.m. on September 19, 1956, when, owing to the negligent manner in which the defendant, Alan William Pilley, drove his motor-bicycle, it collided with her and knocked her down. She claimed £55 3s. 8d. special damages and £300 general damages.

The county court judge found that both the plaintiff and defendant had been equally to blame for the accident and he awarded to the plaintiff, in addition to the special damages which were agreed, the sum of £75 general damages.

The plaintiff appealed against the finding that she was negligent and the amount of the award of general damages. The plaintiff's injuries and the nature of the medical evidence is fully stated in the judgment of Lord Evershed M.R.

J. D. Stocker for the plaintiff.
A. Michael Lee for the defendant.

No cases were cited in argument.

LORD EVERSHED M.R. The plaintiff in the action, who is the appellant in this court, Mrs. Margot Winifred Wilson, was injured in the evening in September, 1956, when crossing the main road at Staines, by being run into by the defendant riding a motor-bicycle. She brought these proceedings accordingly to recover damages, special and general, in respect of the personal injury which she suffered, alleging negligence on the part of the defendant. I am satisfied on the facts that it would be quite wrong for this court to interfere, as the plaintiff has asked us to do, with the finding that she herself was at fault; and, having reached that stage, it is to my mind equally clear that we could not and should not interfere with the apportionment, a matter which, as has many times been pointed out, is pre-eminently one for the estimate of the trial judge. That part of the appeal was in truth put in second place by Mr. Stocker for the plaintiff. His main complaint was as regards the award of damages. Leaving aside the special damages, which were agreed at some £55, the general damages which the judge awarded to the plaintiff were £75.

Again let me emphasise that interference by this court with an award of damages by the trial judge must be a rare thing, and may I say that it should be perhaps even rarer in relatively small cases tried in the county court. No one would suggest that, because this court thought that the damages, small in any case, were rather on the low side, this court could consider for a moment slightly raising the figure or adopting the converse course in a different kind of case. In other words, the onus upon an appellant seeking to interfere with an award of damages, particularly within this sort of scale, is a very heavy one. No question here arises of any admission of inadmissible evidence or exclusion of evidence which should have been taken into account. It must be established plainly by the plaintiff that the judge here proceeded upon a wholly erroneous estimate.

I have come to the conclusion, with some anxiety, that that question must be answered affirmatively. I think, with all respect to this very careful judge, that, judging by modern standards of award in this type of case, the judge did proceed upon a wholly erroneous estimate.

There was before the judge agreed medical evidence, and to that I must make some reference. According to the first report made by Mr. Godsalve Ward of the Ashford County Hospital, a Fellow of the Royal College of Surgeons, "She," the plaintiff, "sustained a penetrating wound of her right ankle and minor "injuries to the left shin. She underwent an operation the "same day." There was an irregular dirty wound which entered the ankle joint, a few pieces of the external malleolus being torn off, together with further bone injuries. The ligament was reconstituted later and the leg immobilised in a plaster. At a later date a walking plaster was applied, which had to be modified because she was developing a sore. That plaster was

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removed at the end of October, and then she had to attend for exercises. Mr. Ward continues: "When examined on "November 8 she was complaining of some discomfort and stiff-"ness in the right ankle and some tenderness of the left shin "and ankle." She suffered pain which interfered with her sleep for a period. "Her complaint," he goes on, "was of "stiffness of the ankle, particularly on going downstairs, and "that the ankle tended to give way as she walked along, but "she had been able to walk half an hour on level ground." Then he said that she walked with a slight limp; and there follow more technical details of the nature of the injuries. "In "my opinion, your client"—meaning the plaintiff—"is making "a very satisfactory progress from a severe injury to the right "ankle and I told her that she was fit to work on Monday, "November 12. Further improvement is likely to occur in the "function of the right ankle, though at a later date it is possible "that improvement in function may result from manipulation." The surgeon then refers to the fact that the plaintiff was in the habit of indulging, with her husband, in what is said to be a sport or pastime known as motor-cycle scrambling, a procedure which involves on the part of the passenger acrobatic feats of a somewhat terrifying kind, and, not unnaturally, this injury has interfered with this pastime. The plaintiff was a young woman of 21 and though the pastime is one of which I have no personal knowledge, it is a fair point to make that, of course, for a young married woman it is not a light matter that she is prevented from partaking, with her husband, in what they regard as their chosen pastime.

She was examined again by Mr. Ward some seven months later in May of this year, shortly before the trial. Mr. Ward in the second report says: "She still has a tendency for the right "ankle to turn over outwards and her doctor has ordered an "elastic anklet which affords some relief and which acts princi-"pally by protecting the scar against minor injury. There is "still a tendency for the right ankle to swell during the hot "weather." Then he observes that she resumed this somewhat temerarious pastime, but was not able to finish the course. He later proceeds to say that there has been some shrinkage of the right calf as compared with the left, and he concludes with these words: "In my opinion, your client has made a very satisfactory "recovery from a penetrating wound of the right ankle and "minor injuries to the left leg. She is always likely to have "some discomfort in the right ankle in cold and wet weather "but she should regain full function within the next six months "and her present minor symptoms will have, by then, abated."

That was the expert evidence. The judge, of course, also saw and heard the plaintiff herself, and he states his conclusion of fact upon this aspect of the matter in the following language: "Now then, there remains the question of damages"; and he then states the agreed figure of special damage. "The plaintiff

"received a very nasty injury to her right ankle and a lesser "injury to her left leg. She is young and happily she has "made a good recovery. But she was away from work for "eight weeks and her ankle may be expected to give her a "certain amount of trouble in adverse weather for the rest of "her life."

In my judgment, that conclusion is plainly justified. It in fact omits to mention, though I do not suggest that the judge forgot, the earlier discomfort, including the operation which she underwent; but, as the judge makes plain, this could not be called a minor or slight injury. To use the judge's own words, she had a very nasty injury. Speaking some nine months after the accident, when she was still suffering from a certain disability in the right ankle, the judge prophesies, upon evidence which would justify the prophecy, that she may expect to have a certain amount of trouble, that is pain and discomfort, though not to any great extent, for the rest of her life, in this ankle.

In those circumstances, and having regard to the modern scale in awarding damages in this kind of case, what of the figure of £75? I feel forced to the conclusion that that is really a wholly erroneous estimate. I have taken occasion to refer to Kemp and Kemp on the Quantum of Damages. It contains the results of a number of cases of personal injuries, which give some guide to the kind of scale which in modern times is applied. So far as the infinite variety of the circumstances in individual cases permits, it is, to my mind, desirable that there should not be wide disformity in the kind of sums awarded. I must also acknowledge my debt to my brother Ormerod, who in this class of case is far more experienced than I am.

Giving the matter the best consideration I can, my conclusion would be that £75 for general damages would be appropriate, and appropriate only, to compensate pain and suffering and damages generally in cases which, if not trifling, could be properly classified as slight and such as would be likely to have no future effects of a lasting nature, still less of a permanent character. With all respect, it does not seem to me, as I follow the evidence and the judge's clear conclusion, that this injury is of that character; and I would therefore have awarded, and think this court should award, as general damages, in lieu of the figure stated by the judge, the sum of £200. To that extent I would allow the appeal.

ROMER L.J. I agree that £200 is the appropriate sum to award in this case, having regard to the medical evidence, which shows that this girl did suffer considerable pain and discomfort for a number of weeks and had a thoroughly disagreeable and unpleasant time generally. In addition, there is the evidence in the medical reports and which appears in the judge's judgment that she is likely always to have some discomfort in the right

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ankle in cold and wet weather in the future. In those circumstances I agree that £200 is the appropriate and proper sum to award.

But at the same time I should like to associate myself with what the Master of the Rolls has said with regard to appeals from county courts in this class of case. It would be very unfortunate, I think, if in comparatively slight cases (and by "comparatively slight" I mean by comparison with the dreadful cases of personal injury that so often come before the courts), where the judge has come to the conclusion that the injury is small and can be compensated for by a comparatively small sum of money, the matter should be brought to this court. As the Master of the Rolls has said, the onus is a heavy one on any plaintiff who is awarded a small sum of money by a county court judge and comes to the Court of Appeal in the hope of getting more. But in the circumstances of the present case, I do think that £75 falls far short of what ought to be awarded, and that the sum should be increased in the way the Master of the Rolls has indicated.

On the question of liability, I think the judge was perfectly right, and that this court has no ground for interfering.

ORMEROD L.J. I agree for the reasons which have already been given in full that this sum of £75 should be increased to £200; but beyond that I think there is nothing that I can usefully add.

Judgment for the appellant for £127 11s. 10d.

Solicitors: *Hugh V. Harraway & Son for Edmund Evans, Kingston-upon-Thames; G. Howard & Co.*

B. A. B.

[PROBATE, ETC., DIVISION.]

1957
Aug. 26.

* PRACTICE DIRECTION (JUDICATURE FEE STAMPS).

Husband and Wife—Practice—Documents—Judicature fee stamps.

On and after October 1, 1957, all Probate and Divorce fees in the Principal Probate Registry and the Divorce Registry will be payable by *impressed* judicature fee stamps.

The use of *adhesive* stamps in payment of fees will be discontinued.

B. LONG,
Senior Registrar.

August 26, 1957.

[CHANCERY DIVISION.]

* *In re* PARINGA MINING AND EXPLORATION CO. LTD.

1957
Oct. 28.

Wynn-Parry J.

[No. 00514 of 1957.]

Company — Capital — Reduction — Form of Minute — Share premium account written off—Whether reference in minute required—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 4, 56 (1), 69 (1).

Where on a petition for the reduction of share capital and of the share premium account the share premium account is written down or written off, no reference to the share premium account should be made in the minute.

PETITION.

Paringa Mining and Exploration Co. Ltd., by this petition, asked for the confirmation of a reduction of the company's capital and the share premium account. The petition, so far as relevant, provided: The share capital at the time of the presentation of the petition was £300,000, divided into £270,440 stock and 591,200 shares of 1s. each. The stock was deemed to be fully paid up and all the said shares were unissued. On May 22, 1957, the sum of £189,556 18s. 2d. stood to the credit of the share premium account of the company.

The articles of association of the company provided that the company might by special resolution reduce its share capital and any share premium account.

At an extraordinary general meeting, held on May 22, 1957, special resolutions in accordance with section 141 of the Companies Act, 1948, were passed providing, inter alia: (1) That the share premium account of the company be reduced from £189,556 18s. 2d. to nil by cancelling and wholly extinguishing the same. (2) That the capital of the company be reduced from £300,000 divided into 591,200 unissued shares of 1s. each and £270,440 stock to £67,610, and that such reduction of capital be effected: (a) by cancelling and wholly extinguishing all the 591,200 unissued shares of 1s. each, and (b) by cancelling capital which had been lost or was unrepresented by available assets to the extent of 9d. out of every shilling in nominal amount of the said £270,440 stock.

It was further resolved that the capital of the company should be increased to £500,000 by the issue of 8,647,800 shares of 1s. each.

The minute which it was proposed to register to give effect to those resolutions contained no reference to the share premium account, and was in the following terms: "The capital of "Paringa Mining and Exploration Co. Ltd. was by virtue of a "special resolution and with the sanction of an order of the "High Court of Justice dated . . . 1957 reduced from £300,000 "divided into 591,200 shares of 1s. each and £270,440 stock to

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"£67,610 stock. A special resolution has been passed to take "effect upon the aforesaid reduction of capital taking effect "increasing the capital of the company to £500,000 by the "creation of 8,647,800 additional shares of 1s. each."

Ralph Instone for the company.

No cases were cited in argument.

WYNN-PARRY J. This is a petition for the confirmation of a reduction of the company's capital and share premium account by writing down its capital from £300,000 to £67,610 and its share premium account from £189,556 18s. 2d. to nil. The evidence satisfies me that both the sums in question have been lost, and I find no difficulty in confirming the reduction.

A point, however, has been taken on the form of the minute. It is, I am told, the practice of the court up to now, in cases where there is a share premium account and it is written off or written down, to include a reference to the resulting position as regards the share premium account in the minute. This practice has been challenged by Mr. Instone, who appears for the company.

The position of the share premium account on a reduction of capital is dealt with by section 56 of the Companies Act, 1948. Subsection (1) says: "Where a company issues shares at a "premium, whether for cash or otherwise, a sum equal to the "aggregate amount or value of the premiums on those shares "shall be transferred to an account, to be called 'the share "'premium account,' and the provisions of this Act relating to "the reduction of the share capital of a company shall, except "as provided in this section, apply as if the share premium "account were paid-up share capital of the company." Prima facie, that language is sufficient to bring into operation all the other provisions of the Act relating in any way to the reduction of the share capital of the company, and would therefore bring into operation sections 69 and 70. Subsection (2) provides—this is the exception contemplated by subsection (1)—that "the share "premium account may, notwithstanding anything in the fore-"going subsection, be applied by the company in paying up "unissued shares of the company to be issued to members of "the company as fully paid bonus shares, in writing off—(*a*) the "preliminary expenses of the company; or (*b*) the expenses of, "or the commission paid or discount allowed on, any issue of "shares or debentures of the company; or in providing for the "premium payable on redemption of any redeemable preference "shares or of any debentures of the company."

I will consider section 69, bearing in mind the provisions of section 4, namely, that "A company may not alter the conditions "contained in its memorandum except in the cases, in the mode "and to the extent for which express provision is made in this

"Act." Section 69 relates to the registration of the order of the court and the minute, and subsection (1) to the content of the minute according to the type of case involved. Subsection (5) is the important subsection for this purpose: "The minute when "registered shall be deemed to be substituted for the corres- "ponding part of the memorandum, and shall be valid and "alterable as if it had been originally contained therein." Section 70 relates to the liability of members in respect of reduced shares; and, prima facie, that also must operate in the case of a reduction involving the writing down or writing off of the share premium account. Take first the case of writing off a share premium account altogether. What is the relevance, for the purpose of the minute, of putting in a reference to that complete writing off? Subsection (5) of section 69, as I pointed out, provides in effect that the minute is to form part of the memorandum, taking the place of the statement of the capital in the memorandum which, before registration of the minute, and before the reduction was confirmed, represented an accurate statement of the company's capital. If—this, I think, is a stronger case—a share premium account is written down without being written off completely, then the remaining amount of the share premium account, if it appears in the minute, must by the operation of subsection (5) of section 69 be part of the memorandum.

How, then, is one to reconcile section 4, which provides that a company may not alter the conditions of the memorandum except in the cases expressly provided in the Act, with the provision in subsection (2) of section 56 that the share premium account may be applied by the company in the various ways which are stated in that section? It may be said that that can be done because of the express exception in subsection (1); but it seems to me to be very inconvenient to proceed upon the basis that something is to be treated as part of the memorandum of association of a company and therefore, prima facie, unalterable under section 4 except to the extent expressly allowed by the Act, and at the same time there should be this express power to deal with the share premium account as provided in section 56 (2).

I think that the sensible view to take is to regard the provision of section 69 relating to the minute—I shall not trouble about section 70—as inapplicable to cases where the reduction involves either the writing down or the writing off of the share premium account, so far as regards the share premium account. I think that the convenience of the matter and the doubts which have been thrown on the possible reconciliation of section 4 and section 56 make it desirable to alter the practice. I shall therefore propose in this case to accede to the application which has been put forward by Mr. Instone and direct that the minute shall make no reference to the share premium account.

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I therefore approve the minute without the proposed reference to the share premium account, with the slight exception that the word "additional" in front of "shares" in the last line of the minute as appearing in the petition should be omitted. There will be the usual directions as to advertisement.

Order accordingly.

Solicitors: *Nordon & Co.*

I. G. R. M.

[COURT OF APPEAL.]

C. A.

1957 *Oct.* 17.

Jenkins, Parker and Pearce L.JJ.

* MONMOUTHSHIRE COUNTY COUNCIL *v.* BRITISH TRANSPORT COMMISSION.

[1956 M. No. 146.]

Railway—Bridge—"Immediate approaches"—Bridge built by railway company to carry road over railway—Road diverted for 367 *yards to connect with bridge—Liability of British Transport Commission to maintain diverted road—Railways Clauses Consolidation Act,* 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 46, 50.

In 1860 a railway company, pursuant to a private Act incorporating the provisions of the Railways Clauses Consolidation Act, 1845, constructed an extension to an existing railway so that it crossed a turnpike road. The company built a bridge to carry the road over the railway and the original line of the road was diverted at two points either side of the bridge so as to lead up to the bridge. The diversion on the north side of the railway necessitated a new stretch of road being constructed which, from the point where it left the old road to the bridge, measured some 367 yards, and ran along the top of the railway embankment. During recent years the embankment had started to slip and the road was in danger of giving way. In an action by the plaintiffs, as the highway authority, against the defendants for a declaration that the defendants were liable to maintain the new stretch of road and the embankment as constituting part of the "immediate approaches" to the bridge within section 46 of the Act of 1845:—

Held, that, in view of the express terms of section 46 and having regard to the relative positions geographically of the bridge itself and the diversion road, it could not be said without abuse of language that the relevant part of the diversion road was part of the "immediate approaches" to the bridge within the meaning of section 46; the diversion road was, for the purposes of the Act, simply a diversion of the old road in the course of constructing the railway, and the fact that the diversion road at one end of its length joined the bridge over the railway could not have the effect of converting what was simply a diversion of the road into "the "immediate approaches" of the bridge or into "necessary works "connected" with it; accordingly, the plaintiffs were not entitled to the declaration sought.

Observation of Fry L.J. in *Bury Corporation* v. *Lancashire and Yorkshire Railway Co.* (1888) 20 Q.B.D. 485, 490, considered.

Per Jenkins L.J.: The question whether section 46 applies in any particular case is to a great extent a question of fact and degree.

Decision of Lord Goddard C.J. [1957] 1 W.L.R. 456; [1957] 1 All E.R. 662 affirmed.

APPEAL from Lord Goddard C.J.[1]

The plaintiffs were the highway authority for the county of Monmouth and the defendants the successors in title to the Newport, Abergavenny and Hereford Railway Co. In 1847 the company was authorized by the Newport, Abergavenny and Hereford Railway (Extension to Taff Vale Railway) Act, 1847, which incorporated the provisions of the Railways Clauses Consolidation Act, 1845,[2] to construct an extension to the Taff Vale Railway, from the parish of Llanvrechva to Merthyr Tydvil. Accordingly, in 1860 the company constructed the extension so that it crossed a turnpike road. For this purpose a bridge was built by the company to carry the road over the railway, the original road being diverted between two points A and B on a plan and two new stretches of road approximately 143 yards in length on the south side of the railway and some 367 yards on the north side were constructed to lead up to the bridge. The new stretch of road and a footpath on the north side of the line ran along the top of an embankment which during recent years had started to slip so that the road was in danger of giving way. The plaintiffs claimed a declaration that on the true construction of the Railways Clauses Consolidation Act, 1845, the defendants were liable to maintain the bridge with its approaches and all necessary works connected therewith from points A to B including the embankment, and an order that the defendants forthwith and at their own expense carry out between those points (a) all such works as might be required for the reconstruction and reinstatement of the embankment; (b) all such supplementary works as might be necessary for the repair and maintenance of the road and footpath.

Lord Goddard C.J. gave judgment for the defendants.

The plaintiffs appealed.

Harold Williams Q.C. and *Harold Marnham* for the county council.

Geoffrey Cross Q.C. and *H. E. Francis* for the British Transport Commission.

[1] [1957] 1 W.L.R. 456; [1957] 1 All E.R. 662.

[2] Railways Clauses Consolidation Act, 1845, s. 46: "If the line of the "railway cross any turnpike road or "public highway, then (except where "otherwise provided by the special "Act) either such road shall be carried "over the railway, or the railway shall "be carried over such road, by means "of a bridge, of the height and width "and with the ascent or descent by "this or the special Act in that "behalf provided; and such bridge, "with the immediate approaches, and "all other necessary works connected "therewith, shall be executed and at "all times thereafter maintained at "the expense of the company. . . ."

S. 50: "Every bridge erected for "carrying any road over the railway "shall (except as otherwise provided "by the special Act) be built in "conformity with the following regu-"lations; (that is to say) there shall "be a good and sufficient fence on each "side of the bridge of not less height "than four feet, and on each side of "the immediate approaches of such "bridge of not less than three feet. ". . ."

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The following cases were referred to in argument in addition to those cited in the judgments: *West Lancashire Rural Council* v. *Lancashire and Yorkshire Railway Co.*[3]; *Hertfordshire County Council* v. *Great Eastern Railway Co.*[4]

JENKINS L.J. stated the facts and continued: The question in the case is whether, having regard to the terms of the relevant provisions of the Railways Clauses Consolidation Act, 1845, these defects in the embankment fall within the Transport Commission's liability for the maintenance of the bridge or of the approaches to or other works connected with the bridge, to put the matter at this stage in a neutral form. The Lord Chief Justice took the view, having considered the relevant enactments, that the want of repair complained of was outside the scope of the Transport Commission's liability to maintain bridges and connected works. On the other hand, it is contended by the council that the diversion road was part of the work of constructing the bridge and its approaches, as it was a necessary incident of the bridge in the sense that access would be had to the bridge by passing along it. That is the nature of the dispute between the parties, and I should next refer to some of the provisions of the Act of 1845.

The first of the sections to which we were referred was section 16, which has the side-note "Works to be executed," and provides that, subject to the provisions and restrictions in this and the special Act, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works; then the company is authorized, inter alia, to construct in, under or over, inter alia, any roads such inclined planes, tunnels, embankments, bridges, roads and ways as they think proper.

Next the section deals with the alteration of the course of rivers, etc., and under that part of the section the company may alter the course of any rivers, streams or watercourses, and they may divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets or ways as they may think proper. That section, therefore, gives a general power to divert roads as well temporarily as permanently.

Section 46 is the one upon which this case really turns. The side-note is "Crossing of roads." [His Lordship read the section and continued:] The provision about crossing on the level does not enter into this case, but I should say that the road here in question was admittedly a turnpike road at the time when the bridge was constructed, and is now Route A.472 in the modern road classification.

Section 50 contains further provisions about the construction

[3] [1903] 2 K.B. 394; 19 T.L.R. 625.

[4] [1909] 1 K.B. 368, 379; 25 T.L.R. 198; affirmed [1909] 2 K.B. 403, 412; 25 T.L.R. 573 (C.A.).

of bridges carrying roads over railways. [His Lordship read section 50 and continued:] There is a provision about width, and there is a provision about ascent, that is to say, the gradient of the road as it rises to the level of the bridge.

Then section 53 provides that if in the exercise of any of the relevant powers it be found necessary to cross, cut through, raise, sink or use any part of any road so as to render it impassable for or dangerous or extraordinarily inconvenient to passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with or as nearly so as may be.

Finally, section 56, which has the side-note "Roads interfered with to be restored or others permanently substituted within a limited time," provides: "If the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be; and if such road cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow; and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods after the first operation on the former road shall have been commenced."

Those are, I think, all the sections to which we were referred, and it may be said that on one view of the case the question here is whether the diversion road, which was constructed at the time when the bridge was built, was a substituted road within section 56; that is to say, was it the case that the company found it necessary to substitute a new road for the old one? If so, then the company's liability to maintain that substituted road came to an end when the road put into permanently substantial condition was made available for the public. Or, on the other hand, is this diversion road part of the relevant works connected with the bridge so as to fall within section 46 of the Act, that is to say, is it part of "such bridge with the immediate approaches and all other necessary works connected therewith"? If it falls within the the language of section 46, then the liability for maintenance imposed on the company with respect to the bridge must extend to the repair of the embankment of the cutting where its condition imperils the diversion road.

The question is one on which there is remarkably little authority. We are referred by Mr. Williams to a number of cases,

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beginning with *North Staffordshire Railway Co.* v. *Dale*,[1] in which the decision was to the effect that the roadway over a bridge was part of the bridge, so that the railway company was obliged, not only to maintain the structure of the bridge but also the road surface going across it.

Then there were two Irish cases, *Waterford and Limerick Railway Co.* v. *Kearney*,[2] and *Fosberry* v. *Waterford and Limerick Railway Co.*[3] Both these cases dealt with bridges which crossed over the road, so they were the converse of the present case. The upshot of them, with, I think, a dissent by Hayes J. in *Waterford and Limerick Railway Co.* v. *Kearney*,[4] was that the obligation to repair did not extend to the roadway passing under the bridge.

London and North Western Railway Co. v. *Skerton*[5] was to the same effect as the Irish cases, that is to say, to the effect that a railway company who, in carrying a railway over a highway by a bridge, lowered the level of the highway, were not bound to keep the slope of the road in repair as being a part of the approaches on each side of the bridge.

In *Bury Corporation* v. *Lancashire and Yorkshire Railway Co.*[6] the Court of Appeal followed *Dale's* case,[7] the decision being to the effect that where a railway crosses a highway, and the road is carried over the railway by means of a bridge, the railway company are bound to keep in repair the roadway upon the bridge, such roadway being part of the bridge which, by the section, the company are to maintain. That gives the approval of the Court of Appeal to Lord Campbell's view in *Dale's* case.[8]

None of these cases, of course, touched the present case, because this is not a case where the road goes under the railway, nor is the dispute confined to the question whether the company's liability for maintenance includes, or does not include, the actual roadway passing over the bridge. But perhaps some assistance is to be derived from these observations in the judgments of Lord Esher M.R. and Fry L.J. in the *Bury* case.[9] The Master of the Rolls said[10]: "The substance of their view was this"—that is the view of the court in *North Staffordshire Railway Co.* v. *Dale*[11]—"here is a section dealing with certain specified "cases in plain language, and, if that section is to be looked at "alone, according to the plain meaning of the words, there "could not be a doubt as to its effect: but then astute counsel "suggested that it must be read in conjunction with other "sections, and so endeavoured to bring a fog over its meaning. "The court said that that was not the way to construe it; that, "dealing specifically with particular cases, it must be taken by

[1] (1858) 8 E. & B. 836.
[2] (1860) 12 I.C.L.R. 224.
[3] (1862) 13 I.C.L.R. 494.
[4] 12 I.C.L.R. 224.
[5] (1864) 5 B. & S. 559.
[6] (1888) 20 Q.B.D. 485; affirmed (1889) 14 App.Cas. 417.
[7] 8 E. & B. 836.
[8] Ibid.
[9] 20 Q.B.D. 485.
[10] Ibid. 485, 488.
[11] 8 E. & B. 836.

"itself." Then comes this important passage: "One thing is "quite clear, that, whatever works the section compels the "railway company to execute, it likewise compels them to main-"tain for ever. The question is, therefore, what are they bound "to execute under the section? The section does not refer to "all bridges which they may have to make, but only to certain "bridges, which they have to make under certain specified "circumstances." Then Fry L.J. said [12]: "So, again, the "expression 'all necessary works connected therewith' must "mean works necessary in the same sense as approaches are "necessary. Approaches are necessary that vehicular traffic "may use the bridge; and so all necessary works mean all works "necessary to make the bridge an effective and useful part of the "highway."

In the present case the Lord Chief Justice, after considering the various sections, and in particular section 46, came to the conclusion, in effect, that this claim that the Transport Commission were liable for the maintenance of the diversion road at the point where the alleged want of repair has arisen was not warranted by section 46, the point in question being too remote from the bridge to make it reasonably possible to say that what is demanded was repairs either to such bridge or to its immediate approaches, or that this part of the road fell within the description of "all other necessary works connected therewith," that is to say, connected with the bridge. He said this at the conclusion of his judgment [13]: "I do not think that this part "of the road and embankment with which I am concerned in "this case comes within section 46 at all. I cannot say that in "doing work that is required to prevent the road in this way "falling into the cutting it is necessary work connected with the "bridge, or with the approaches to the bridge. I think it is a "cutting which has an embankment which is there for the "protection of the cutting. It is not there for the protection "of the bridge."

There were a number of other authorities to which Mr. Williams referred us, but none of them I think really advances the argument one way or another. The question whether section 46 applies in any particular case seems to me to a great extent to be a question of fact and degree.

Mr. Cross for the Transport Commission puts his argument in this way. He says that liability to maintain under section 46 is confined to works done under the section. He says that the new road and the cutting alongside which it ran were not works done under section 46 at all, and that the works in the cutting, such things as retaining walls, were put there for the purpose of securing the banks of the cutting, and had nothing whatever to do with the bridge. He says, therefore, that the works in question obviously not being works forming part of the bridge

[12] 20 Q.B.D. 485, 490.

[13] [1957] 1 W.L.R. 456, 459; [1957] 1 All E.R. 662.

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itself, were not other necessary works connected with the bridge. He further maintains that one could not reasonably hold that the part of the diversion road with which this case is concerned was part of the immediate approaches to the bridge. He suggests that the immediate approaches to the bridge comprehend nothing further from the bridge itself than the points at which the roadway begins to ascend onto the bridge, or at which the passenger going over the bridge once more reaches the general level of the road having descended from the bridge. I cannot, I confess, entirely follow that last argument, which is weakened in the present case by the circumstance that there are no points of ascent or descent at all. I should note, however, that it is to some extent supported by an interlocutory observation by Mellor J. in *London and North Western Railway Co.* v. *Skerton*,[14] to which the Lord Chief Justice referred with approval.

For my part, I prefer to found myself simply upon the express terms of section 46, and to say that on the facts of the case, having regard to the relative positions geographically of the bridge itself and the diversion road, it cannot possibly be said without abuse of language that the relevant part of the diversion road was part of the immediate approaches to the bridge. The Lord Chief Justice called in aid section 50 of the Railways Clauses Consolidation Act, 1845, which imposes certain obligations as to fencing. I think there is force in his view that it can hardly have been intended that in connexion with the erection of a bridge such as the bridge in the present case, the railway should be under a special obligation to fence the whole length of the diversion road.

The point is, when one reaches it, really a short point of construction, and I cannot usefully say any more than that, in my view, the proposed diversion road was, for the purposes of these statutory provisions, simply a diversion of the old road in the course of constructing the railway, and the fact that the diversion road at one end of its length joined the bridge over the railway cannot have the effect of converting for the purposes of the Act what was simply a diversion of the road into the immediate approaches of the bridge or into necessary works connected with the bridge. Of course, it is true that if there had been no diversion road, and the old road had simply been got rid of, and the bridge had been built with no road across it at all, then no traffic would have been able to reach the bridge, so that reading, without regard to its context, the language of Fry L.J. in the *Bury* case[15]: "Approaches are necessary that "vehicular traffic may use the bridge; and so all necessary works "mean all works necessary to make the bridge an effective and "useful part of the highway," one might say that this brought the whole of the diversion road into the area of approaches. One cannot, however, press that reasoning too far; for otherwise one might find a railway company, on the strength of their

[14] 5 B. & S. 559, 564.

[15] 20 Q.B.D. 485, 490.

having erected a bridge, made liable for the maintenance of several miles of roadway on either side of the bridge, because were it not for that roadway vehicular traffic could not reach the bridge at all. I think the answer to that line of argument is that the word "approaches" in section 46 is qualified by the word "immediate," and one has to find here something that is an immediate approach to the bridge.

I am fortified in the conclusion to which I have come by some answers given by the county surveyor in cross-examination by Mr. Cross, which I think bear out the view that it could not be said that the diversion road and the cutting were made for the purposes of the construction of the bridge. It was necessary to have a bridge to take the road over the railway, and the siting of the line of the railway was such that it was necessary to divert the existing road. It cannot then be said that the cutting or the diversion road were mere incidents of the construction of the bridge.

For the reasons I have endeavoured to state, in my judgment the Lord Chief Justice, if I may say so with respect, was perfectly right in the conclusion to which he came, and I would dismiss this appeal.

PARKER L.J. I agree. In order to succeed, Mr. Williams must bring this case within section 46 of the Act. He seeks to do that, in the first instance, by saying that the road and the embankment in question formed part of the immediate approaches to the bridge. He goes so far as to say that "approaches" includes everything which the railway company had to alter in order to enable traffic to reach the bridge; in other words, he treats the whole of the road between "A" and "B" on the plan as approaches. I am quite unable to accept that, because, as it seems to me, it gives no effect to the words in the section "immediate approaches." Section 46, as it seems to me, is dealing really with a point on the map, namely, a point where the road crosses the railway or the railway crosses the road, and it is dealing only with works at that point. I would also mention that it would be surprising if Mr. Williams' contention is right, having regard to the obligation of the railway company under section 50 to fence all the immediate approaches.

Secondly, he says that if he is wrong on that, at any rate it comes within the words "all other necessary works connected "therewith." It seems to me that on the facts of this case the works in question were necessary for the railway company's cutting, and not necessary for the bridge. Be that as it may, it seems to me again that the necessary works connected therewith are really matters such as buttresses and revetments, and the like, which are directly, and not indirectly, connected with the structure of the bridge, the words here being: "such bridge "with the immediate approaches and all other necessary works."

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For those reasons, and the reasons given by my Lord, I would dismiss this appeal.

PEARCE L.J. I agree. The insertion of the word "immediate" in section 46, and the use of the word "with" instead of "and" are clearly intended to narrow the word "approaches." I cannot believe that the additional words, ". . . and all other necessary works connected therewith" were intended to bear a meaning which would in fact extend the ambit of the word "approaches," which had already been deliberately narrowed. In my view, the road and embankment in this case do not come within the section.

For the reasons my Lords have given, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Overton & Blackbourn for Vernon Lawrence, Newport; M. H. B. Gilmour.*

J. A. G.

[COURT OF APPEAL.]

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[1956 T. 477.]

Building — Safety regulations — Safe means of access — Fall of erector from steel framework—Liability of employers—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 5, 30 (3).

Negligence—Safe system of work—Dangerous premises—Steel erector.

An experienced steel erector, while proceeding to his place of work in the erection of the steel framework of a building, fell to the ground from a height of 20 feet 6 inches and sustained fatal injuries. The structure comprised upright "stanchions" connected longitudinally by horizontal "channels" 3 inches wide at the top; the channels were connected transversely to a similar line of channels by cross-members or "trimmers." There was support for the hand between the western and central stanchions, but none between the central and eastern stanchions, where, however, it would have been possible to lay boards across the trimmers.

The deceased climbed a ladder by the western stanchion, walked along the channel to the central stanchion, and while walking along the channel from the central to the eastern stanchion fell in some unexplained way. In an action brought by the widow against the employers for a breach of the duties imposed by the Building (Safety, Health and Welfare) Regulations, 1948 [1]:—

[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 5: "Provision of scaffolds and means of access. Suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground or from part of the building, or from part of a permanent structure or from a ladder or other available means of support, and sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work."

Reg. 30: "Openings in roofs, floors

Held, affirming Lloyd-Jacob J., that notwithstanding that the deceased was an experienced man accustomed to walk along structures of this kind, the defendants had failed to provide "sufficient safe means of access" so as to satisfy the requirements of regulation 5.

Sheppey v. *Matthew T. Shaw & Co. Ltd.* [1952] W.N. 249; [1952] 1 T.L.R. 1272 applied.

Per Jenkins L.J. The truth is that the defendants provided no means of access in any ordinary sense of that expression, but left it to the gang to make their own way about the structure as best they could. As at present advised, I am by no means satisfied that the four trimmers at the eastern end of the section were "open "joisting" within the meaning of regulation 30 (3).

Per Parker L.J. A means of access is not "safe" within regulation 5 if it is a possible cause of injury to anybody acting in a way that a human being may be reasonably expected to act in circumstances which may reasonably be expected to occur. Further, in applying that test the person to be considered is the person who will use the means of access.

APPEAL from Lloyd-Jacob J.

Doris Rose Mary Trott, as widow and administratrix of the estate of Charles John Trott, deceased, sued W. E. Smith (Erectors) Ltd. for damages under Lord Campbell's Act and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her husband at the age of 32 years in an accident which befell him while working as a steel erector in the employment of the defendants.

The plaintiff based her claim on breach by the defendants of their statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, regulation 5, regulation 30 (3), and regulation 97, which relates to the provision in certain circumstances of safety nets, sheets and belts; and also upon negligence at common law.

The work upon which the deceased was employed at the time of the accident was the erection of the steel framework for a new school at Tunbridge Wells. The defendants had sub-contracted for the erection of the steel with another company, which had itself sub-contracted for the supply and erection of the steelwork with the head contractors for the entire project. The deceased was working as one of a gang consisting at the material time of the foreman, one Golding, the deceased himself, and one Harvey. All three were experienced steel erectors. The accident happened in the early afternoon of Saturday, May 14, 1955, when the deceased fell off the structure at a point some 20 ft. from the ground, striking his head in the course of his fall on some part of the steelwork, and sustaining injuries which proved fatal.

"and walls; open joisting . . .
"(3) Subject to paragraphs (5) and
"(6) of this regulation, when work
"is done on or immediately above
"open joisting through which a
"person is liable to fall a distance
"of more than 6 feet 6 inches, the
"joisting shall be securely covered
"over by temporary boards or other
"covering where and to the extent
"necessary to afford safe access to or
"foothold for the work, or other
"effective measures shall be taken to
"prevent persons from falling."

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The structure at which the deceased was working might be regarded as a rectangular section some 20 ft. long by some 6 ft. wide, treated for convenience of exposition as lying lengthways from east to west. On each of the long sides of this section of the structure there had been erected three vertical members (termed stanchions), one at either end and one in the middle, the tops of these stanchions being some 23 ft. 7 ins. from the ground. The three stanchions on either side of the section had been connected by longitudinal members (termed "channels") running the whole length of the section at a height of 20 ft. 6 ins. from the ground. These channels had been connected from north to south by transverse members (termed "trimmers") at the same height, that is to say, some 20 ft. 6 ins. from the ground. One of these trimmers ran between the western pair of stanchions, and another between the central pair of stanchions, while a third connected the eastern pair of stanchions; and finally two more were fixed from channel to channel so as to divide, at equal intervals of a little over a yard, the space between the eastern end of the section and the central pair of stanchions. On either side of the section the top of the western stanchion had been connected with the top of the central stanchion so as to form, in effect, a rail 3 ft. 1 in. high above the channels placed at the height of 20 ft. 6 ins., but no channels had been fixed on either side between the tops of the central and eastern stanchions. A channel member of the type in use on this site when in position would present to the feet of anyone walking upon it a surface of only 3 inches wide; which also applied to a trimmer or transverse member of the type used. A ladder had been set up against the eastern side of the western trimmer and lashed to that member. The ladder being so positioned, a person in the course of ascending it would have his back to and so would not (unless he turned round) be able to observe the movements of anyone on the eastern part of the structure.

Before the gang went to their dinner on the day of the accident Golding, the foreman, had decided that the next thing to do would be to fix a channel between the top of the central stanchion on the north side of the relevant section of the structure and the top of the eastern stanchion on the same side. In preparation for this the gang had, before going to dinner, hoisted the appropriate channel member on to the trimmers at the eastern end of the section and laid it across those trimmers close to the side on which it was to be fixed.

Anyone having occasion to reach the eastern stanchion on the north side of the relevant section of the building would have to mount the ladder, turn to his right at the top, and gain the channel 20 ft. 6 ins. from the ground on the north side of the section. He would then have to turn to the right again, and make his way along that channel, with the channel connecting the tops of the western and central stanchions as a handhold as far as the central stanchion. Then from the central to the

eastern stanchion he would have to make his way along the channel 20 ft. 6 ins. from the ground and only 3 inches wide, for a distance of some 10 feet without any handhold at all.

On returning from their dinner, the deceased and Harvey set about the task of fixing the channel which had been placed in readiness on the trimmers. The deceased went up the ladder first, intending to go to the eastern stanchion on the north side of the section and attend to that end of the channel, leaving it to Harvey to deal with the inner or western end. The deceased was apparently up the ladder before Harvey started to climb. When Harvey was two-thirds of the way up he heard a noise, looked round, and saw the deceased falling, and said: "Oh, "Christ, Charlie," and, scrambling down, saw the deceased lying on the ground in Golding's arms. Harvey said in evidence that he saw the deceased strike his head on one of the beams as he fell, but failed to identify the spot to the satisfaction of the judge. The point from which the deceased fell was, however, fixed by the judge as being just to the east of the central stanchion.

In the meantime Golding had been on the ground intent on sorting out nuts and bolts to throw up to the other two at the appropriate moment. The first he knew of the accident was Harvey's shout and a clatter of spanners. He put his hands over his head, and the next he knew the deceased was on top of him.

Lloyd-Jacob J. held that the defendants were in breach of regulation 5 and regulation 30 (3), and accordingly found it unnecessary to deal with the claim under regulation 97. As to the claim at common law, he said, in effect, that if necessary he would have been prepared to hold that the plaintiff was entitled to succeed on this ground also. Accordingly, on March 18, 1957, he gave judgment for the plaintiff for damages which he assessed at £3,835, and from that judgment the defendants appealed. The appeal related only to liability, and it was not sought, in the event of the decision below as to liability being upheld, to challenge the amount of the damages awarded.

F. W. Beney Q.C. and *D. P. Croom-Johnson* for the defendants.

John Thompson Q.C. and *W. Dudley Collard* for the plaintiff.

The following case, not referred to in the judgments, was cited in argument: *Paris* v. *Stepney Borough Council.*[2]

JENKINS L.J., after stating the facts: This being the nature of the accident, should it be held to have been due to the breach by the defendants of any of the statutory regulations relied on by the plaintiff?

[2] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

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[His Lordship read regulations 5, 30 (3) and 97 and continued:] The argument before us was directed almost entirely to regulation 5, on which the judge mainly founded his decision in the plaintiff's favour. It is agreed that the first branch of it is inapplicable. There remains the provision that "sufficient safe "means of access shall so far as is reasonably practicable be "provided to every place at which any person has at any time "to work." It is not in dispute, as I understand the argument, that the eastern stanchion on the north side of the relevant section of the building was for this purpose a place at which the deceased had to work in the fixing of the channel, or that the only means of access he had to that place consisted as to the last 10 feet simply of the 3-inch wide channel 20 ft. 6 ins. from the ground, apart from such dubious assistance as he might derive from the trimmers, spaced as they were over a yard from each other, and themselves only three inches wide; or that for this last 10 feet he would have no handhold whatever.

But, says Mr. Beney, for the defendants, this man was a steel erector accustomed to heights and to keeping his balance on narrow surfaces far above ground. For him the means of access that he had here was to all intents and purposes safe. It would never have occurred to anyone before the accident happened that a steel erector walking along a 3-inch wide girder without any handhold might possibly slip and fall. Golding, with his long experience of steel erecting, saw no risk in it, and Cullim, the defendants' outside supervisor, with 30 years' experience in the steel erection trade, said that a 3-inch wide girder was a satisfactory foothold for a steel erector, that a steel erector would "walk it comfortably without fear"; and that in all his 30 years' experience he had never known of boards being used to provide access for an operation such as this. Mr. Beney also laid stress on the absence of evidence of any comparable accident to a steel erector in the past. In sum, his argument comes to this, that for the persons by whom it was to be used (namely, skilled steel erectors) the 3-inch means of access was, so far as could reasonably be foreseen before the accident happened, a safe means of access. A means of access which has that degree of safety is a safe means of access within the meaning of regulation 5 and it cannot be reasonably practicable to provide in advance for happenings which cannot reasonably be foreseen.

Considerations of this kind are to my mind more cogent where the charge is one of negligence at common law than they are in relation to a charge of breach of statutory duty. The regulation here specifically enjoins the provision of safe means of access so far as is reasonably practicable. That seems to me to place on the employer a stricter obligation than is laid upon him in relation to comparable matters by the general duty of reasonable care imposed at common law. Given an accident to a skilled steel erector properly using as the means of access provided to his place of work a girder only three inches wide, then, prima

facie, as it seems to me, the means of access being obviously inadequate for anyone other than a person specially skilled in this way, has been shown by the event to be unsafe even for a skilled steel erector; and for the purposes of the statutory duty imposed by regulation 5 the onus is, I should have thought, cast upon the employer to show that the means of access was safe so far as it was reasonably practicable to make it so: compare *Edwards* v. *National Coal Board*.[1]

The obligation is, of course, limited to what it is reasonably practicable to do, and I agree that the word "safe" in the regulation cannot be construed to mean absolute safety, which is seldom, if ever, possible, let alone reasonably practicable, to attain. I concede further that, in determining what is safe within the meaning of the regulation, some regard must be had to the capabilities of the persons by whom the means of access is to be used. But the extent to which the statutory requirement of safety can be qualified on this account has its limits, as is well illustrated by the case tried by my brother Parker as a judge of first instance of *Sheppey* v. *Matthew T. Shaw & Co. Ltd.*[2] This was the case of an accident to a steel erector who was engaged with others in painting a steel structure, and one must remember that they had to carry paint pots and were engaged on work which could not, strictly speaking, be called the ordinary work of a steel erector. Moreover, in the course of his ordinary work, a steel erector would have a special carrier for his tools, and would not, as in *Sheppey's* case, be encumbered by a paint pot. Nevertheless, I find considerable assistance in the following passages from the judgment in that case.

Parker J. posed the question[3]: "What, then, is the true "meaning of the word 'safe,'" and he said: "It cannot mean "'absolutely safe' in the sense that it must be such means of "access that no accident can occur." Again he cited Oliver J. in *Collins & Bailiss* v. *Western Aircraft*[4] as saying: "I think "that the duckboard was a safe means of access. I cannot think "that 'safe' means 'entirely safe.' It must mean 'safe for a "'man who is acting reasonably.' I hold that the duckboard "was a safe means of access so far as reasonably practicable."

Parker J. continued: "It is urged upon me on behalf of "the defendants that 'safe' means 'reasonably safe,' bearing "in mind the type of man who is going to use it, and it is "pointed out, as is perfectly true, that steel erectors are used "to heights far greater than the height in this case—that they "climb, as one witness said, like cats about steelwork at great "heights, often with no handhold, and walk along the girders or "sit astride of them and work their way along them regardless "of the height at which the work is done. The evidence of the

[1] [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743.
[2] [1952] W.N. 249; [1952] 1 T.L.R. 1272.
[3] [1952] 1 T.L.R. 1272, 1274.
[4] Unreported.

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"views of those people working in the business was all one way, "that from a steel erector's point of view the job was being "done in a perfectly safe way."

Parker J. further observed: "As I have said, reference "has been made to passages in decided cases where the duty "is said to be one to provide reasonable safe means of access. "For myself, with great deference, I get little help from adding "the word 'reasonably.' It is not in the regulations. If it is "used merely in contradistinction to 'absolutely safe,' I can "understand it; but if it is intended to mean 'safe for anybody "'acting reasonably,' in the sense of taking full precautions for "their own safety, I cannot agree with it." He then went on to point out that the regulations are intended, amongst other things, to protect workmen against the results of carelessness or inadvertence.

He later said[5]: "'In considering whether the means of "'access provided is safe or unsafe, it must not be assumed "'that everybody will always be careful. A means of access is "'unsafe if it is a possible cause of injury to anybody acting in "'a way a human being may be reasonably expected to act in "'circumstances which may reasonably be expected to occur.'" That was his paraphrase and adaptation to the case then before him of what was said by du Parcq L.J. in *Walker* v. *Bletchley Flettons Ltd.*[6] Parker J. went on: "Adopting that test, I "cannot think that a means of access which involves climbing "such a lattice girder as I have described, under or over purlins, "while manipulating at the same time a paint pot, is a safe "means of access, albeit the man is a steel erector."

Then there is this passage: "In considering whether a means "of access is safe, it would be right to consider the employment "of the people who are going to do the work. It may be that "an access would be safe, say, for a steel erector where it would "not be safe for a lawyer; but one must not carry that too far, "because otherwise, as Mr. Everett said, you would be testing "the safety of access really by the skill of people to avoid the "danger. I think that in considering safety you must assume "that the means of access will be used by a person experienced "in the particular trade in question, and in my view the means "in the present case was not safe for a steel erector."

I also derive assistance from the case decided in this court of *Wilson* v. *International Combustion Ltd.*[7] The matter there under consideration was negligence at common law as distinct from breach of statutory duty, and the task in the course of which the accident happened was of a somewhat special kind. Nevertheless, I think that assistance on the question now before us is to be found in the following observations of Morris L.J. in that case. He said: "Mr. Marven Everett further submits that "there was nothing unusual or difficult for a steel erector in

[5] [1952] 1 T.L.R. 1272, 1275.
[6] [1937] 1 All E.R. 170, 176.
[7] Unreported, July 18, 1956.

"making his way along a girder and that as the appellant fell "while doing the sort of thing that steel erectors are accustomed "to do, his fall did not result from the respondents' breach of "duty." Then later Morris L.J. continued: "The nature of "their work may at times expose them to certain unavoidable "risks which they may be willing to take. These circumstances, "however, do not alter the fact that in walking along or in "straddling joists which are high above the nearest floor level, "there is an inherent peril and an inherent risk of falling. "Indeed, the facts of this case show how a steel erector may "fall. As Romer L.J. pointed out in the course of the argument "this morning, this steel erector fell, although he was not himself "guilty of any negligence. It follows, I think, and indeed it is "clear, that it must be something perilous to proceed along steel "joists when there is an open space on either side and when a "fall may not be broken until the floor below is reached."

Finally he added: "It seems to me that it is of no avail to "say that the appellant was only doing what steel erectors often "do, or to say that the appellant was running risks which steel "erectors generally regard as slight. The failure of the respon-"dents directly brought it about that the appellant was subjected "to those risks which result when a steel erector goes along "girders. The fact that on this occasion those risks materialized "may be unfortunate for the respondents, but still more unfor-"tunate for the appellant. In my judgment he was exposed to "those risks quite unnecessarily, and he would not have been "exposed to them but for the respondents' breach of duty. His "injuries resulted from risks which he was unnecessarily running, "and they were in my judgment caused, and directly caused, "by the respondents' negligence."

The defendants' argument in the present case to the effect that the 3-inch means of access was safe because a skilled steel erector could negotiate it without mishap is really tantamount to saying: "We did not provide safe means of access for the "deceased. But it was unnecessary to do so for he was a "skilled steel erector well able and fully accustomed to use "unsafe means of access, surmounting the attendant dangers by "his agility and good balance." This clearly is no answer to the claim under regulation 5. The truth is that the defendants provided no means of access in any ordinary sense of that expression, but left it to the gang to make their own way about the structure as best they could. That it was reasonably practicable in a physical sense to provide the deceased, if not with absolutely safe means of access, at all events with safer means of access than he actually had, is not open to doubt. Golding, in effect, agreed in the course of his evidence that it would have been perfectly practicable to lay a plank or planks across the trimmers between the central and eastern stanchions at the east end of the relevant section of the building, and that if this had

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been done the deceased could have passed in safety from the central to the eastern stanchion.

For these reasons I am of opinion that the judge was right in holding that the defendants were in breach of their statutory duty under regulation 5. Mr. Beney criticized some passages in his judgment as indicating the view that absolute safety was the criterion set by regulation 5. I will not go into these passages in detail. Suffice it to say that I cannot regard them, read in their context, as so intended. The view I have formed as to the claim under regulation 5 makes it unnecessary for me to express any opinion on the claim under regulations 30 (3) and 97, and I say nothing about them apart from observing that, as at present advised, I am by no means satisfied that the four trimmers at the eastern end of the section were "open joisting" within the meaning of the regulation. I may compare the case in this court of *Montgomery* v. *A. Monk & Co. Ltd.*[8] It would also be superfluous to express any view on the claim based on negligence at common law. Mr. Beney criticized the part of the judgment dealing with this aspect of the case on the ground that the judge expressed the view (in effect) that liability at common law followed from liability under regulation 5; and Mr. Beney cited in this connexion a well-known passage in the speech of Lord Tucker in *Latimer* v. *A. E. C. Ltd.*[9] But I do not think that the judge in the passage complained of really meant to say any more than that the standard of care prescribed by regulation 5 approximated to the standard of care set by the common law with respect to the same matter, which, if not absolutely right, is, at all events, not very far wrong.

In the result, I hold that this appeal fails, and should be dismissed.

PARKER L.J. I agree. In my judgment a means of access is not "safe" within regulation 5 if it is a possible cause of injury to anybody acting in a way that a human being may be reasonably expected to act in circumstances which may reasonably be expected to occur. Further, in applying that test, the person to be considered is the type of person who will use the means of access. That was the test which I suggested in *Sheppey* v. *Matthew T. Shaw & Co. Ltd.*[10]; and as I understand the position, both counsel in the present case accepted that test as correct. It is true that Mr. Beney sought to base some argument on the word "sufficient" which he read as meaning "sufficiently," and as qualifying "safe"; but I do not think that even he sought to depart from the suggested test. For my part, however, I am unable to read "sufficient" in that way. I think that it is merely quantitative, and qualifies "means of access." Further,

[8] [1954] 1 W.L.R. 258; [1954] 1 All E.R. 252.

[9] [1953] A.C. 643, 658; [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

[10] [1952] 1 T.L.R. 1272.

both parties accept the judge's finding that the deceased must have slipped while walking on the 3-inch flange of a channel at a point where he had no handhold.

In these circumstances, this case, as I see it, turns entirely on the true inference to be drawn. Mr. Beney, of course, stresses that this man was a highly experienced steel erector; that he was used to doing this type of work at heights; that he must have done this work on this very site many times before; and that, so far as these employers were concerned, the evidence was that there had been no previous accident. On the other side, Mr. Thompson naturally relies on the undoubted fact that human beings, however skilled, are prone to slip, and that in this operation a slip entails almost certain death or serious injury.

For my part I am clear that the only proper inference is that this means of access was not safe within the meaning of that regulation. Giving all possible weight to Mr. Beney's argument, it can only mean that steel erectors are at ease at heights, and find no difficulty in walking along a 3-inch flange with no handhold. It does not mean that they are immune from the risk of slipping, however careful they may be.

That, of course, is not the end of the matter, because there is no breach of the regulation if it is not reasonably practicable to make the means of access "safe" within the meaning of the regulation. Whether or not some precaution is reasonably practicable will depend on a number of considerations. Cost is one, and I think that any risk inherent in providing the precaution is another. It is true that in the present case little if any evidence was directed to this issue, but for my part I can see no difficulty in laying planks on the trimmers. These could be raised and slid into position from a point where the men had a handhold. Alternatively, I can see nothing impracticable in providing a ladder by means of which the deceased could have mounted direct to the end of the channel and the stanchion where he was to work.

Accordingly, I would dismiss this appeal, and find it unnecessary to consider the position under regulation 30 (3) or regulation 97, or at common law.

PEARCE L.J. I agree with what my Lords have said.

Appeal dismissed.

Solicitors: *Barlow, Lyde & Gilbert; W. H. Thompson.*

F. R. D.

[CHANCERY DIVISION.]

1957
Oct. 22.

Roxburgh J.

*WEST OF ENGLAND STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION LTD. *v.* JOHN HOLMAN & SONS.

[1957 W. No. 1271.]

Practice and Procedure—Parties—Joinder—Partnership—Firm name—Defendants sued in firm name—One partner out of jurisdiction—Application for leave to issue concurrent writ and serve out of jurisdiction—Proper procedure—Note in Annual Practice—R.S.C., Ord. 48a, *rr.* 3, 8.

The plaintiffs, pursuant to R.S.C., Ord. 48A, r. 1, sued the defendants under their firm name, J. H. & Sons, but one of the partners being out of the jurisdiction, the plaintiffs asked for leave to issue a concurrent writ against that partner and to serve it on him out of the jurisdiction:—

Held, that the proper procedure in cases where one partner was out of the jurisdiction was either to sue both the firm and the partner out of the jurisdiction; or to sue all the partners individually, "trading as J. H. & Sons," in both of which cases leave could be given to serve the partner out of the jurisdiction.

PROCEDURE SUMMONS.

The plaintiffs, West of England Steamship Owners' Protection and Indemnity Association Ltd., pursuant to R.S.C., Ord. 48A, r. 1,[1] sued the defendants under their firm name, John Holman & Sons. Service of the writ was effected on the partners within the jurisdiction, but one of the partners being out of the jurisdiction, the plaintiffs on this summons asked for leave to

[1] R.S.C., Ord. 48A: "Actions by and against firms within the jurisdiction." R. 1: "Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action. . . ."

R. 3: "Where persons are sued as partners in the name of their firm under rule (1), the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary. . . ."

"Execution of judgment against a firm." R. 8: "Where a judgment or order is against a firm, execution may issue: (*a*) Against any property of the partnership within the jurisdiction; (*b*) Against any person who has appeared in his own name under rule (5) or (6) . . . (*c*) Against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear. . . . But except as against any property of the partnership, a judgment against a firm shall not render liable, release, or otherwise affect any member thereof who was out of the jurisdiction when the writ was issued, and who has not appeared to the writ unless he has been made a party to the action under Order XI, or has been served within the jurisdiction after the writ in the action was issued."

issue a concurrent writ of summons on him and for leave to serve it on him out of the jurisdiction. They contended that the application could be entertained under the procedure provided by Order 11, r. 1 (*g*).[2]

Kenneth Mackinnon for the plaintiffs.

Case cited in argument not referred to in the judgment: *Worcester City & County Banking Co.* v. *Firbank Pauling Co.*[3]

Roxburgh J., having stated the facts, said that by Order 48A, rr. 1 and 3, the effect of suing the defendants in the firm name was to make all the partners parties to the action, and service on the firm would be deemed service on all the partners, whether within the jurisdiction or not. Under rule 8, however, judgment against a firm did not "affect any member who was out of the "jurisdiction when the writ was issued, and who has not been "made a party to the action under Order 11 . . ." But Order 11 related solely to service and was not the proper procedure to make a person a party to an action. His Lordship continued: For 47 years there has stood in the Annual Practice a note to rule 3 of Order 48A to this effect: "If, however, there is good "reason for effecting service on a partner in a firm sued under "rule (1), who is out of the jurisdiction, he must be sued "personally as well as under the firm's name." That note has, as far as I know, never been challenged. On the other hand, it seems to me to be quite illogical because he is sued by the use of the firm name. Surely if he is to be sued separately there should be something to indicate that the firm name does not in the particular circumstances include him. This particular practice was approved of, as far as I can see, and I think adopted, though the report is not at all easy to follow, in the Irish case of *Lindsay* v. *Crawford*.[1] I see the force of Mr. Mackinnon's attack upon that note and upon the Irish case. He has made a frontal attack on both; but it is not necessary for me to decide in this case whether that is necessarily the right procedure. The whole rule is illogical in the strict sense of jurisprudence. It is one of those many examples where English law has sacrificed principle to expediency. That being so, I am not sure why this practice, which has stood for 47 years, should not be continued because it is convenient, though illogical. It is certainly convenient because, if there is going to be an application under Order 11 for leave to serve a particular individual out of the jurisdiction, it is obviously much more convenient that that particular individual who is going to be dealt with separately

[2] Ord. XI, r. 1: "Service out of "the jurisdiction of a writ of sum-"mons or notice of a writ of summons "may be allowed by the court or a "judge whenever . . . (*g*) Any person "out of the jurisdiction is a necessary "or proper party to an action properly "brought against some other person "duly served within the jurisdiction."

[3] [1894] 1 Q.B. 784; 10 T.L.R. 345.

[1] (1910) 45 Ir.L.T. 52.

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should be separately named in the writ. On the basis of convenience, therefore, there is everything to be said for what does seem to me to be an illogical practice.

Unfortunately I take the view that Mr. Mackinnon's policy is one which is neither justified by rule nor convenient. He seeks to say that he can come before the master in an action merely against the partners in the firm name and apply for leave to serve one of the persons disclosed as being a partner in an affidavit. That does not seem to me to be a convenient practice. It seems to me to be not in accordance with the requirements of Order 11. I should have thought that the best way of handling this type of case was one which has apparently not occurred to anyone before, namely, to sue all the partners in any country by name, because this machinery is after all only preliminary. Though one might make a mistake about the constitution of a firm and might get a wrong name, where one is dealing with an exceptional case like this, and wishes to make the foreign partner liable, my view is that the logical and most convenient way would be to name all the partners as parties individually, adding at the end "trading "as John Holman & Sons." I am not going to say that the practice which it is suggested has been adopted in the past is wrong. I see no sufficient reason for doing so. As I have said, it seems to me to be illogical, but much in English law is illogical, and it is plainly convenient. On the other hand, I am not proposing to adopt as a standard for the future Mr. Mackinnon's approach which appears to me to be not only technically wrong but practically not convenient. I shall give him this alternative: He will have to amend before I give any leave to serve out of the jurisdiction; I shall be quite willing to let him adopt the course which has hitherto, so far as I know, been adopted for about 50 years. Whether logical or not, I do not further pause to inquire, but I should give him the necessary leave and let the foreigners come and argue this point if they think it is worth arguing. Or he can do what I have suggested, which is to my mind the more convenient course. He can amend by putting in the names of all the partners individually, and then I shall give him leave, as I have already said, under Order 11, r. 1 (*g*), because obviously the foreign partner is a proper party. He may have his choice; but I am not prepared to sanction what seems to me to be a new practice and which he has endeavoured to satisfy me is the right practice. There would be leave to amend by substituting the partners nominatim.

Order accordingly.
Leave to appeal refused.

Solicitors: *Richards, Butler & Co.*

I. G. R. M.

[HOUSE OF LORDS.]

* R. B. BURDEN LTD. . . . . APPELLANT; H. L. (E.)†

AND

SWANSEA CORPORATION . . . . RESPONDENT.

1957
Mar. 12, 13, 17, 18;
May 29.

Building—Contract—Certificate—Determination of contract by builders—Interim certificates—Issue—Negligent assessment by independent surveyor — Whether "interference or obstruction" by building owner.

In 1949 a local authority entered into a building contract with contractors who were to be entitled to payments on the issue of interim certificates. Clause 20 (1) provided that "if [the local "authority] interferes with or obstructs the issue of any [interim] "certificate," the contractors were to be entitled to determine the contract. There was provision for arbitration in the case of the withholding by the architect of any certificate. While the work progressed interim certificates were issued and interim payments were received by the contractors in accordance with the contract. In June, 1951, the corporation appointed, at the request of the architect, an independent surveyor to make valuations in connexion (inter alia) with this contract. In October, 1951, after the contractors had applied for an interim payment of £5,785, he recommended a payment of £1,287. That valuation, which was not properly made, the surveyor declined to change and the town clerk suggested referring the matter to arbitration, but the contractors determined the contract on the ground that the actions of the surveyor amounted to interference or obstruction by the local authority with the issue of a certificate within clause 20 (1):—

Held (Lord Somervell of Harrow dissenting), that the local authority had not interfered with or obstructed the issue of the certificate, within the meaning of clause 20 (1), since it had given no instructions impeding the architect in performing his duty of certification. Although the surveyor had not done his work properly, his negligence did not constitute such intermeddling as could amount to interference. Therefore the contractors were not entitled to determine the contract and the matter ought to have been referred to arbitration.

Per Lord Radcliffe. The local authority did not interfere with or obstruct the architect in the issue of a certificate; it gave no instructions, direct or indirect, which impeded him.

Decision of the Court of Appeal (1955) 54 L.G.R. 161 affirmed.

APPEAL from the Court of Appeal (Denning, Morris and Parker L.JJ.).

This was an appeal from an order of the Court of Appeal dated January 18, 1956, which set aside that part of the judgment of His Honour J. D. Casswell Q.C., one of the Official Referees of the Supreme Court, dated October 6, 1955, whereby it was adjudged and declared that the appellant company, R. B. Burden Ltd., did properly determine their employment under a building contract. The court's order also directed that

† *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD TUCKER, LORD COHEN and LORD SOMERVELL OF HARROW.

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judgment be entered for the respondents, the Swansea Corporation, on that issue and that the costs of the appeal to the Court of Appeal be paid by the appellant company.

The facts are fully stated in the opinion of Lord Radcliffe.

Frederick Beney Q.C., *Edward Rimmer Q.C.* and *J. S. Daniel* for the appellant company.

F. Elwyn Jones Q.C., *Eric Blain* and *Michael Mann* for the respondent corporation.

The following authorities, besides the one cited by Lord Radcliffe, were referred to in argument: *Wisbech Rural District Council* v. *Ward*[1]; *In re An Arbitration between De Morgan, Snell & Co. and Rio de Janeiro Flour Mills and Granaries Ltd.*[2]; and *S. Pearson & Son Ltd.* v. *Dublin Corporation.*[3]

Their Lordships took time for consideration.

May 29. VISCOUNT SIMONDS. My Lords, in this unfortunately protracted litigation between the appellants, a firm of building contractors, and the respondents, the County Borough of Swansea, the short point for your Lordships' consideration arises upon the construction of a few words in a building contract into which the parties entered in December, 1949.

I have had the advantage of reading the opinions which my noble and learned friends, Lord Radcliffe and Lord Tucker, will deliver and will not occupy your Lordships' time by a statement of the facts and history of the case, which are there fully set out.

The relevant clause, which, we were told, is one that is commonly found in such contracts, authorizes the contractor to determine his employment under the contract "if the employer "within the period which is named in the appendix to these "conditions and thereafter for seven clear days after written "notice from the contractor does not pay to the contractor the "amount due on any certificate, or if the employer interferes "with or obstructs the issue of any such certificate." The appellants, alleging that the employer had interfered with or obstructed the issue of a certificate, exercised their right of determining their employment. The Official Referee upheld their contention in proceedings in which this and many other issues were referred to him. The Court of Appeal were unanimous in holding that he was wrong. I agree with them. I do not in any way question the findings of fact by the Official Referee. I am not entitled to do so. But I do not think that upon those findings there was within the meaning of the clause any obstruction or interference by the respondents with the issue of a certificate. No doubt, it is the duty of the architect to issue at the right time an interim certificate for the right amount, and I do not pause to ask

[1] [1928] 2 K.B. 1; 44 T.L.R. 62.
[2] (1892) 8 T.L.R. 292.
[3] [1907] A.C. 351.

whether in giving such an interim certificate he is acting merely as agent for the employer, the building owner, or is acting in a judicial or quasi-judicial character. For the question is not what was his duty nor whether he performed it properly. Rather it is whether the respondents interfered with or obstructed his performance, and upon this question I agree so fully with what my noble and learned friends, Lord Radcliffe and Lord Tucker, will say that I do not think it necessary to add any words of my own.

Not the least of the anomalies of this case is that even now, after the expense of litigation up to this House, it has not been determined whether the architect had or had not, at the date when the appellants purported to exercise their rights under clause 20, issued certificates for payment of the full amount to which the appellants were then entitled. This was a matter which could easily have been settled under the arbitration clause in the agreement, and this part at least of the dispute between the parties would have been avoided.

In my opinion, this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD RADCLIFFE. My Lords, the trial of this case before the Official Referee lasted for 53 days. From that hearing only one question has filtered through on appeal to the Court of Appeal and ultimately to your Lordships' House. That is the question whether the appellants, who were building contractors under a building contract dated December 20, 1949, and made between themselves and the respondents, the Swansea Corporation, were entitled by that contract to determine their obligations under it by a notice which they delivered to the respondents on October 30, 1951.

At this stage of the litigation it is possible to indicate the relevant facts and considerations more briefly than was possible when the matter was before the Official Referee and the Court of Appeal. I will make my statement as succinct as I can.

The appellants had undertaken by this contract to build a primary school for the respondents ("the employer") for a contract sum of £102,760. This sum was capable of being increased in accordance with the conditions of the contract. The contract was governed by, inter alia, a set of 27 clauses, styled "the conditions," and for the purposes of those conditions the architect was to be Mr. H. T. Wykes, the Swansea Borough architect, "or in the event of his death or ceasing to be the "architect for the purpose of this contract such other person "as shall be nominated for the purpose by the employer," and the surveyor was to be the same Mr. Wykes "or in the event "of his death or ceasing to be the surveyor for the purpose of "this contract such other person as shall be nominated for the "purpose by the employer."

It was a dispute about the provisions for financing the contract that led to the giving of the notice of determination. It can be

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taken for granted that these provisions and their observance were of importance to the contractors, who would not be expected to finance a contract of this size out of their own resources. Clause 24 of the conditions, therefore, dealt with the issue of interim certificates by the architect. Shortly, the arrangements were that (1) there should be interim certificates each month; (2) subject to a clause 21, which is not here material, the architect was to issue such certificates stating the amount due to the contractors from the employer, and payment due on them was to be promptly met; (3) the amount so certified was to be the total value of the work properly executed and of the materials and goods delivered upon the site for use in the works up to and including a date not more than seven days before the date of the issue of the certificate, less retention moneys as agreed and any instalments previously paid on earlier certificates; and (4) at the time of issuing any interim certificate the architect was entitled to require an interim valuation, whenever he thought it necessary.

Consistently with this scheme for financing the cost of the works clause 20 made special provision for a right in the contractors to give summary notice to the employer determining the employment of the contractors in certain events of which the first two were expressed as follows: "If the employer within the "period which is named in the appendix to these conditions and "thereafter for seven clear days after written notice from the "contractor does not pay to the contractor the amount due on "any certificate, or if the employer interferes with or obstructs "the issue of any such certificate . . ."

The notice which was given by the contractors on October 30, 1951, was given on the ground that the employer had interfered with or obstructed the issue of such a certificate. Whether that was so is the issue which your Lordships have to decide. The learned Referee came to the conclusion that there had been such obstruction and made a declaration accordingly that the contractors had properly determined the contract. The Court of Appeal, on the other hand, decided unanimously that there had not been any such obstruction on the part of the employer and reversed so much of the Official Referee's judgment as related to that issue.

There are two points bearing upon the scope of this appeal which it is convenient to mention at this stage. The first is that the implication of the respondents in the obstruction alleged against them depends entirely upon the measure of responsibility to be attributed to them for the actions of a Mr. Hawkins, a partner in the firm of Messrs. Oswald Parratt, chartered quantity surveyors, and upon the interpretation of his actions in the light of clause 20 of the conditions. As I read the amended particulars of paragraph 29 of the statement of claim, the appellants' allegations of obstruction on the part of the respondents were founded upon a combination of acts or defaults attributed to

persons in the regular service of the respondents, in particular Mr. Williams, a quantity surveyor, and the Town Clerk, as well as to Mr. Hawkins. In view of the findings of the learned referee, who exonerated these persons from having committed any act which amounted to interference or obstruction, I think that we are bound to take it, since his findings were not challenged before us, that whatever obstruction can be brought home to the employer must be founded on the acts or defaults of Mr. Hawkins alone and of no one else.

Secondly, I do not think we should address ourselves to this appeal on the footing that the case was tried by the Official Referee on the basis that Mr. Hawkins was the agent of the employer in all that he did, and that the only question in dispute was whether what he did amounted to obstruction for the purposes of the contract. Had that been the case it might well have been improper for the Court of Appeal, and now for this House, to open the question whether the true meaning of clause 20 is such that the acts of Mr. Hawkins that are complained of can be attributed to the employer at all. But it was not the case. Indeed, I consider that the appellants have nothing to complain of in being required to meet this point. I have read with care the statement of claim and amended particulars, and I remain at the end uncertain whether they amount to an allegation that Hawkins was acting as agent for the employer or whether he was a person, not himself an agent of the employer, whose actions or derelictions were known to and condoned by persons who were such agents. Certainly the statement of claim contains no positive allegation of his agency. There is merely the general statement in paragraph 29: "In or about the month "of October, 1951, the defendants by their servants or agents "wrongfully interfered with or obstructed," etc. There was, therefore, no allegation for the respondents to admit or deny that bore explicitly upon the status of Mr. Hawkins. Their general answer (paragraph 21 of the defence): "It is denied that "defendants by themselves or their servants or agents ever "interfered with or obstructed wrongfully or as alleged or at all "the issue of any certificate to which the plaintiffs were entitled "or any certificate," cannot in the circumstances amount to a confession and avoidance.

It appears that the amended particulars of paragraph 29 were not delivered until the close of the hearing. The form of them could not, therefore, have influenced the course of the trial or the range of evidence called. I conclude, therefore, that there was nothing amounting to agreement between the parties as to Mr. Hawkins' position in relation to the corporation, and the onus of establishing that his actions amounted to obstruction by the employer remained with the appellants.

Before I trace as much as I believe to be relevant in Mr. Hawkins' connexion with the matter, I must say something about the position of architect and surveyor respectively in

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relation to the building owner under a contract of this kind. To take the architect first, it is obvious that his general function is to act on behalf of the owner, and he is the owner's agent to give the required instructions to the contractor. He is placed in office to protect the owner's interests. But in those parts of his duties which relate to the giving of certificates for payment I think that he stands apart from the owner and enjoys to some extent an independent authority of his own. The terms of the contract itself involve that he should have an irrevocable authority from the owner to issue certificates for payment to the contractor up to the amount and according to the terms which the contract prescribes. Hence, under this contract, if the owner even attempts to prevent him doing so by interfering with or obstructing their issue, the contractors are entitled to call off the whole transaction by summary notice. No doubt when the contract goes the architect's authority goes with it. But I take this power of determination to be a clear recognition of the fact that in matters of certification the architect is not simply the agent of the employer, but has duties of his own to perform under the contract, duties which he assumes by accepting his appointment as architect.

It is an established principle of law that in granting a final certificate under a building contract the architect acts in an arbitral capacity and is not "merely in the position of an agent "for the building owner": *Chambers* v. *Goldthorpe*.[1] The effect of that decision is that, in granting his certificate, the architect has a duty towards each party to hold the scales even. The considerations which give him this arbitral position with regard to a final certificate are not necessarily applicable so as to place him in the same position with regard to each interim certificate. But I do not think that there is any need to decide that point for the purpose of this case. One need go no further than to accept that under the contract in suit the architect is treated for some purposes as a person distinct from the employer, and that in the exercise of his right and duty to issue interim certificates for payment he is so far distinct that any act of the employer which interferes with or obstructs him in that duty is a breach of contract which goes to the root of the whole engagement.

The duties and position of the surveyor do not appear clearly from the terms of the contract. He, too, is appointed by the employer in the first place and, if the post falls vacant, it is the employer who names his successor. No doubt he is to be paid by the employer. The only specific references to him in the conditions are in clause 9, where he is given the duty of measuring and valuing all variations sanctioned by the architect, and in clause 22, where the architect is directed to inform the surveyor of any expenses incurred by the contractors for special packing and special carriage and the surveyor is to allow for the

[1] [1901] 1 K.B. 624; 17 T.L.R. 304.

same as contractor's payments for the purposes of prime cost. Generally speaking, I regard the surveyor as the person charged with the duty of valuing the contractors' work and advising the architect as to the allowance of their claims for payment, interim and final. But I do not see anything in the contract which suggests that the architect is bound to accept the surveyor's opinions or valuations when he exercises his own function of certifying sums for payment. At that point the architect remains master in his own field.

So long as Mr. Wykes held both appointments no problem could arise as to the respective functions of architect and surveyor. During this period as many as 20 interim certificates were issued by him. There is no evidence recorded by the Official Referee as to how much Mr. Wykes himself did in the work of checking. The procedure adopted varied. It is evident that, having the call on the corporation's quantity surveying section, which was part of the office run by him as borough architect, he used surveyors from the section to get the checking done. At one time a surveyor from the section met on the site a surveyor representing the contractors and quantities were agreed. Quantities, after all, are primarily a surveyor's question. Later there were no site meetings: the contractors' representative measured the work and materials and discussed his figures at the Town Hall with a Mr. Howells, who was himself employed in the section. At one time a Mr. Tee was employed to check these claims, but after he left the service of the corporation in August, 1950, the contractors' claims were passed more or less automatically through the surveying section to the architect for signature.

The reason for this unsatisfactory procedure was shortage of surveying staff at the architect's disposal. By May, 1951, Mr. Williams, the head of the section, began to have misgivings that the somewhat casual acceptance of the contractors' figures had led to considerable overpayment on the interim certificates. Whether he was right or wrong, something which, as I shall mention later, we are left without the means of knowing, the upshot of it was that the architect decided that he must have outside assistance in checking the contractors' claims and quantities. Accordingly he retired from his position as surveyor under the contract and, acting on his recommendation, the corporation appointed in his place Messrs. Oswald Parratt & Co., the firm responsible for the preparation of the original bill of quantities.

Mr. Wykes informed the contractors of the change on August 27, 1951. I think it plain that everyone concerned knew that Messrs. Parratt or the partner, Mr. Hawkins, who was to deal with the matter, was expected to make an interim valuation of the work done to date in order to reassure the architect as to his future certificates. As the contractors say, in subparagraph (*c*) of their amended particulars of paragraph 29 of the statement of claim, "the architect requested Messrs. Oswald

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"Parratt to make a valuation and recommend the sum which "should be paid" on certificate No. 21. The resulting valuation was treated by the Official Referee as "made on the instructions "of the architect," and as an "assessment of value for which "the architect was responsible." Indeed, it is his finding that in the case of certificate No. 21 "the architect decided that an "interim valuation should be made and instructed Messrs. "Parratt to make it."

I am very anxious not to depart at this point from the series of findings made by the learned Referee. One of the difficulties which I have found in appreciating the full effect of those findings is that, although he was forced to come to the conclusion that he could not place any reliance on the evidence of Mr. Hawkins, he was nevertheless under the necessity of arriving at some conclusions as to what had been done or not done by Mr. Hawkins himself in the course of making the valuation that was required of him. As I read the judgment, the material facts as found can be set out in the following order:—

(1) On September 27, 1951, the contractors sent in to the architect a written application for certificate No. 21 in the sum of £5,725 (I have not reconciled this figure with the figure of £9,636 which appears in the letter), together with supporting documents.

(2) By a letter dated October 11, 1951, Mr. Hawkins recommended the architect to issue certificate No. 21 for the sum of £1,287 only. He enclosed with his letter a brief analysis showing a total valuation of work and materials ranking for payment, allowing £5,000 for retention, at the sum of £72,333. Against this sums amounting to £71,046 had already been paid on certificates. The balance was the sum of £1,287.

(3) This figure of £72,333 represented Mr. Hawkins' true view of the value at the relevant date, September 30, 1951. But he had made no proper valuation which was capable of supporting that figure, and had acted with insufficient attention to the matter and in too great a hurry.

(4) The architect accepted Mr. Hawkins' recommendation, and on October 12, 1951, he did in fact issue and sign interim certificate No. 21 for the amount of £1,287.

(5) Although the amount recommended by Mr. Hawkins was what he thought was due to the contractors at the time, he became aware at a later date during the same month of certain deficiencies in his calculations, in that he had omitted to allow for a considerable amount of hard core delivered on the site and for certain price variations. He did not report these matters to the architect when he became aware of them, although it was his duty to do so.

(6) The contractors were indignant that their claim for £5,725 current payment should thus be reduced to £1,287. They protested by letter both to the architect and to the Town Clerk on behalf of the corporation. The architect took no action, being

apparently content to stand by Mr. Hawkins' recommendation. The Town Clerk replied in a short letter that Mr. Hawkins' valuation was a proper valuation made strictly in accordance with the contract.

(7) The contractors thereupon gave notice determining their employment under clause 20 of the conditions.

My Lords, if at this point I turn back to the words of that clause, I find it very difficult to see in what way the employer had been guilty of interfering with or obstructing the architect in the issue of a certificate. The corporation had given no instructions, direct or indirect, which impeded the architect in the performance of his duty of certification. They had left him alone, as it was right that they should. More than that, when he found that he could not adequately discharge his double duty of acting as architect and surveyor, they met without delay his request that he should be allowed to engage outside assistance. The firm chosen was chosen at his suggestion, not theirs. It was the firm who had been responsible for the original bill of quantities: and Mr. Hawkins, as the Referee finds, was a very experienced quantity surveyor.

In fact, the architect did issue his certificate for £1,287 within the permitted time. What went wrong, as is now established, is that the work which Mr. Hawkins had been engaged to do and on which that certificate was based had not been properly done. No doubt we must suppose that the architect would not have accepted the recommendation if he had known at the time the facts as they were later ascertained at the trial. But he did accept it. In my opinion, it is a misuse of language to say that in those circumstances and in that setting the employer had interfered with or obstructed the issue of a certificate.

I think that the learned referee arrived at his findings by a transposition of the language of clause 20 which is not permissible. Throughout he treats Mr. Hawkins' actions as the equivalent of the employer's actions for this purpose; and I have already indicated why I do not think that this treatment is adequate for the situation with which clause 20 is concerned. But, even so, his first finding is that Mr. Hawkins "obstructed "the issue of the sort of certificate to which the plaintiffs were "entitled." By this he means that Mr. Hawkins, by not basing his recommendation on a proper valuation, led the architect to issue a certificate upon unsatisfactory measurements. But I cannot read clause 20 as directed to the issue of one "sort" of certificate rather than another or to the methods of computation employed before the issue of a certificate. If those methods are deficient they may be expected to lead to the certification of a wrong sum. If it is too small—the error may be either way—the contractors are entitled to claim an immediate arbitration under clause 27 of the contract and to get the matter put right. But I do not think that they are entitled to call the whole thing

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off under clause 20 on the ground that proper methods of valuation have not been applied.

I think it of some importance to point out that even by the conclusion of the hearing it had not been established whether the contractors were at the relevant date entitled to more than £1,287 or to much more than, or to as much as, that sum. Yet the whole point of making a condition about the employer obstructing the architect's issue of a certificate must lie in the prejudice to the contractors in being kept out of money due to them. In spite of this the learned referee took the view that the question what was the true state of the account was immaterial to the validity of the contractors' notice. In that view he was acceding to the argument of their counsel that it was immaterial whether Mr. Hawkins' recommendation was too high or too low, and that, even if it should turn out in the end that it was too high, the contractors' rights under clause 20 would have been just the same. This contention was thus part of the contractors' case: it does not appear to have been advanced or conceded by the corporation. If it was necessary to the contractors' case to establish that more than £1,287 was then due, they did not do so. I do not express any final opinion on this, since I think that Mr. Hawkins' defective procedure does not, in any event, amount to obstruction by the employer. But I must say that it would take a good deal to persuade me that it was not relevant for this purpose to know whether the contractors were entitled to anything more than the money that they got. Can one be guilty of obstructing something unless it has a right to start?

The learned referee's next finding is that Mr. Hawkins, by failing to report to the architect some of the reasons why the sum recommended was lower than the sum applied for, "obstructed "the issue of a supplementary certificate to which the plaintiffs "were entitled." But then the contract does not provide for supplementary certificates: so clause 20 cannot have such a contingency in mind. If an interim certificate allows too small a sum, the remedy is by arbitration. To say that there was obstruction of the issue of a supplementary certificate seems to me no more than an indirect finding that the contractors were in fact entitled to be paid more than £1,287 in October, 1951. But how can such a finding stand in the face of the learned Referee's previous statement that it was both impossible and immaterial to decide whether the contractors had been overpaid before the issue of certificate No. 21?

There are two remaining points which I have left for separate mention. The learned referee found a third head of interference and obstruction on the part of the corporation. This arose out of the fact that when Mr. Hawkins sent the architect his recommendation for £1,287 he left in blank the statement of sums due to nominated sub-contractors which, under the contract, the architect had power to direct the contractors to pay over. The architect obtained from the surveying section a statement of

sums amounting to £672 in all and passed these on to the contractors in his letter of October 12, 1951, which notified them of the issue of certificate No. 21. The statement that these sums were due to sub-contractors was an error: there had been a miscalculation in the surveying section and nothing was due.

The point that this amounted to interference or obstruction in the issue of a certificate was not much pressed in argument before your Lordships, I think wisely. I do not read the letter dated October 17, 1951, from the contractors' solicitors as resting the notice of determination on this ground at all. As I see it, a mistake in a direction as to the payment of amounts to sub-contractors does not affect the issue of a certificate one way or the other. It is concerned solely with what is to happen after the issue of the certificate and relates to the question what the contractors are to do with the money which, ex hypothesi, has been paid to them. It does not seem to me a possible use of words to say that an erroneous direction obstructs the issue. It is true that the mistake originated in the corporation's office and was made by the officials of the surveying section: but the responsibility for accepting it and giving any direction in respect of it was the architect's, and the officials were for this purpose no more than his advisers or instruments.

Lastly, it was suggested that by the town clerk's letter of October 29, in which he rejected all assertions of misconduct on the part of Mr. Hawkins, described his valuation as a proper one and by implication denied that the contractors were entitled to a certificate for a larger sum, the corporation had adopted Mr. Hawkins' actions and, albeit retrospectively, obstructed the issue of a certificate within the meaning of clause 20. I do not myself find the necessary substance in this argument. The letter is not put forward as a ratification: it could not be, considering that Mr. Hawkins had not made any claim to any status of agency other than that which was involved in his firm's appointment as surveyors under the contract, and it results too from the learned Referee's findings that the officials of the corporation did not at the date of the letter have any sufficient knowledge of Mr. Hawkins' proceedings to be in a position to ratify them. But, if there was no ratification, what does the "adoption" amount to? It seems to me to amount to no more than saying that the corporation were going to stick to the view that Mr. Hawkins had done all that he should and that the contractors were not entitled to make his disputed valuation a ground of determination under clause 20. Their confidence in the surveyor proved to have been misplaced, but I do not think that, in saying what they did, they made his actions any more their own for the purpose of that clause than they were before.

For these reasons I am of opinion that this appeal ought to be dismissed. The reasons which I have given do not differ in substance, I think, from the grounds that commended themselves to Denning and Parker L.JJ. in the Court of Appeal. But it is

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perhaps worth while to say that, in my view, the answer that ought to be returned to the question raised depends essentially upon the special position between employer and architect envisaged by a clause in the form of the present clause 20. I should find it very much more difficult to resolve it by any general propositions as to the relations of building owner, architect and surveyor under a building contract.

LORD TUCKER. My Lords, the short point for decision in this appeal is whether, on the findings of the learned Official Referee, the respondent corporation "interfered with or obstructed the "issue of a certificate" within the meaning of clause 20 in a building contract made between the appellant as contractor and the respondents as employer, dated December 20, 1949, for the construction of a primary school at Swansea.

Under the contract, the borough architect, Mr. Wykes, was appointed architect and surveyor for the purposes of the contract. He was subsequently replaced as surveyor by the firm of Messrs. Oswald Parratt, who were appointed in his place by the corporation, as they had power to do under the contract. Mr. Hawkins was the representative of the firm, who acted pursuant to this appointment.

Clause 24 (a) of the contract provides that at the period of interim certificates (i.e., monthly) interim valuations shall be made whenever the architect considers them necessary and that, subject to clause 21 (which deals with sub-contractors), the architect shall issue a certificate stating the amount due to the contractor from the employer, and the contractor shall be entitled to payment therefor within the period named in the appendix.

Clause 24 (b) provides that the amount so due shall, subject to clause 21 (a) and to any agreement between the parties as to stage payments, be the total value of the work properly executed and of the materials and goods delivered upon the site for use in the works up to and including a date not more than seven days before the date of the said certificate, less the amount to be retained by the employer and less any instalments previously paid.

Clause 27 provides for arbitration in case of any dispute or difference between the employer or the architect on his behalf and the contractor, either during the progress or after completion or abandonment of the works, as to the construction of the contract or arising thereunder or in connexion therewith (including any matter or thing left to the discretion of the architect) or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation mentioned in clause 19 (which deals with variations) or the rights and liabilities of the parties under clauses 19, 20 or 25.

Clause 20 (1), which is the clause directly in question, reads, so far as relevant, as follows: "If the employer within the period

"which is named in the appendix to these conditions and there-
"after for seven clear days after written notice from the con-
"tractor does not pay to the contractor the amount due on any
"certificate, or if the employer interferes with or obstructs the
"issue of any such certificate, . . . the contractor may, without
"prejudice to any other rights or remedies, thereupon by notice
"by registered post to the employer or architect determine the
"employment of the contractor under this contract."

It has been found that in the early stages of the contract it was the practice for persons in the corporation's surveyor's department from time to time to meet a representative of the contractor to agree figures and valuations for the purpose of the issue by the architect of interim certificates. As time went on, owing to pressure of work, it was found impossible for anyone to attend the site on behalf of the corporation, and the contractor's figures were checked by the office staff so far as was practicable. When the work was nearing completion some of the corporation officials suspected that this practice had resulted in considerable overpayments, and this was one of the reasons for the appointment, shortly before the twenty-first interim certificate was due, of Mr. Hawkins of the independent firm of Messrs. Oswald Parratt, who had prepared the original bills of quantities.

It is, I think, clear that Mr. Hawkins was appointed not only to act as surveyor for the limited purposes expressly laid down in the contract, but also to carry out the valuations and measurements which had previously been done, with the architect's consent, by members of the corporation's permanent staff with a view to assisting the architect to obtain the necessary materials for the issue of his certificates.

The Official Referee has found as a fact that "in the case of "certificate 21 the architect decided that an interim valuation "should be made and instructed Messrs. Parratt to make it."

Mr. Hawkins accordingly made what he claimed to be a valuation, as a result of which the architect issued a certificate for £1,287 as against £5,785 claimed by the contractor.

The Official Referee has found that this valuation was not properly made, and the question for decision is whether the defects and errors found constitute obstruction or interference by the employer with the issue of a certificate.

The Official Referee considered Mr. Hawkins an unsatisfactory and unreliable witness, but your Lordships are only concerned with his actual ultimate findings as to what was done or left undone by Mr. Hawkins. He found that the amount of £1,287 recommended by Mr. Hawkins was what he then thought was due to the contractor under clause 24 (b), that his valuation had been made in too great a hurry without visual valuation on the site, that it omitted to include approximately £1,500 for hard core, which had been bought and used by the contractor, and that he failed to inform the architect of this omission when it was brought to his notice after he had made his recommendation.

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He further found that Mr. Hawkins had not included certain excess payments made by the contractor during the certificate period, consequent on price variations, and had made certain miscalculations with regard to preliminaries.

Finally he found that as a result of a mistake in the corporation's surveyor's department the certificate as issued provided for payment to sub-contractors of a sum of £650 or thereabouts out of the total certified. This sum was not in fact payable and the contractor never paid it but retained the full sum.

It is unnecessary to refer further to this last finding since counsel for the appellant did not contend that this mistake would by itself have justified determination under clause 20.

By reason of these matters the Official Referee stated he had come to the conclusion, not without some hesitation, that by producing that so-called valuation, Mr. Hawkins obstructed the issue of the "sort of certificate" the contractor was entitled to and consequently he could determine his employment under clause 20.

The Court of Appeal allowed the corporation's appeal. Denning L.J., I think, assumed without deciding that Mr. Hawkins' acts and omissions amounted to obstruction or interference, but held that the corporation were not liable for the acts of the surveyor within the sphere of duties assigned to him under the contract. Morris L.J. considered the corporation not liable because Mr. Hawkins was employed as an independent consultant not subject to their control. He refers to him "conducting himself erroneously," but expresses no view as to whether such erroneous conduct constituted obstruction or interference with the issue of a certificate.

Parker L.J. said he was prepared to accept that Mr. Hawkins was guilty of interference or obstruction but absolved the corporation from responsibility on grounds similar to those expressed by Denning L.J.

My Lords, I agree with the conclusion reached by the Court of Appeal, but I would base my decision rather on the ground that the findings of the Official Referee do not constitute interfering with or obstructing the issue of a certificate within the meaning of clause 20. I think, without attempting an exhaustive enumeration of the acts of the employer which can amount to obstruction or interference, that the clause is designed to meet such conduct of the employer as refusing to allow the architect to go onto the site for the purpose of giving his certificate, or directing the architect as to the amount for which he is to give his certificate or as to the decision which he should arrive at on some matter within the sphere of his independent duty. I do not think that negligence or errors or omissions by someone who at the request or with the consent of the architect is appointed to assist him in arriving at the correct figure to insert in his certificate can amount to interference. Interference to my mind connotes intermeddling with something which is not one's

business, rather than acting negligently in the performance of some duty properly undertaken. Nor do I think that the conduct found against Mr. Hawkins obstructed the issue of a certificate; it may have resulted in the issue of a certificate for a smaller sum than that which was due, but that is, in my view, a matter for arbitration under clause 27 and not a ground for repudiation under clause 20. I think the use by the learned Official Referee of the words "the sort of certificate" to which the contractor was entitled shows the difference between the interpretation which he put upon these words and that which I have endeavoured to suggest as correct.

My Lords, one of the difficulties of this case, as it has come to this House, is that your Lordships do not yet know whether or not there had been overpayments on previous certificates and whether in fact any sum was due when certificate 21 was issued. An interlocutory order was made, by consent, postponing the ascertainment of these figures until after the decision on obstruction. It would be a curious result if your Lordships were to hold that the issue of "the sort of certificate" to which the contractor was entitled has been obstructed or interfered with so as to justify his determining the contract, if it should eventually be found that he was not at the date of the certificate entitled to any payment.

These considerations tend to confirm me in the view that errors due to negligent valuation were never intended to give rise to the remedy afforded to the contractor by clause 20, but fall to be dealt with only by arbitration under clause 27.

Holding as I do that the acts and omissions found against Mr. Hawkins do not amount to obstruction or interference within clause 20, it follows that the letter from the town clerk of October 29, 1951, in which he asserted that a proper valuation executed strictly in accordance with the contract had been made, cannot of itself constitute obstruction although in fact the valuation was not correct or properly made.

For these reasons I would dismiss the appeal.

Lord Cohen. My Lords, I agree and have nothing to add.

Lord Somervell of Harrow. My Lords, I agree that the words "interferes" or "obstructs" are not apt to describe omissions which are negligent and not wilful. I would myself, however, have thought that there was evidence on which the learned referee could find, as he did, that the activities of Mr. Hawkins amounted to obstruction. I would also have thought that the "obstruction" by Mr. Hawkins was obstruction by the employer within the meaning of clause 20 (1). The majority of your Lordships think otherwise, and I only record the points on which I disagree in the hope that those concerned with the drafting of this printed form of contract may be led to try to substitute words which will indicate with less obscurity to the

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contractor when he is entitled to exercise the rights conferred by the clause.

I would have allowed the appeal.

Solicitors: *Thomas Edwards & Co.; Kenneth Brown, Baker. Baker for T. B. Bowen, Guildhall, Swansea.*

F. C.

[RESTRICTIVE PRACTICES COURT.]

1957
Nov. 4.

* PRACTICE DIRECTION (RESTRICTIVE PRACTICES).

Restrictive Practice—Practice—Application to extend or abridge time—To be made to clerk of court—Restrictive Practices Court Rules, 1957 (*S.I.* 1957, *No.* 603), *r.* 49.

By virtue of the power conferred upon me by rule 49 of the Restrictive Practices Court Rules, 1957, I HEREBY give the following general direction:

Applications in England and Wales to extend or abridge the time prescribed by the said rules or by order of the court may until further order be dealt with by the clerk of the court who may at his discretion either dispose of the same or adjourn them to the judge.

PATRICK DEVLIN,
President.

November 4, 1957.

[COURT OF APPEAL.]

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Jenkins, Parker and Pearce L.JJ.

* TAYLOR *v.* JOHN SUMMERS & SONS LTD.

[1956 T. 316.]

Court of Appeal — Notice of appeal — Form — Specifying grounds of appeal—Ground of misdirection—Particulars necessary—Rules of the Supreme Court (Appeals), 1955, *Ord.* 58, *r.* 3 (2).

The defendants applied for further and better particulars of the plaintiff's notice of appeal against the dismissal of his claim against the defendants, his employers, for damages for personal injury. The claim was based on (a) breach of statutory duty; (b) negligence at common law.

Particulars were sought under the following paragraphs of the notice of appeal: "(1) That the judge misdirected himself in law "and on the facts. (2) That the judge was wrong in holding that "the defendants, their servants or agents, were not guilty of "negligence as alleged. (3) That the judge was wrong in holding "that the defendants, their servants or agents, were not in breach

"of section 26 (2) of the Factories Act, 1937, as alleged. (4) That "the judge ought to have held that the defendants, their servants "or agents, were in breach of duty towards the plaintiff in each "of the foregoing respects and that such breaches were the cause of "the accident sustained by the plaintiff":—

Held, dismissing the application, that if the only ground alleged in the notice had been the first, that would not have been a sufficient notice of the grounds of appeal, for the purposes of R.S.C., Ord. 58, r. 3 (2),[1] but the further paragraphs in the notice stated with sufficient particularity the grounds of appeal, and no further particulars should be ordered.

Sansom v. *Sansom* [1956] 1 W.L.R. 945; [1956] 3 All E.R. 446 applied.

Pfeiffer v. *Midland Railway Co.* (1886) 18 Q.B.D. 243 and *Murfett* v. *Smith* (1887) 12 P.D. 116 distinguished.

Per curiam. Applications for particulars of grounds of appeal are by no means to be encouraged.

APPLICATION for further and better particulars of the plaintiff's notice of appeal.

The facts are set out in the judgment of Jenkins L.J.

W. L. Mars-Jones Q.C. and *Esyr Lewis* for the defendants.
Norman Richards Q.C. and *Geoffrey Howe* for the plaintiffs.

All the cases cited in argument are referred to in the judgments.

JENKINS L.J. This interlocutory application arises in an appeal by the plaintiff in the action dismissing his claim against his employers (the defendants) for damages for personal injury. The claim was put on two grounds. First, it was said that the injury was brought about by a breach of the defendants' statutory duty; and, secondly, it was said that the defendants were guilty of negligence at common law. Those were the two issues. As regards the claim for breach of statutory duty, the defendants rely, inter alia, on a contention that the place where the accident happened was not a factory, and they propose to raise that contention by way of cross-notice. But the application with which we are now concerned is an application by the defendants for further and better particulars of the notice of appeal.

R.S.C., Ord. 58, r. 3, in its new form, provides by paragraph (2): "Notice of appeal may be given either in respect of "the whole or, in respect of any specified part of the judgment "or order of the court below; and every such notice shall specify "the grounds of the appeal and the precise form of the order "which the appellant proposes to ask the Court of Appeal to "make." So that the rule, as it now stands, requires the grounds of appeal to be specified in the notice of appeal.

In the present case the grounds of appeal are thus stated:

[1] R.S.C., Ord. 58, r. 3: "(2) "Notice of appeal may be given "either in respect of the whole or "in respect of any specified part of "the judgment or order of the court "below; and every such notice shall "specify the grounds of the appeal "and the precise form of the order "which the appellant proposes to ask "the Court of Appeal to make."

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"(1) That the judge misdirected himself in law and on the facts. "(2) That the judge was wrong in holding that the defendants, "their servants or agents, were not guilty of negligence as "alleged. (3) That the judge was wrong in holding that the "defendants, their servants or agents, were not in breach of "section 26 (2) of the Factories Act, 1937, as alleged. (4) That "the judge ought to have held that the defendants, their servants "or agents, were in breach of duty towards the plaintiff in each "of the foregoing respects and that such breaches were the "cause of the accident sustained by the plaintiff. (5) That the "plaintiff was in the premises aforesaid entitled to recover "damages against the defendants."

Particulars are sought under each of those paragraphs. "Under paragraph 1. (1) Of 'That the judge misdirected him-"'self in law and on the facts,' stating in what respects it is "contended that the judge misdirected himself (i) in law and "(ii) on the facts. Under paragraph 2. (2) Of 'That the judge "'was wrong in holding that the defendants, their servants or "'agents, were not guilty of negligence as alleged,' stating the "grounds on which it is alleged that the judge was wrong. "Under paragraph 3. (3) Of 'That the judge was wrong in "'holding that the defendants, their servants or agents, were "'not in breach of section 26 (2) of the Factories Act, 1937, as "'alleged,' stating the grounds on which it is alleged that the "judge was wrong. Under paragraph 4. (4) Of 'That the "'judge ought to have held that the defendants, their servants "'or agents, were in breach of duty towards the plaintiff in "'each of the foregoing respects . . . ,' stating the grounds on "which it is alleged that the judge ought so to have held."

Those particulars, if complied with, would greatly increase the length of the notice of appeal, and add their quota to the costs of the proceedings. Mr. Mars-Jones, for the defendants, says that the notice of appeal, as it stands, does not sufficiently particularize the ground of appeal, and that it is necessary that particulars should be given in order that his clients may not be taken by surprise. He relies in particular on paragraph 1 of the grounds of appeal: "That the judge misdirected himself in law "and on the facts"; and he draws an analogy between the particulars required in a notice of appeal under this new rule, and the particulars required on a motion for a new trial. He has referred us to *Pfeiffer* v. *Midland Railway Co.*,[1] where it was held that: "A notice of motion for a new trial on the ground of "misdirection should state how and in what matter the judge "misdirected the jury"; and it appears from the judgment of Huddleston B. that the only objection stated in the original notice of motion was misdirection. One can appreciate that a general allegation of misdirection, without saying in what respect the judge misdirected the jury, might well be held (as it was held in that case) to be insufficient.

[1] (1886) 18 Q.B.D. 243.

Similarly, in *Murfett* v. *Smith*,[2] there was a motion for a new trial on a probate suit tried before Hannen P. and a common jury, and a notice of motion for a new trial was served in the following form: It asked that the judgment should "be "set aside and a new trial had between the parties on the "ground that the judge misdirected the jury and that the verdict "was against the weight of evidence." There, again, those general allegations of misdirection, and that the verdict was against the weight of evidence, were considered an insufficient statement of the grounds for the motion.

From those authorities it seems to me to be reasonably plain (if authority were needed) that if the only ground alleged in the notice of appeal in the present case had been the first—namely, that the judge misdirected himself in law and on the facts—that, standing alone, would not have been a sufficient notice of the grounds of appeal. But it does not stand alone. It is followed up by grounds 2, 3, 4 and 5; and I am satisfied that those grounds each state with sufficient particularity the point which it is intended to raise. It will be noticed that in ground 2: "That the judge was wrong in holding that the defen-"dants, their servants or agents, were not guilty of negligence as "alleged," the words "as alleged" clearly bring in the allegations in the statement of claim; and, again, what the second ground is saying quite clearly is that the plaintiff is going to contend that the judge ought to have held that the defendants were guilty of negligence in the respects alleged in the statement of claim. Similarly, one finds the words "as alleged" at the end of the third ground, which is the allegation that the judge was wrong in holding that the defendants were not in breach of section 26 (2) of the Factories Act, 1937. It seems to me that that also is a ground which is perfectly sufficient in point of particularity. Then ground 4 really does no more than recapitulate grounds 2 and 3; and ground 5: "That the plaintiff "was in the premises aforesaid entitled to recover damages . . ." is consequential. It seems to me, therefore, that grounds 2 to 5 are each stated with sufficient particularity.

On an application of this sort one must have some regard to the intention of the rule; and on that I may refer to what was said by Denning L.J. in *Sansom* v. *Sansom*[3]: "I am sorry "that these new rules take more time. This is the second case "today in which an application and more expense have been "incurred because of the new rules. It is not intended that "there should be elaborate grounds of appeal set out at great "length. They should be short and simple. The object of the "rule is to eliminate points which are no longer in controversy "so that the parties need not go to the expense of copying "documents or preparing the case on those points."

Bearing in mind those observations of Denning L.J., it seems

[2] (1887) 12 P.D. 116.

[3] [1956] 1 W.L.R. 945; [1956] 3 All E.R. 446.

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to me that the grounds of appeal here stated are plainly sufficient, with one reservation, and that is that I have some doubt as regards the first one; and as I have said, if that had been the sole ground of appeal I think there would have been some substance in this application. But Mr. Norman Richards, for the plaintiff, disclaims any intention of raising on ground 1 any matter which is not already particularized in grounds 2, 3, 4 and 5; and I think that is not only a very proper statement to make but it is really a statement which Mr. Norman Richards was bound to make, not by way of concession but for the reason that the remaining grounds of appeal embrace between them the whole of the issues of law and of fact raised in the action, so that ground 1 cannot add anything to the grounds specifically given. Ground 1, in effect, is mere surplusage, which I think would have been better left out, or perhaps would better have appeared at the end of the grounds of appeal introduced by the words "in the premises," or some language of that sort, showing that it was merely a collecting and sweeping up of that which had gone before.

These applications for particulars of grounds of appeal are by no means to be encouraged. Having given the best consideration I can to Mr. Mars-Jones's application, I have come to the conclusion that there is no substance in it, and that it should be refused. In my view, also, the costs of the application should be the plaintiff's in any event.

PARKER L.J. I entirely agree.

PEARCE L.J. I agree.

Application refused.

Solicitors: *Carpenters for Laces & Co., Liverpool; Russell Jones & Walker.*

J. A. G.

[QUEEN'S BENCH DIVISION.]

1957
Nov. 4, 5, 6.
Lord Goddard C.J.

* PULLIN *v.* PRISON COMMISSIONERS.

[1955 P. No. 2201.]

Factory—Definition—Prison—Workshop in which prisoners employed on manufacture of coir mats—Under penal discipline—Not working under contracts of employment—Not a factory—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151 (1).

The plaintiff, while serving a sentence of imprisonment in one of H.M. prisons, was employed in the prison workshop in processes connected with the manufacture of coir mats. Some four months after his discharge from prison he was found to be suffering from pulmonary tuberculosis. He claimed damages for personal injuries from the Prison Commissioners as occupiers of the prison alleging

negligence and breach of statutory duty. He based the latter claim on the allegation that the prison workshop was a factory within the meaning of section 151 (1) of the Factories Act, 1937,[1] and alleged that the commissioners, in breach of section 47, had failed to take steps to protect him from dust and impurities resulting from the process of manufacture carried on in the workshop with the result that the tuberculosis from which he was found to be suffering was caused or aggravated:—

Held, that the Factories Act, 1937, which put obligations on employers of labour in certain premises to take precautions for the safety of their workpeople, applied to persons working for wages under contracts of employment and not to those working under penal discipline; and therefore, on a true construction of the Act, a prison workshop was not a factory within the meaning of section 151 as the prisoners were obliged to work there as a consequence of their sentence and neither the relationship of master and servant nor employment for wages existed; accordingly, the plaintiff's claim failed.

Weston v. *London County Council* [1941] 1 K.B. 608; 57 T.L.R. 390; [1941] 1 All E.R. 555 applied.

ACTION.

The following facts are those relevant to this report. The plaintiff, George Pullin, was convicted of larceny on November 9, 1951, at Middlesex sessions and sentenced to three years' imprisonment. He was committed to H.M. prison, Pentonville, on the same day. He had previously been for some weeks on remand at H.M. prison, Brixton, where he had been medically examined on more than one occasion. His health had been found to be satisfactory. On November 11, 1957, two days after his reception at Pentonville, the plaintiff reported sick at about 10.30 p.m., his complaint being that he had vomited blood. The prison doctor who examined him admitted him to the prison hospital, where he was given certain treatment and kept under observation until November 15. He was then discharged and was put to work in the prison workshop where coir mats were made and where he continued to work until July, 1952. He was in that month transferred to the workshop annexe in which was housed a cropping machine through which the mats were trimmed after they were taken off the frames in the main workshop. The plaintiff worked on the cropping machine and was also required to empty a dust extractor from time to time, a shovel being provided for the purpose. He was engaged on this work until April, 1953, when he was transferred to other work in and about the prison. He was discharged on October 31, 1953, having

[1] Factories Act, 1937, s. 151 (1): "Subject to the provisions of this section, the expression 'factory' means any premises in which, or within the . . . precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:—(*a*) the making of any article or of part of any article; or (*b*) the altering . . . of any article; or (*c*) the adapting for sale of any article; being premises in which, or within the . . . precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control: . . ."

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earned full remission of his sentence. He obtained employment as a lorry driver, but in February, 1954, he was found to be suffering from pulmonary tuberculosis and subsequently spent two periods in hospital.

In this action the plaintiff sued the Prison Commissioners for damages alleging negligence and/or breach of statutory duty while he was in Pentonville Prison. He contended that the commissioners, as occupiers of the prison, were responsible for the appointment and control of staff employed there; that the workshop, which contained the machinery for the manufacture of coir mats, and in which prisoners, including the plaintiff, were employed to work during their period of imprisonment, was a factory within the meaning of section 151 of the Factories Act, 1937; that the process of manufacture of coir mats resulted in the giving off of dust and impurities of such a character and to such an extent as to be likely to be injurious to the persons employed; that the commissioners, in breach of section 47 of the Factories Act, 1937, had failed to take practicable measures or any measures at all to protect him from the dust and fumes emanating from the process of manufacture of coir mats; and that, as a result of his employment, dormant or quiescent tubercle bacilli were activated in his lungs, or, in the alternative, such inflammation of his lungs as may have been present at the date of his imprisonment was aggravated and he had thereby suffered pain and incurred loss.

He also alleged negligence in that the commissioners had failed, inter alia, adequately to examine him upon admission to prison or before he was employed; failed to diagnose or detect the presence of tubercle bacilli in his lungs; and exposed him to conditions where there was dust present in the air when they knew or should have known that it was medically unwise so to do.

The commissioners denied that the prison workshop was a factory within the meaning of the Factories Act, 1937, and did not admit that any of the matters complained of by the plaintiff was capable in law of affording him any cause of action against them.

Christopher Shawcross Q.C. and *Peter Benenson* for the plaintiff.

Sir H. B. H. Hylton-Foster Q.C., S.-G., and *Rodger Winn*, for the commissioners, referred to sections 64 (3), 104 (1) (3), 151 (4), 152 (4) (6) and 154 of the Factories Act, 1937, to show that the Act did not apply to prisons.

The following cases were cited in argument: *Weston* v. *London County Council*[2]; *Tozeland* v. *Guardians of the Poor of the West Ham Union*.[3]

[2] [1941] 1 K.B. 608; 57 T.L.R. 390; [1941] 1 All E.R. 555.

[3] [1907] 1 K.B. 920; 23 T.L.R. 325.

The case is reported only on the issue relating to the Factories Act, 1937.

LORD GODDARD C.J. This is an action of a somewhat remarkable character and I think, in some respects, it is unique. It is an action brought by a man who was undergoing a sentence of three years' imprisonment (which meant that, having earned full remission he was kept in prison for two years) against the Prison Commissioners in respect of his treatment in Pentonville Prison, which he alleges was responsible for a condition of tuberculosis from which he was found to be suffering three or four months after his discharge.

[His Lordship stated the facts and reviewed the evidence. He found that at some time, probably not long before he was charged with the offence for which he was convicted and sentenced, the plaintiff had been suffering in some degree from tuberculosis and he was therefore prone to it; that normal precautions were exercised and the prison doctor was not negligent in the diagnosis he made and the treatment he prescribed on November 11, 1951. His Lordship was satisfied on the evidence and the medical records that there was no indication of illness or symptom which would have raised the suspicions or called the attention of the doctors during the time he was in prison which would have put them on inquiry as to the plaintiff's state of health. His Lordship continued:] This action is first of all framed as a breach of the Factories Act, 1937. I am satisfied that on a true construction of the Act I ought not to hold that a prison workshop is a factory. I will content myself with referring to *Weston* v. *London County Council*,[1] in which Wrottesley J. held that a technical institute was not a factory and gave reasons which seem to me to be even more compelling in the case of a prison than they were in the case of a technical institute. The Factories Act, 1937, is an Act designed for the protection of the persons working in factories, that is to say, it is an Act which is intended to and does put obligations on employers of labour in factories and other places to take various precautions for the protection of their work people. I think it applies, as the Solicitor-General submitted, to people working under contract and not to prisoners employed on labour as part of penal discipline.

Section 151 (1) of the Act gives an interpretation of the word "factory" and then goes on to provide: "And (whether or not "they are factories by reason of the foregoing definition) the "expression 'factory' also includes the following premises in "which persons are employed in manual labour, that is to say," and then there are set out premises such as ships, dry docks, yards and various other premises in which certain businesses are carried on, such as laundries, and so forth, all of which appear to be factories. If Parliament had intended a prison to be

[1] [1941] 1 K.B. 608; 57 T.L.R. 390; [1941] 1 All E.R. 555.

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included it would be a remarkable thing if, when considering the latter provisions of that subsection, they should not have made any reference to a prison. I think that for the Factory Act to apply there must be found to exist (except in certain express cases, as, for instance, apprentices, which are dealt with separately) the relationship of master and servant and employment for wages. There is no employment for wages in the case of prisoners. Prisons are put under the control of the Secretary of State, who exercises his control through the Prison Commissioners, and through visiting magistrates who visit the prisons to see that the provisions of the Prison Act, 1952, are being carried out.

A number of sections of the Factories Act, 1937, to which my attention was called show quite clearly that they cannot possibly apply to prisons. The work which is carried on in prisons is work which is penal in the sense that the prisoners are obliged to work as a consequence of their sentence. I do not find any section in the Act which faintly indicates in my opinion that a prison workshop can be a factory. I think that the reasons given by Wrottesley J. in *Weston* v. *London County Council*,[1] and the considerations which he applied to show that a technical institute, in which work was being carried on which, if it had been carried on by persons employed under a contractual relationship, would have made it a factory, was not a factory apply in the present case. If they did not make that institute a factory in that case, still less do they make a prison a factory in this case.

The other point made on behalf of the plaintiff was that he was employed in what might conveniently be described as unhygienic conditions. If I were satisfied that he was set to work in such conditions that his health was undermined, I think it might very well be that when he was discharged from his sentence he might have a cause of action; but I cannot find that that was so. The only thing that can be suggested about the place in which he was working is that there was a certain amount of dust. An extractor was provided, and no one suggests that it was not a proper one. It is said that it was sometimes necessary to clean out the extractor and to move the accumulation of particles of cut coir which came from the mat-cutting machine on which the plaintiff was working. The answer to that is that there was a shovel provided for him to take that accumulation out. I cannot hold that this was a dangerous occupation or that the conditions under which the plaintiff worked were such as to cause him ill health, subject to this, that probably had it been known that he was suffering from tuberculosis the doctor would not have thought this was a suitable place for him to work in. Indeed, if it had been known that he was suffering from tuberculosis, as to which I am by no means satisfied, it is likely that

[1] [1941] 1 K.B. 608.

he would not have been put on to any work at all. In my judgment the Factories Act, 1937, does not apply, and I can find no ground to show that anybody has been negligent. Therefore, on both grounds, this action must be dismissed.

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Judgment for defendants.

Solicitors: *Pollard, Stallabrass & G. Martin; Treasury Solicitor.*

E. M. W.

[COURT OF APPEAL.]

* CLARKE *v.* E. R. WRIGHT & SON (A FIRM) AND ANOTHER.

[Plaint No. M. 3525.]

C. A.

1957 *Oct.* 25, 28, 29, 30.

Lord Evershed M.R., Romer and Ormerod L.JJ.

Building—Safety regulations — Scaffold — Unstable—Glazier injured—Breach of building regulations by employer—Duty of employer to take "express" steps to be satisfied that scaffold not supplied by him stable—Time when steps to be taken—Meaning of express—Damages—Apportionment—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 21.

Causation—Breach of statutory duty—Onus of proof.

Costs—Contribution to—Prior agreement—Offer by one of co-defendants to contribute proportion of damages recovered—Order to pay smaller proportion—Liability for costs—R.S.C., Ord. 16A, *r.* 12A—*County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 100.

A glazier standing on a ladder resting on a scaffold was injured when the ladder slipped and fell to the ground because the scaffold was unstable and had leaned outwards from the building. He sued his employers and also the builders who had erected the scaffold. It was not disputed that until the day before the accident happened the scaffold had been stable, but the supports which tied it to the building had been removed shortly before he arrived to begin his work for the day, so that the windows could be glazed more easily. Thereafter the scaffold was attached to the wall of the building by putlogs penetrating the brickwork for three inches and it was supported by braces buttressing the uprights towards the building. The employers had not inspected or taken any steps to see whether the scaffold was stable before their employee began to work on it, but it was conceded that the onus was on the plaintiff to prove that that failure, and consequent breach of regulation 21 of the Building (Safety, Health and Welfare) Regulations, 1948,[1] had been responsible for or contributed to the damage suffered by the glazier:—

Held, that on the evidence the glazier had discharged the onus of proving the employers' failure to satisfy themselves as to the stability of the scaffold in the condition in which their employee would use it (as they were required to do by the regulation), had on

[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 21: "Scaffold used by workmen of more "than one employer . . . where a "scaffold or part of a scaffold is "to be used by or on behalf of an "employer other than the employer "for whose workmen it was first "erected, the first-mentioned employer shall, before such use, and "without prejudice to any other "obligations imposed upon him by "these Regulations, take express "steps, either personally or by a "competent agent, to satisfy himself "that the scaffold or part thereof is "stable. . . ."

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a balance of probabilities materially contributed to the accident and that they were, therefore, liable to him in damages.

Bonnington Castings Ltd. v. *Wardlaw* [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615 applied.

(2) That the damages should be apportioned as to one-fifth to the employers and the remaining four-fifths to the builders, who were substantially to blame for the state of the scaffold, and that the amount of the general damages should be increased from £100 to £250, having regard to the permanent nature of the injury suffered by the glazier.

After the pleadings had been closed but before the hearing in the county court the first defendants, the employers, made an unequivocal offer to the second defendants, the builders, to contribute 25 per cent. of any damage which might be recovered by the glazier in the action. The offer was not accepted, and it was contended on behalf of the first defendants that as a smaller proportion was eventually awarded against his clients he ought to be indemnified by the second defendants against all the costs of both hearings:—

Held, that as between the two defendants the costs should be contributed in the same proportions as had been ordered in relation to the judgment debt of the plaintiff, but that in so far as the costs of both the first defendant and the plaintiff had been increased by the rejection of the offer, the second defendants should pay two-thirds of the increase which the first defendant had to pay to the plaintiff and two-thirds of the increase of the first defendants' own costs.

APPEAL from Judge Tylor sitting at Southampton County Court.

On November 19, 1954, the plaintiff, Bazil Walter Clarke, a glazier in the employ of the first defendants, E. R. Wright & Son, a firm of glaziers, was injured by a fall from unstable scaffolding whilst glazing the windows of the first floor of a house pursuant to a contract between his employers and the second defendants, Wheeler & Son (hereinafter called "the builders"), who were building the house. The builders had erected scaffolding and it was not disputed that until the day before the accident happened the scaffolding was kept properly and rigidly in position. Pieces of the scaffolding were passed through the walls of the house and were tied inside the wall so that outward pressure from the wall on to the scaffolding could not throw the uprights of the scaffolding out of the perpendicular. But in order that the glazing could take place easily, the employees of the builders, shortly before the arrival of the plaintiff on the day of the accident, removed the ties inside the wall and those of the transverse pieces or "putlogs" which passed through the openings of the windows. Thereafter the stability of the scaffolding and its maintenance in the vertical position depended on braces which were attached to the scaffold uprights at an angle sloping downwards and outwards to the ground away from the building. The plaintiff arrived at the house and placed the ladder which he had with him on planks resting on the remaining putlogs. These putlogs were not tied to the wall of the house but were of the spearhead type and were inserted into the brickwork of the

building for a distance of three inches. The plaintiff climbed up the ladder and began his work. The braces were not standing on a sufficiently firm foundation to resist the outward push from the foot of the ladder and consequently the scaffold uprights leaned out from the house, the planks slipped or became dislodged, and the ladder with the plaintiff fell to the ground. After the accident the plaintiff was taken to the Royal South Hampshire Hospital at Southampton and was found to have fractured the right transverse process of the first lumbar vertebra. He was treated as an in-patient for some time and afterwards had to rest at home and then for some further weeks to have physiotherapeutic treatment.

The plaintiff brought proceedings against his employers and also against the builders, alleging against his employers that they had failed to inspect the scaffolding before sending him to work on it and were, accordingly, in breach of regulation 21 of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948, No. 1145).[1] As against the builders it was alleged that they were negligent in the erection and maintenance of the scaffolding and were also in breach of the regulations.

At the trial agreed medical reports were put in which stated that when the accident occurred the plaintiff was suffering from pre-existing degenerative changes in the lumbar spine, known as spondylosis. The report stated that while such changes could remain symptomless for many years, an accident of sufficient severity to cause a fracture of a transverse lumbar process might produce symptoms which could also persist indefinitely, and that that was apparently what had happened to the plaintiff. He had a persisting disability consisting of pain in the lower lumbar region on stooping and lifting heavy weights, which made it impossible for him to lift heavy weights at work. The disability was apparently stationary and was likely to remain permanently but did not appear to interfere greatly with his employment or general activities. The witness was not of opinion that the disability would increase with time.

The judge awarded £100 by way of general damages and special damages were agreed at £100. The award was exclusively against the builders. The plaintiff appealed and the builders cross-appealed.

Eric McLellan for the plaintiff.

Stephen Chapman Q.C., *F. B. Purchas* and *Giles Rooke* for the first defendants, the employers.

Robert Hughes and *John Southam* for the second defendants, the builders.

In addition to the case referred to in the judgment of Lord Evershed M.R., the following were cited in argument: *Galashiels*

[1] For footnote 1 see page 1191.

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Gas Co. v. *O'Donnell (or Millar)*[2]; *Davison* v. *Apex Scaffolds Ltd.*[3]; *Pratt* v. *Richards*[4]; *General Cleaning Contractors* v. *Christmas*[5]; *Cilia* v. *H. M. James & Son (A Firm), Spark (Third Party)*.[6]

LORD EVERSHED M.R. stated the facts and continued: The plaintiff has appealed to this court and his case has been, first, that the judge wrongly acquitted the employers from all liability. Mr. McLellan, for the plaintiff, has put the case both on the grounds of breach of the regulations (two particularly) and at common law. Mr. McLellan further has said that the amount of £100 is a wholly erroneous assessment of the damages appropriate for a man in a case in which the accident has caused something to happen which will render him for all time not only liable to some discomfort and pain but under the disability that he will not at any time hereafter be able in the course of his work to lift heavy weights. There has also been a cross-appeal on the part of the builders. It was said on their behalf that the judge wrongly held them to have infringed certain other building regulations, but Mr. Hughes, for the builders, at an early stage of his argument decided that he would not and could not pursue that part of his cross-appeal and, if I may say so, I think he was prudent to take that course.

In the circumstances, therefore, what this court must now determine is, first, whether the employers as well as the builders should be held liable to the plaintiff on one or other or both of the grounds put forward by Mr. McLellan; secondly, if so, how the damages ought to be apportioned between the two defendants; and thirdly, whether the sum of £100 which I have mentioned should be displaced by some substantially larger figure, there being, of course, the limit imposed by the county court jurisdiction.

[His Lordship said that he attached considerable importance to the evidence given in cross-examination by a supervisor of scaffolding, a Mr. Young, who was appearing as an expert witness on behalf of the builders. He said that they would always tie scaffolding to door or windows, that braces should be against something hard and that they would never use braces of the type which were used. His Lordship continued:] The judge who saw Mr. Young was completely convinced by what he said. The part of his judgment which is relevant is as follows: "The evidence of Mr. Young, an independent expert and "supervisor of scaffolding of considerable experience stated "that there were two methods adopted in the erection of "scaffolding. The best and safest was to tie the uprights

[2] [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319.
[3] [1956] 1 Q.B. 551; [1956] 2 W.L.R. 636; [1956] 1 All E.R. 473.
[4] [1951] 2 K.B. 208; [1951] 1 T.L.R. 515; [1951] 1 All E.R. 90n.
[5] [1953] A.C. 180; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.
[6] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.

"to the building by means of 'putlogs' or cross-pieces the "ends of which penetrated the wall of the building and are "bolted to the wall by a cross-bar inside the wall. This ensures "that the scaffolding, when subjected to the weight of men "working on it and to the consequent outward pressure, will be "held securely in an upright position. The other method which "is adopted only if it is impracticable to adopt the first method, "and where it is not possible to bolt or tie the putlogs to the "building, is to rely upon supports bolted at an angle to the "uprights and bedded in the ground on a solid footing. A solid "footing is essential, as if the supports which are bolted to the "uprights, sink further into the soil, they fail to support the "uprights and tend to drag them out of the perpendicular. I "have no hesitation in accepting and acting on Mr. Young's "evidence."

I have already said that shortly before the arrival of the plaintiff to glaze the windows, the builders' servants, for reasons which appeared to them good, removed the ties which had hitherto held the scaffolding uprights in a firm position and thereafter allowed the scaffolding to rely for security upon the braces. In doing that it is clear that, to say the least, they made an error of judgment because it was undoubtedly the fact that the supports were not sufficiently firm at their footings that caused the accident to the plaintiff.

So far as the builders are concerned I have earlier stated that Mr. Hughes no longer disputes his clients' liability for substituting for the first or preferable method, the second method of supporting the scaffolding in circumstances which failed to comply with what I will call Mr. Young's requirements, in that it must be taken as now conceded that they were in breach of certain of the regulations applicable to persons engaged in the building trades and the like.

But it is now necessary to consider the situation of the employers. Two of the regulations, and two only, have been relied upon, namely, Nos. 5 and 21 in the Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948, No. 1145). No. 5 is opened by the rubric: "Provisions of Scaffold and Means "of Access." "Suitable and sufficient scaffolds shall be pro-"vided for all work that cannot safely be done on or from the "ground or from part of the building, or from part of a permanent "structure or from a ladder or other available means of support, "and sufficient safe means of access shall so far as is reasonably "practicable be provided to every place at which any person has "at any time to work." It was contended, particularly in light of regulation 4, that there was thereby imposed an imperative obligation upon all persons who might be concerned as employers of labour or tradesmen with an operation when scaffolding was required. On the other hand, it was said by Mr. Stephen Chapman, for the employers, that, at worst so far as he was concerned, the regulation could not apply unless first of all it was

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established that this work was work that could not safely be done, inter alia, from a ladder or other means of support. In other words, it was his argument that unless it was shown by appropriate evidence that this glazing could not—and I emphasize the word "could"—be done otherwise than from a scaffolding, then this regulation was inapplicable, at any rate, to him.

In the circumstances I do not think it necessary to express any view upon the application to this case, or to the employers in this case, of regulation 5, because, in my judgment, the employers are in any case liable under regulation 21. [His Lordship read the regulation and continued:] There is no doubt that the regulation is one which is applicable to a case of this character, for here a scaffold was to be used by or on behalf of an employer, namely, the first defendants, being other than the employer, videlicet, the builders, for whose workmen the scaffolding was first erected. It, therefore, follows that the first defendants were by this regulation placed under an obligation before such use to take express steps by a competent agent to satisfy themselves that the scaffold was safe. The use of the adjective "express" is somewhat ungrammatical and peculiar. Nobody suggests that it means "quick." I assume the intention was that the steps must be such as were directed and directed specifically to the question which had to be determined, namely, whether the scaffold was stable. It is not in doubt that the first defendants took no such steps. They made no inspection and they took no steps, "express" or direct or otherwise, to satisfy themselves of the stability of the scaffold before the plaintiff began his operations upon it.

The fact that they failed to take any steps is not, however, the end of the matter, for it is conceded that it is still for the plaintiff to prove that that failure on the first defendants' part was responsible for or contributed to the damage which the plaintiff suffered. Mr. Chapman drew our attention upon that matter to *Bonnington Castings Ltd.* v. *Wardlaw*[1] and the statement in the headnote may be taken as correctly summarizing the effect of the speeches in the House of Lords and as laying down the test which has to be applied. In that case a steel dresser had been exposed to silica dust which was alleged to arise from certain grinding. It was proved that the grinders were not kept free from obstruction in accordance with certain regulations and the question was whether the plaintiff had succeeded in establishing that the pneumoconiosis which he contracted could be attributed to the breach of the grinding of metals regulations. The passage in the headnote, which in fact is founded on a passage in the speech of Lord Reid,[2] reads as follows[3]: "That "the onus of proof lay on him to show, by the ordinary standard

[1] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

[2] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

[3] [1956] A.C. 613.

"of proof in civil actions, at least that on a balance of probabili-"ties the breach caused or materially contributed to the injury "and not merely that it was possible that the injury might have "been so caused." In *Wardlaw's* case [3] the House went on to find that the plaintiff had discharged the onus of proof and I arrive at a similar conclusion in the present case.

The judge upon this part of the case expressed himself at the end of his judgment briefly as follows. Having said that he doubted whether there had been any compliance with the regulation he goes on: "But I do not think that if the first defendants "[the employers] had inspected the scaffolding before the plain-"tiff used it, they could have discovered that the supports had "no proper footing. This could only have been discovered by "excavating under all the supports" and that, he thought, would be more than the regulation imposed. I should perhaps say that the doubt which the judge expressed arose from this, that the plaintiff himself had made an inspection and it was argued, therefore, that the employers had vicariously discharged their obligation via the plaintiff. That point was not pursued by Mr. Chapman and must be taken as abandoned.

I observe first of all that the judge expressed the obligation as one of mere "inspection." He said inspection would have failed to reveal the defect, the absence of the secure foundation. But, in my judgment, the obligation is more than that of mere inspection; it is an obligation to take "express" steps to satisfy oneself that the scaffolding is stable. Of course, if it were proved that no ordinary reasonable investigation could possibly have disclosed the defect, it might be that the plaintiff would be said to have failed to discharge the onus upon him. But I cannot find any evidence which justifies the conclusion that the employers could not by taking proper steps have discovered what turned out to be the cause of the accident.

I revert to the evidence of Mr. Young which the judge said he had no hesitation in accepting in its totality that the method of supporting the scaffolding by braces was one not to be adopted except in case of necessity and only then provided that the footings of the braces were secured on a solid foundation. One way to find out the facts is to ask questions, simple and straightforward. It seems to me, looking at the evidence here, that there is no good ground, with all respect, for supporting the judge's conclusion that no "express" steps which the employers could and indeed should have taken would have sufficed to disclose the defect. I accept entirely the way in which the matter is stated in the headnote in *Wardlaw's* case [4]; nevertheless I apprehend the court would not be astute to look for some escape for an employer who has, beyond a peradventure, failed altogether to comply with an obligation placed upon him. If one takes Mr. Young's evidence and the essential inferences from it and bears in mind the absence from the evidence of anything to

[3] [1956] A.C. 613.

[4] Ibid.

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suggest that the bad footings were in some way concealed, it seems to me that the answer within the terms of the statement from Lord Reid's speech which I have read is that, judged by the ordinary standard of proof, on a balance of probabilities this breach of duty did materially contribute to the injury.

I have not forgotten one point which Mr. Chapman did press upon us, namely, a point arising from the three words "before "such use." It was suggested that the obligation would be satisfied if the employers took the express steps at any time before the use by their servant. I have said already that the removal of the ties only occurred on the morning of the accident so that it follows that if the employers had, through a competent agent, investigated the scaffolding the day before, they would have found that it was erected in accordance with what Mr. Young called the preferable method, namely, that it was secured by ties. But it seems to me that the words "before such use" import a reference to the scaffold as it will in fact be provided for use by the employers' servant. In other words, if the employers had taken the required steps the day before, they should obviously have satisfied themselves, among other things, that the scaffolding as it then appeared was in the condition in which their servant would use it; and an inquiry would have disclosed the answer, presumably, that the ties were to be removed.

The point is a relatively short one and I do not think I shall improve upon it by further exposition. My conclusion is that, on the evidence, the plaintiff has established on balance of probabilities that the failure of his employers to satisfy themselves as to the stability of the scaffold in the condition in which he used it materially contributed to the accident. I am not satisfied on the evidence that it can properly be concluded that the steps, if taken by a competent agent, could in no circumstances have disclosed the essential frailty of the footings of the braces.

If I am right so far it follows that the plaintiff is and was entitled to succeed against his employers as well as against the builders, and to do so by reason of a breach by them of regulation 21 of the regulations of 1948. In those circumstances I think it unnecessary to pursue, and I do not, therefore, pursue, the alternative claim that the employers were liable at common law. A number of cases was referred to but in the circumstances I shall, I hope, be forgiven if I pass them over.

The result, therefore, is, if I am right, that the plaintiff should have recovered judgment against both defendants and the next question accordingly emerges: In what proportions as between them should they bear responsibility? Mr. Hughes, for the builders, has said: "Well, it was all a very unfortunate affair. "The plaintiff, as is the fact, had successfully glazed one window "before the collapse occurred and therefore there was nothing "very obviously wrong." He said also: "I was entitled to have "the benefit of the employers' experience. They were under an "obligation to take these steps for the benefit of their own

"employees and I simply did what I thought was best for all "concerned." There is, I think, force in that argument but, on the other hand, I think Mr. Chapman is right in saying that substantially the blame for this accident should fall upon the builders. As a matter of common sense, I think he is entitled to say that an employer of labour, a glazier, such as were the first defendants, does rely upon the competence of the contractor. The scaffolding had been up some time and people had been working on it. Moreover he says the breach was one of a somewhat technical character. I am not sure that I attach much significance to that. But the real trouble was because somebody, no doubt with the best of motives, at a very late hour chose to alter the method whereby the scaffold was held stable and change what had formerly been a perfectly good scaffold for all purposes into one that held in it the element of risk which unfortunately materialized. Giving the matter the best consideration that I can and thinking, as I do, that the substance of the blame should fall upon the builders, I would apportion it as to one-fifth to the employers and four-fifths to the builders.

There remains only the question of general damage. I have said that the special damage was £100 so that the area in which, so to speak, the court can manoeuvre is limited in any event to a maximum of £300. I have already read the relevant part of the surgeon's report and opinion and I have emphasized the fact, unfortunate though it undoubtedly is, that this accident served to make active and permanently active, so as to confer a partial disability, an inherent defect which might not have troubled the plaintiff for a very long time, if ever. He is a man whose profession or trade is that of glazing windows. He obviously requires to go about with ladders and to erect them at various places and positions. To be disabled for all time from the capacity to lift heavy weights is, I would have thought, a serious calamity, apart altogether from the pain and suffering which at times it appears that he will get from this spondylosis. If I preface what follows by a repetition of that which fell from Jenkins L.J.,[5] namely, that a change by this court in the quantum of damages awarded is a rare thing, I am not unmindful of the fact that this appears to be the third occasion in a very short time in which it has been done.[6] Nevertheless I do say and I do repeat that nothing short of clear proof that there has been either some error of principle or some wholly erroneous estimate applied will suffice, and the onus upon an appellant seeking to alter the quantum of damage is a very heavy one. But I think in this case that there has, with all respect to the judge, been a wholly erroneous estimate according to modern standards of the damage which should have been awarded. A man who has suffered an injury which is not only painful but which is going to have a permanent disabling effect, even though it cannot be regarded as very serious, is not

[5] See *Phillips* v. *Price*, *The Times*, October 30, 1957.

[6] See *Wilson* v. *Pilley* [1957] 1 W.L.R. 1138.

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one of whom it can be said that he has suffered only slight injury, and I do not think, with all respect, that £100 was and is an adequate award. I would, therefore, substitute for that figure the sum of £250. I therefore think that the appeal should be allowed so as to substitute for the judgment a judgment against both defendants with the necessary statement that the liability is to be borne as to one-fifth and four-fifths as between the defendants and that the amount of general damages should be raised from £100 to £250, making a total accordingly of £350 instead of £200.

ROMER L.J. I agree so fully with the judgment which the Master of the Rolls has delivered that were it not for the fact that we are taking a different view from that of the county court judge I should have been very content to adopt what my Lord has said without more; but out of respect to the judge I will make a few observations of my own.

As against the employers the plaintiff relied on regulations 5 and 21 of the Building Regulations and alleged in his particulars of claim that they were in breach of them. Regulation 5 apparently was not relied upon before the county court judge and was not dealt with by him at all and, therefore, according to the ordinary practice it would be difficult for the plaintiff to rely before this court on a regulation which formed no part of his case in the court below. But apart from that and as at present advised I would merely say, and it is unnecessary to say more, that I am doubtful in the extreme whether regulation 5 has any application to this case at all, and at that I leave it.

But regulation 21 does, I think, apply to the position which the employers occupied in this matter and they were subject to the obligations which that regulation imposes. My Lord has read the regulation, and I do not propose to read it again. I think Mr. Chapman was prepared to concede that having regard to the terms in which the regulation is couched his clients were within it and it was conceded, and it is an undoubted fact, that they took no steps whatever to perform the obligations which the regulation imposes. But Mr. Chapman said that nevertheless the plaintiff cannot rely on that breach by his clients unless he can show that the breach was wholly or in part the cause of the plaintiff's accident. I think the evidence shows clearly that if his employers had taken some such steps as are envisaged in the regulation it is more than probable, it is highly probable, that they or their representatives would have acquired information which would or might, if acted upon, have prevented the accident which occurred. If they had asked the builders' foreman, on the day before, whether the scaffolding as it then existed was going to continue to exist when their employee was working upon it on the following day, I suppose that they would have been told: "No, because we are going to remove the bars from across the

"windows." If, on the other hand, they had sent a representative on the following morning just before the workman started to use the platform, they or their representative would have seen that the bars had been removed from across the windows and would, I suppose, have taken steps to ensure the safety of their employee accordingly. It hardly lies in the mouth of the employers, having done nothing whatever about it at all, to say that even if they had made inquiries nothing good to the plaintiff would have come of them.

I think, therefore, for myself, in agreement with the Master of the Rolls, that the omission by the employers to perform their obligations under regulation 21 did in some measure contribute to the calamity which befell the plaintiff. At the same time I think there is considerable force in what Mr. Chapman said in regard to the proportion of liability as between themselves and the builders, who undoubtedly were in breach of more than one regulation so far as this matter is concerned. Mr. Chapman said that, when you get work of this kind going on, generally speaking it is the job of the principal contractors, the main contractors, to put up the scaffolding and see that it is kept in proper order, and it is not unnatural, although strictly it may be wrong, that other people who are concerned in the joint operation should rely, to some extent, on the people who put the scaffolding up, and to whom it belongs, to see that it is kept in a proper state. Therefore, although it cannot be said of the employers that they were other than in breach of regulation 21 and that that breach to some extent contributed to the accident, I am in agreement with my Lord that by far the greater part of the blame must be shouldered by the builders, who did, with no doubt the best possible motives, something which brought them within breach of, at all events, regulation 9, and probably regulation 12 as well, which resulted in the plaintiff's ladder getting upset and him being cast to the ground.

Taking all the relevant circumstances into account I agree that the proper proportion of blame is one-fifth on the employers and four-fifths on the builders, and accordingly the judgment of the court should give effect to that apportionment.

The only question which remains is as to the quantum of damages, and there again I find myself in complete agreement with the view which the Master of the Rolls has expressed, that having regard to the medical evidence the statement in the second medical report that the plaintiff has a persisting disability consisting of pain in the lower lumbar region on stooping and lifting heavy weights, which makes it impossible for him to lift heavy weights at work, and that this disability appears to be stationary and is likely to remain permanently, it does appear to me that £100, which was the sum awarded by the judge, is far below that which should be awarded and that that sum ought to be increased to £250 as my Lord has said.

I accordingly agree with the order in relation to all the points

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which have been raised before us which the Master of the Rolls has indicated.

ORMEROD L.J. I find myself in complete agreement with the judgments which have been delivered on the three matters which were argued before the court, and the only point upon which I would wish to say anything at all is on the question of the apportionment of blame between the two defendants.

Mr. Chapman has argued that even if his clients, the employers, are in breach of regulation 21 that is a purely technical breach and, therefore, the proportion of responsibility which should be attributed to them should be very small indeed, in fact should be almost nominal. I agree with the view which has already been expressed that in this case the substantial blame for the accident must rest on the builders. They were the people on the site; they were the contractors in charge of the site, the main contractors; and they were the contractors who had in the first place erected the scaffolding and under the building regulations were responsible, so long as that scaffolding was being used, for its proper maintenance. Unquestionably under those circumstances theirs is the substantial blame. On the other hand, of course, it must be remembered that there was a duty on the employers. One of their employees was going to work on this site and was going to work on this scaffolding, a matter which might reasonably have been anticipated by his employers, and of course the provision of regulation 21 is a provision for the safety of the workpeople of any employer whose employees are going to work on a particular site where there is scaffolding. In those circumstances, of course, it cannot be said that the breach by the employers is merely a technical breach and that any proportion of blame which is allotted to them should be purely nominal. I agree that the substantial blame must lie on the builders, and I agree that a proper proportion here is the proportion of one-fifth to the employers and four-fifths to the builders.

On the issue of damages there is nothing I wish to say except that in these circumstances I, too, am satisfied that the award made by the judge, with all respect to him, was based on a wholly erroneous estimate and that the figure should be increased to one of £250.

[A further discussion then ensued as to the apportionment of costs having regard to an unequivocal offer made by the first defendants before the first hearing, pursuant to R.S.C., Ord. 16A, r. 12A, and section 100 of the County Courts Act, 1934, to contribute 25 per cent. of any damages which might be recovered by the plaintiff in the action. As the proportion which the Court of Appeal held the first defendant ought to contribute as between the two was not 25 per cent. but 20 per cent., it was contended by counsel for the first defendants that from the expiration of

the ten days after October 30, 1956, the date of the offer, he ought to be indemnified by the second defendants against all the costs here and below.]

LORD EVERSHED M.R. The matter is one of discretion on the express terms of the order, and I think such a result would be unduly harsh on the second defendants. As Mr. Hughes points out non constat that three sets of costs would have been avoided. It may be that the first defendants would have wished separate representation. The letter does not go on to suggest the contrary; and even if both had been represented by the same solicitors and counsel, still less does it follow that the bill would have been paid exclusively by the second defendants.

We think that a just result will be achieved by directing that the appeal be allowed and judgment entered for the plaintiff for £350 with costs against both defendants, and that the contribution as between the two defendants as regards the plaintiff's judgment debt and costs of action and appeal to be as to the first defendants one-fifth of such judgment debt and costs, and as to the second defendants four-fifths of such judgment debt and costs. In so far as the first defendants' and the plaintiff's costs of the action and of the appeal have been increased by reason of the rejection by the second defendants of the first defendants' offer made pursuant to R.S.C. Ord. 16A, r. 12A, and section 100 of the County Courts Act, 66⅔ per cent. of any such increased costs which the first defendants are called upon to pay to the plaintiff and 66⅔ per cent. of the first defendants' own costs so increased shall be paid by the second defendants to the first defendants.

Appeal allowed.

Solicitors: *Maltz, Mitchell & Co. for Bernard Chill & Axtell, Southampton; Barlow, Lyde & Gilbert; Park Nelson & Co. for Footner, Taylor & Lawrence, Romsey.*

E. D.

[CHANCERY DIVISION.]

* PRACTICE DIRECTION (AUCTIONEERS' REMUNERATION).

1957
Nov. 18.

Agency—Auctioneer—Remuneration—Sales of freehold and leasehold properties carried out under direction of court—R.S.C., Ord. 51. *Estate Agent.*

The Lord Chancellor has directed that the scale of remuneration authorized to be allowed in the Chancery Division to surveyors, auctioneers and estate agents for their professional services in respect of a sale of freehold or leasehold property under the direction of the court shall remain unchanged. But

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the judge may in any particular case authorize a fee up to, but not exceeding, the scale fee recognized by the governing bodies of those professions as one proper to be charged where work, other than court work, is involved.

MAURICE WILLMOTT,
Chief Master.

November 18, 1957.

[NOTTINGHAMSHIRE ASSIZE.]

1957
July 2.

Hallett J.

* O'NEILL *v.* S. J. SMITH & CO. (BIDFORD) LTD. AND ANOTHER.

[1956 O. No. 658.]

Fatal Accidents Acts—Damages—Insurance—Pension scheme—Weekly payments made to widow and children—Whether to be taken into account in assessing damages—Whether paid "under any contract "of assurance or insurance"—Fatal Accidents (Damages) Act, 1908 (8 *Edw.* 7, *c.* 7), *s.* 1.

A miner, having been killed in a street accident, an action was commenced by his widow under the Fatal Accidents Acts 1846 to 1908 and the Law Reform (Miscellaneous Provisions) Act, 1934. On his death the widow and her infant children became entitled to weekly sums payable under a mine-worker's contributory pension scheme:—

Held, that the sums payable to the widow and children of the deceased under the pension scheme must be taken into account in assessing damages under the Fatal Accidents Acts as they were not sums payable "under any contract of assurance or insurance" within section 1 of the Fatal Accidents (Damages) Act, 1908.

Smith v. *British European Airways Corporation* [1951] 2 K.B. 893; [1951] 2 T.L.R. 608; [1951] 2 All E.R. 737 applied.

Bowskill v. *Dawson* (*No.* 2) [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649 distinguished.

Per curiam. "Payable on the death" relates to the time and not merely the cause of payment and where payments are merely to commence as from and because of the death that is not sufficient to bring such payments within the exception created by section 1 of the Act of 1908.

ACTION.

The plaintiff, Hannah Stevenson O'Neill, sued as administratrix of the estate of her late husband under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, for the benefit of herself and two infant children, the deceased having been killed in a street accident. Liability was admitted and the issue was limited to the assessment of damages. The deceased, who was a mine-worker, had received an average net wage of £15 10s. 6d. a week. At the

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[Reported by R. J. TOYN, Esq., Barrister-at-Law.]

time of his death at the age of 34 he had a savings bank account amounting to £32 6s. 4d. and left also cash to the amount of £150. During his employment by the National Coal Board the deceased contributed to a pension scheme established by virtue of the Coal Industry Nationalisation Superannuation Regulations, 1950 (S.I. 1950, No. 376) under which the plaintiff widow and her two children became entitled to weekly benefits after the death of the deceased. It was contended by the defendants that the benefits received under the pension scheme should be taken into account, and that they were not sums "paid or payable . . . "under any contract of assurance or insurance" required to be left out of account by virtue of section 1 of the Fatal Accidents (Damages) Act, 1908,[1] and with this point solely is this report concerned.

D. M. Cowley for the plaintiff.
A. J. Flint, for the defendants.

No cases other than those referred to in the judgment were cited in argument.

Hallett J., having stated the facts and considered the question of the degree of dependency of the plaintiff and her children upon the deceased, continued: The question which presents a certain amount of difficulty is the mine-workers' pension scheme. The scheme, which has been approved with numerous amendments by the Minister of Fuel and Power, was established, by virtue of the Coal Industry Nationalisation (Superannuation) Regulations, 1950, which were made by the Minister under section 37 of the Coal Industry Nationalisation Act, 1946, as amended by section 4 of the Coal Industry Act, 1949. Clause 3 provides that every employer shall pay a standard contribution of so much. I do not know why it says "every "employer," except on the basis that there is some employer other than the Coal Board. I suppose there possibly may be some; but one mostly thinks of it as an entirely nationalized industry. The board are to contribute a deficiency contribution on January 1, 1952, that is the first day of the scheme, of £2,000,000. They are also to contribute certain monthly payments and they have to make up deficiencies. (I am not going into the matter in detail.) Then every member is to contribute such sums as may from time to time be appropriate under the rules. I do not know what the contribution of the deceased man as a member of this pension scheme was, as it was not in evidence before me. I do not think it is a vital defect.

Under this scheme certain benefits become payable to the widow and to the children. Having regard to a recent increase,

[1] Fatal Accidents (Damages) Act, 1908, s. 1: "In assessing damages "in any action . . . there shall not be "taken into account any sum paid or "payable on the death of the deceased "under any contract of assurance or "insurance, whether made before or "after the passing of this Act."

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the benefit which is now being paid is 10s. a week to the widow and 5s. a week for each of the two children. Prior to the increase, the total benefits payable were, I am told, 13s. 6d. a week; but I think it is really quite hopeless to go into these matters with meticulous accuracy and take into account 13s. 6d. for a certain period and 20s. for another period; then, for the future, if these payments follow the rule of all other payments to workmen, it may be they will go up still further. I know not. I think I must take the figures as I have them and do the best I can.

The point of difficulty is this. The defendants contend that these benefits, derived from the pension scheme, should be taken into account as counterbalancing the pro tanto pecuniary loss caused to the dependants by the death. Mr. Cowley, on the other hand, contends that they ought not to be taken into account, because of the provision contained in section 1 of the Fatal Accidents (Damages) Act, 1908. Up to a point there seems to me to be no doubt about the legal position at all. Morris L.J., in *Bowskill* v. *Dawson* (*No. 2*),[1] to which I have been referred, reviews this aspect of fatal accident cases and points out, by reference to earlier authorities, that until the Act of 1908 a sum received by the claimant under an accident insurance policy fell to be deducted, just as any other sum which was received by reason of the death of the deceased and which conferred a pecuniary advantage upon the dependants, and had to be set off against the probable loss to the dependants occasioned by the death. But section 1 of the Act of 1908 created an exception. There have been other statutory provisions which have created further exceptions. For instance, there was the Widows', Orphans' and Old Age Contributory Pensions Act, 1925, s. 22, which I think creates a further exception in respect of pensions paid under that Act. There is also a provision in section 2 (5) of the Law Reform (Personal Injuries) Act, 1948, by which benefits under the National Insurance Act, 1946, are not to be taken into account; and that applies to an action commenced before July 5, 1948. But apart from these statutory exceptions, it seems to me to be quite clear law that from the assessed loss must be deducted any pecuniary advantage received by the dependants in consequence of the death. It is not suggested that any other exceptions here apply, and, therefore, the point that arises is: Does the exception contained in the Act of 1908 avail the dependants in the present case?

One must look at the actual language of section 1, which is as follows: "In assessing damages in any action . . . there shall "not be taken into account any sum paid or payable on the "death of the deceased under any contract of assurance or "insurance, whether made before or after the passing of this "Act." The question then is whether these sums which are

[1] [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649.

being paid week by week to the widow and to the children, and have been since the death, and will be paid as long as the scheme allows, are sums paid or payable on the death of the deceased under any contract of assurance or insurance.

Mr. Flint, for the defendants, has taken two points. First, he says that the sums with which I am now concerned are not sums paid or payable on the death of the deceased, because there is no lump sum payable to the widow or children in the events that happened on the death: what are payable are weekly payments. (I am going to refer to the relevant terms of the scheme in a moment.) Secondly, says Mr. Flint, these sums are not paid under any contract of assurance or insurance. As to the second point, there are certain authorities. As to the first point, neither side has been able to refer me to any authority at all.

On the second point, there are two authorities to which I have been expressly referred. One is *Smith* v. *British European Airways Corporation*,[2] a decision of Hilbery J., which was apparently not taken to appeal; but he was basing himself to a considerable extent on *Lory* v. *Great Western Railway Co.*,[3] which was a decision of Asquith J.

In *Smith* v. *British European Airways Corporation*[4] Hilbery J. held, as Asquith J. had in the earlier case, that the benefits received by way of pensions had to be taken into account: in those cases the total amount of the benefits had to be capitalized and corresponding allowance made against a sum which would otherwise have been awarded in respect of pecuniary loss.

The other case which I have already mentioned is *Bowskill* v. *Dawson* (*No. 2*).[5] On the very special circumstances, as they seem to me, of that case, the Court of Appeal decided that the sum paid should not be taken into account in the assessment of damages. In that case there was an unquestionable policy of insurance taken out. It was what was called a policy of group life assurance, and it was taken out under a trust deed between the employers and certain trustees, the trustees agreeing to carry into effect the policy and to pay the benefits thereby provided; and the deceased man was actually, I think, named as one of the persons assured, one of the employees covered who were the lives insured. I have had occasion to consider the judgments on previous occasions, and it is sufficient to say that it was held that Dawson "had a right enforceable in equity to "the life assurance benefits under the scheme," and, therefore, the sum paid, which in that case was a lump sum, was paid or payable on his death under a contract of assurance or insurance within the meaning of section 1 of the Act of 1908.

The question, therefore, is whether that authority governs this case, and whether these sums received as benefits by the

[2] [1951] 2 K.B. 893; [1951] 2 T.L.R. 608; [1951] 2 All E.R. 737.
[3] [1942] 1 All E.R. 230.
[4] [1951] 2 K.B. 893; [1951] 2 T.L.R. 608; [1951] 2 All E.R. 737.
[5] [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649.

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widow and children in the present case are not to be regarded as counterbalancing the disadvantages which they have otherwise suffered through the loss of the late Mr. O'Neill.

In the first place, it seems to me the facts here are very different from the facts in *Bowskill's* case.[6] In the present case there is no question of any contract of insurance or assurance whatever between anybody which gives rise to these payments in favour of the widow and children.

The scheme provides under rule 21 for widows' benefits. Rule 21 (*b*) provides: "Subject as hereinafter provided, the "benefit payable under this rule shall be," and there is then a provision for certain weekly payments to a widow. Rule 22 deals with children's benefits, and provides by rule 22 (*a*): "The benefits payable to the dependent children of a deceased "member shall be," and then it lays down what they are to be. It is observed that, as far as those two rules are concerned, there is no provision for a payment on death in the shape of a lump sum at all. There is a provision for payment of pensions commencing when death has occurred. Rule 23, I think, makes it, if anything, plainer still, because that deals with death benefits. It says this: "The benefit payable to the estate of a deceased member on his death if he leaves no person to whom "benefit is payable under rule 21 and no dependent children "shall be," and then it goes on to say what it is. So they are there drawing a contrast between a death benefit payable to the deceased man's estate, and the benefits payable under the two preceding rules to the widow and children of a deceased man after his death.

Throughout these rules there are certain discretionary powers, to which I am not going to refer in detail, but which I mention because they seem to me to support the view which I had arrived at without hesitation, that there is here no question of a contract of insurance at all between anybody giving rise to these payments. They are payments under a contributory pension scheme. Whatever the legislature may think right to do in the future, having regard to the way in which these pension schemes have now become so general and so important in the nationalized industries and outside the nationalized industries, I have come to the conclusion that the prima facie obligation to give credit for benefits received after a death which is displaced by section 1 of the Act of 1908 has not been displaced in the present case. If one wishes to make use of that exception, one must show that one comes clearly within its terms; but in the present case it seems to me that the plaintiff is clearly outside the terms of the exception.

The other point raised by Mr. Flint is certainly an interesting point. On the whole, I am inclined to think it is also sound by way of a second string. Mr. Flint points out that the section

[6] [1955] 1 Q.B. 13.

relates to sums paid or payable on the death of the deceased, and submits that that contemplates a lump sum then payable and not the commencement of payment of weekly or by monthly sums. It is a rather difficult point, because the words "on the death" might perhaps be regarded as equivalent to "by reason of the "death"; and that is what Mr. Cowley contends. He says these sums payable under the mine-workers' pension scheme are payable by reason of the death and, therefore, they are payable on the death of the deceased within the meaning of section 1. Mr. Flint, on the other hand, contends that is not so, and that "payable on the death" relates to the time of payment and not merely to the cause of payment and that, where nothing is payable on the death and there are merely payments which are to commence as from the death and because of the death, that is not sufficient to bring these payments within the exception created by the section.

At first I was inclined to think that was rather too fine a reading of the words; but, on the whole, I am inclined to think that Mr. Flint's contention is right on that also, although, having regard to the view which I take on the other point, such a view is not essential to my decision.

I have been somewhat reinforced in my favourable attitude towards Mr. Flint's argument by the consideration of the rules to which I have referred, because it seems to me here in the rules themselves they are drawing a distinction between death benefits, in the sense of a lump sum which is payable upon the death, and continuing benefits such as are paid to the widow and children under rules 21 and 22. For these reasons, I think I must take into account the benefits received by the dependants under the mine-workers' pension scheme.

The next problem which arises is: How should one set about giving effect to that principle? Having regard to the fact that the benefits are in the form of weekly payments, the present amount of which is ascertained at £1, I think the best way of dealing with it—and I believe counsel agree—is by saying: as against the sum of £X a week which the widow would have received for her own benefit and that of the children, had the deceased not died, there should be set the sum of £Y a week which she and the children have come into advantageously as a result of the deceased having died. I think, from my own point of view, the best practical way of doing it is to do it by way of reduction of the weekly sum which I regard as the sum which has been lost. I quite realize that there is a difference between the position of the widow and the children, because the widow's payment will go on for as long as the rules provide, whereas the children's payment will end at 16, or, in certain events, at 21. But in any case I have to divide up the total funds available, as a result of my judgment, between the widow and the children.

[After taking into account contingencies and deducting £182 being the amount of the deceased's estate, damages were assessed

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at £7,357 10s., made up of £6,657 10s. to the widow (including £39 10s. funeral expenses) and £175 to each of the two children under the Fatal Accidents Act, 1846, and £350 under the Law Reform (Miscellaneous Provisions) Act, 1934.]

Judgment for the plaintiff.

Solicitors: *German & Soar, Beeston; Browne, Jacobson & Roose, Nottingham.*

[LEEDS ASSIZES.]

1957 *July* 23, 24, 25, 26, 29.

Donovan J.

*CLARKSON *v.* MODERN FOUNDRIES LTD.

[1955 C. No. 3460.]

Damages—Negligence—Continuing negligence—Injury to health arising partly outside and partly within period of limitation — Whether plaintiff entitled to recover in respect of whole injury.

Limitation of Action — Negligence — Injury caused by acts outside statutory period—Injury partly caused outside statutory period—Materially contributed to within statutory period — Measure of damages—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2 (1).

Causation—Continuing causes—Factory—Onus of proof.

The plaintiff was employed in the defendants' iron foundry from 1940 to 1951. In May, 1951, he was found to be suffering from pneumoconiosis. On August 19, 1955, the plaintiff issued a writ alleging breaches of statutory duty on which he succeeded. The defendants pleaded, inter alia, that they were only liable in respect of a cause of action arising on or after August 19, 1949, and submitted that the inference was that the plaintiff contracted pneumoconiosis before that date. On the medical evidence the judge found that each year from 1940 to 1951, during which the plaintiff was exposed to pathogenic dust, played its part in producing the disease and that the two years between August, 1949, and August, 1951, made a material contribution to the severity of the disease, which in all probability already existed before 1949:—

Held, that the plaintiff was entitled to recover damages in respect of his whole injury although part was inflicted before August, 1949, since it was impossible to discover what that part was.

Bonnington Castings Ltd. v. *Wardlaw* [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615 applied.

Crookall v. *Vickers-Armstrong Ltd.* [1955] 1 W.L.R. 659; [1955] 2 All E.R. 12 distinguished.

Action.

From 1940 to 1951 the plaintiff, John Norman Clarkson, worked in the iron foundry of the defendant company, Modern Foundries Ltd., as a metal dresser. His work consisted of dressing castings, that is, knocking off all flashes and rough edges and removing the sand still adhering to the casting. For this purpose he used various tools, a hand hammer, a hand chisel, a pneumatic hammer and an electric portable grinder. He also used from time to time a swing frame grinder.

[Reported by G. M. Smailes, Esq., Barrister-at-Law.]

The operations in the foundry produced dust in the atmosphere. The operations which principally produced it were: (1) The lifting of the casting from its bed in the moulding section of the shop. Some of the moulding sand had to be dislodged from the casting for this purpose, but most of the resulting dust would be carried by the hot air up to the roof and out through the ventilators situate above the moulding section of the shop. Some of this dust might at times drift into the fettling and dressing section, some 40 to 60 feet away, where the plaintiff worked, though it would be very little. (2) The decoring of the casting, that is, the knocking off with bars of a core of sand still inside the casting, and the periodical shovelling up of such sand. For the first two years of his employment the plaintiff was approximately 30 feet from the decoring section and for the next eight years about 60 feet. (3) The use of portable hand grinders. Up to 1943 these were pneumatic. After that they were electric. They produced fine dust when they ground off any still adherent sand, of which there was usually some on the casting. (4) The use of the swing frame grinder on the heavier and long castings. This likewise gave rise to fine dust when still adherent sand was ground off, though the real purpose of this grinder was to grind off metal excrescences on the casting.

In May, 1951, the plaintiff was found to be suffering from pneumoconiosis and went into hospital in September of that year. It was common ground that he contracted the disease while in the employment of the defendants between 1940 and 1951, and did so through breathing silica particles from the atmosphere of the fettling and dressing shop. In the present action he claimed damages from the defendants on the ground that he contracted the disease through their negligence or breach of statutory duty. It was admitted on his behalf that the allegations of negligence added nothing to the allegations of breach of statutory duty, and the judgment was therefore confined to the latter.

It was held on the facts: (i) that in breach of section 4 (1) of the Factories Act, 1937, while the plaintiff was employed in the fettling and dressing section effective and suitable provision was not made for securing and maintaining by the circulation of fresh air in each workroom the adequate ventilation of the rooms and for rendering harmless by such ventilation the impurities in the air; (ii) that the defendant company were in breach of regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, in that they did not cause an exhaust appliance to be fitted to or near the swing frame grinder; (iii) that the defendant company were also in breach of statutory duty when large castings too large to get in the blast chamber were shot-blasted outside it with no tarpaulin to prevent dust from escaping into the fettling and dressing shop; (iv) that the defendant company having provided a mask and told the plaintiff to wear it during his fettling operations were not in breach of

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section 47 of the Act; but that there were times when he would be in the fettling and dressing section and without any negligence on his part not wearing his mask (for example, when using the hand hammer and chisel) and be breathing an atmosphere containing pathogenic silica dust and had there been adequate ventilation of that section it was certain that he would not have inhaled so much of the dust as he did, and it was a reasonable inference that the breach of section 4 (1) alone made a material contribution towards his illness.

By their defence the defendant company pleaded (inter alia) that if and so far as the plaintiff relied on any cause of action which accrued prior to August 19, 1949, the same was statute barred, and they relied upon section 2 of the Limitation Act, 1939.

G. S. Waller Q.C. and *R. P. Smith* for the plaintiff.
Rudolph Lyons Q.C. and *R. Withers Payne* for the defendants.

In addition to the cases cited in the judgment, *Nicholson* v. *Atlas Steel Foundry and Engineering Co. Ltd.*[1] was referred to.

Donovan J. stated the facts, made the findings summarized above, and continued: There is, however, this further point in the case. The plaintiff contracted the disease some time between 1940 and 1951. He did not issue his writ, however, until August 19, 1955, shortly after he had changed his trade union. The defendants therefore plead that they are liable only in respect of any cause of action arising on or after August 19, 1949, and they say that the inference is that he contracted pneumoconiosis before this date. The plaintiff was exposed to this pathogenic dust from the year 1940 onwards, and each year from 1940 to 1951 played its part, on the medical evidence, in producing the disease. The two years between August, 1949, and August, 1951, which are not affected by the Limitation Act, were years when he was also exposed to the same dust and, on the medical evidence, which I accept, the exposure for the two years made a material contribution to the severity of the disease which in all probability already existed. Dr. Tattersall, for the defence, said that the plaintiff had it in 1949; and he added that on an arithmetical basis one could say that, had the plaintiff left the defendants in 1949, he would have been one-fifth, or two-elevenths, better off as regards his expectation of working life and his expectation of life itself; but Dr. Tattersall did not pretend that this was anything but guesswork. I think it to be a just conclusion from the evidence I heard that the two years from August, 1949, to August, 1951, themselves made a material contribution towards the plaintiff's present condition—certainly not one which can be disregarded on the de minimis principle.

Then comes the problem: Is the defendants' liability to damages to be limited to the aggravation of the disease which

[1] [1957] 1 W.L.R. 613; [1957] 1 All E.R. 776.

occurred in these two years? Here it is important to remember that I am not dealing with a case where only part of a plaintiff's injury is shown to be caused by a particular defendant and it would therefore be wrong to make him pay for more. The present is a case where the whole injury was caused by a default on the defendants' part; and the only question is whether, as to part of it, the Limitation Act can be successfully pleaded. Here the onus is on the defendants. They must show that the injury was inflicted before August, 1949; and they do, I think, show that as to part. But just what part it is impossible for anyone to discover. It certainly cannot be done merely by doing a proportional sum in arithmetic. In *Bonnington Castings Ltd.* v. *Wardlaw* [1] the plaintiff had been exposed to some silica dust in respect of which the defendants were innocent and to some in respect of which they were guilty. It was held that, the plaintiff having shown that the latter dust materially contributed to his pneumoconiosis, that was enough to entitle him to recover damages, which, apparently, he did recover in full. By parity of reasoning, in the present case the plaintiff, having established that the last two years, 1949 to 1951, have made a material contribution to his illness, is also entitled to recover and, I think, to recover in full, for if it was impossible to distinguish between innocent and guilty dust in the matter of liability in the case just cited, it was equally impossible to distinguish between them in the matter of the quantum of damages.

I was also referred to the decision of Glyn-Jones J. in *Crookall* v. *Vickers-Armstrong Ltd.*[2] There it was held that the defendants were liable in damages only in respect of so much of the total injury as was suffered after their breach of duty towards the plaintiff: in other words, for the aggravation of his injury which their negligence caused, but not for the whole injury. This decision cannot apply, it seems to me, to the facts of the present case. Here the defendants were in breach of their statutory duty before the plaintiff contracted pneumoconiosis, and it was caused by that breach. The question is simply whether the plaintiff is too late to recover in respect of his whole injury. I think that the ratio decidendi of *Bonnington Castings Ltd.* v. *Wardlaw* [3] obliges me to hold that, once the plaintiff shows that exposure to this dust contributed materially to his injury from August, 1949, to 1951, he is entitled to recover in respect of his whole injury although part was suffered before August, 1949.

Judgment for the plaintiff.

Solicitors: *W. H. Thompson; Bromley & Walker, Leeds.*

[1] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

[2] [1955] 1 W.L.R. 659; [1955] 2 All E.R. 12.

[3] [1956] A.C. 613.

[COURT OF APPEAL.]

C. A.

1957
Nov. 21, 22.

Lord Evershed M.R., Romer and Ormerod L.JJ.

* ST. PANCRAS BOROUGH COUNCIL *v.* UNIVERSITY OF LONDON.

[1957 S. No. 674.]

Rates and Rating — Charities — "New list" — Notices terminating allowances—Sent before first year of new list—Whether premature — Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8 (2) (3).

Notices under section 8 (3) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, terminating allowances from rates payable under the new list of rates conferred on certain classes of ratepayers by section 8 (2) (*b*) cannot be sent before April 1, 1956, the date of the coming into operation of the first new valuation list.

Quaere whether an effective notice under subsection (3) can be given during the first year of the new valuation list.

Decision of Wynn-Parry J. [1957] 1 W.L.R. 778; [1957] 2 All E.R. 395 affirmed.

APPEAL from Wynn-Parry J.[1]

On March 21, 1956, notices dated March 20, 1956, were served by the plaintiffs, St. Pancras Borough Council, on the defendants, the University of London, informing them of the withdrawal as from March 31, 1959, of the limitation on the defendants' liability for rates conferred by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[2] in relation to certain

[1] [1957] 1 W.L.R. 778; [1957] 2 All E.R. 395.

[2] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to the following hereditaments . . . —(*a*) any "hereditament occupied for the purposes of an organisation . . . "which is not established or conducted for profit and whose main "objects are . . . concerned with "the advancement of . . . education "... (2) For the purposes of the "making and levying of rates in a "rating area, for the year beginning "with the date of the coming into "force of the first new valuation list "for that area (in this section "referred to as 'the first year of the "'new list'), and for any subsequent "year, the amount of rates chargeable in respect of a hereditament to "which this section applies shall, "subject to the following provisions "of this section, be limited as "follows . . .—(*a*) for the first year "of the new list, the amount so "chargeable shall not exceed the "total amount of rates . . . which "were charged in respect of the hereditament for the last year before "the new list came into force; "(*b*) if, by virtue of the preceding "paragraph, the amount of rates "chargeable in respect of the hereditament is less than it would have "been apart from that paragraph, "the proportion by which it is thereby required to be reduced shall "apply to any subsequent year "during which the hereditament "continues to be one to which this "section applies, and accordingly "the amount of rates chargeable in "respect of the hereditament for any "such year shall be reduced by that "proportion. . . (3) Where paragraph "(*b*) of the last preceding subsection "has effect in the case of a hereditament, the rating authority may at "any time give notice to the occupiers of the hereditament that, as "from the end of the year specified "in the notice, being a year ending "not less than 36 months after the "date on which the notice is given, "the limitation imposed by virtue of "that paragraph shall either cease to "apply to the hereditament or shall "be modified as mentioned in the "notice. . . ."

properties of the defendants there referred to. These properties (which were hereditaments within the meaning of section 8 (1) of the Act) included University College (the main assessment), and a number of other properties in Gordon Square, Gower Street, Cartwright Gardens, Flaxman Terrace and Taviton Street.

The valuation officer as required by section 1 (3) of the Act transmitted the new valuation list referred to in section 1 (1) to the rating authority; and the first year of the new valuation list for the rating area of the plaintiffs began on April 1, 1956.

The town clerk of the plaintiffs stated in an affidavit that doubts had arisen as to whether on the true construction of section 8 (3) the notices of March 20, 1956, were valid and effective to remove from the defendants as from March 31, 1959, the privileges conferred on them as ratepayers under section 8 (2) (*b*) of the Act. If the notices were ineffective on the grounds that they could not be validly served until a year subsequent to "the first year of the new list," it would be necessary for the plaintiffs to serve new notices, in which case the said privileges could not be terminated until March 31, 1961, at the earliest.

The plaintiffs took out a summons asking the court to determine whether on the true construction of section 8 (3) of the Act the notices were valid and effective.

Wynn-Parry J. held that the notices in question were prematurely given and were invalid.

The plaintiffs appealed on the ground that Wynn-Parry J. had wrongly construed section 8 (3). The defendants served notice that they would contend that Wynn-Parry J.'s judgment should be affirmed on the alternative ground that, on the true construction of subsection (3) no notice under that subsection can be validly served until after the commencement of the new list as defined in subsection (2) of section 8.

R. E. Megarry Q.C. and *C. Fletcher-Cooke* for the plaintiffs.
R. O. Wilberforce Q.C. and *W. B. Harris* for the defendants.

The following cases were referred to in argument and were not referred to in the judgments: *Richards* v. *McBride* [3]; *Alexander* v. *Springate*.[4]

LORD EVERSHED M.R. In my judgment this is really a plain case; and I entirely agree with the conclusion which Wynn-Parry J. reached. The question is one, in the end of all, of the effect, as a matter of English, of the first two-and-a-half lines of subsection (3) of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. That section was one concerned to give to certain "organizations" a privilege, or the chance of a privilege, under the new Rating Act. There is no question that the London University, the respondent to this appeal, is an

[3] (1881) 8 Q.B.D. 19.

[4] [1951] 1 K.B. 803; [1951] 1 T.L.R. 266; [1951] 1 All E.R. 351.

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"organization" within the scope of the section; and I therefore need not further refer to subsection (1) of section 8.

Subsection (2) states the nature of the privilege which may be obtained; and it arises, as Mr. Wilberforce put it to us, in two distinct phases: The first phase is covered by paragraph (*a*) and is during what is called "the first year of the new list"—that is, the new valuation list—and, so far as is relevant to this case, the first year of the new list began on April 1, 1956. It is provided that, during that year, as regards an organization of the type mentioned, if it remains such at all relevant times, it is not to be chargeable for rates in any sum exceeding that in respect of which it was charged for the last year of the old list. Then paragraph (*b*) of the subsection deals with the succeeding years; and, again assuming that the hereditament in question remains unaltered, and that the organization still remains one within the scope of the first subsection, it is provided that the proportion of the new rate for the second and subsequent years, which the organization will bear in respect of the given hereditament, is the same proportion of the new rate as was the rate actually paid during the first year of the new assessment to the rate which, apart from the subsection, would have been chargeable. Subsection (3) gives to rating authorities the right to determine, or put a limit upon the extent or duration of, those privileges. I may add that by a later subsection the rating authority is given a further discretion (notwithstanding, as I understand it, anything else that it may have done or not have done) to make remissions in cases of particular ratepayers—all of which goes to show that the section, over a period of time (and again I am borrowing from what fell from Mr. Wilberforce), is designed to give a breathing space during which it may be seen how the new rating will work in practice, particularly in regard to organizations of the kind mentioned.

I return to subsection (3) of section 8, which gives to the rating authority this power to determine privileges. It opens as follows: "Where paragraph (*b*) of the last preceding subsection "has effect in the case of a hereditament, the rating authority "may at any time give notice to the occupiers of the heredita-"ment that, as from the end of a year specified in the notice, "being a year ending not less than thirty-six months after the "date on which the notice is given, the limitation imposed by "virtue of that paragraph shall either cease to apply to the "hereditament or shall be modified as mentioned in the notice."

The first year of the new list began on April 1, 1956. The Act itself had come into operation on the first of the preceding July—July 1, 1955. The appellants here—the St. Pancras Borough Council—had, let it be said, made themselves very alert as to the nature and extent of their duties and powers under this new Act; and they, on March 21, 1956—before the first year of the new list had begun—served what I may call a subsection (3) notice upon the London University in respect of the hereditament in question

If that notice was a good notice, then it would take practical effect from the end of the year specified in the notice, being the "year ending not less than thirty-six months" (or three years) "after the date on which the notice" was given. That would have the effect that this notice, if good, would begin to operate after April 1, 1959. But the London University challenged the validity of the notice on the simple ground that it was premature, and that subsection (3) did not and could not, upon a fair significance of its terms, have contemplated the giving of a notice before the second year of the new list began, or (alternatively) at least before the first year of the new list began. It did not appear that the plaintiffs gave any other notices ex abundanti cautela; so that it is conceded now that, if they were premature in serving this notice, they will not be able to bring in the limitation which such a notice might operate to effect until April, 1961, thereby suffering a substantial loss for the borough. None the less, Wynn-Parry J. came to the conclusion that the notice here was invalid; and I agree with his conclusion.

The real force, I think, of Mr. Megarry's argument lay in the use of the three words "at any time"; for (he said) "at any "time" means "at any time." This Act came into operation on July 1, 1955, and so (he says) it is providing that, at any time after the Act was part of the law of the land, such a notice may be given; and he does not run away at all from the fact that the practical effect of such a notice might, in certain imagined circumstances, be altered or that the notice might even be rendered nugatory. No such circumstances in fact arise here; and Mr. Megarry says that his notice is within the terms of the Act, and should take effect accordingly.

I cannot accept that argument. A first reading of this subsection to my mind produces the effect for which Mr. Wilberforce contends. I would read it, as a matter of first impression, as meaning that when you have got to the stage, when year two has begun, then at any time—namely, at any time thereafter—a rating authority may serve such a notice. But the argument has subjected the subsection to a closer analysis than a mere reliance upon first impression. None the less, the closest analysis has not served (in my case) to disturb the first impression which the words made upon my mind. It seems to me that the most formidable answer to Mr. Megarry's argument lies in the express reference to "paragraph (*b*) of the last preceding subsection"; for if the words "has effect" should be taken as meaning no more or no less than "is operative in law," then there would be no point in making specific reference to paragraph (*b*): the whole section was in operation from July 1, 1955. In other words, it seems to me that, on a fair reading, and after, indeed, a close scrutiny of the language, these words "Where paragraph (*b*) of "the last preceding subsection has effect in the case of a "hereditament" operate to introduce, as Wynn-Parry J. said, a condition—"namely" (and I am quoting from the judge's

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judgment) "that the case must fulfil the conditions of para-"graph (*b*) of subsection (2) before the notice contemplated . . . "can be given." I entirely agree with that; and I think that that view of it is reinforced by the scope—the general character—of the section, which Mr. Wilberforce expressed as contemplating a series of quite definite phases—the first year of the new list, the second and later years of the new list, and then, once the latter period had begun and that phase had been entered into, the possibility of limitations imposed by notice on the part of the local authority. If that is right (as I think it is)—if that is the real meaning of these words "Where paragraph (*b*) of the "last preceding subsection has effect"—then it does not mean that I am introducing into the later language after the words "at any time" the word "thereafter": the subsection means what it says—that, given the condition, then at any time (namely, without any limit as to time) the local authority may give a notice. The words "has effect," in such a context, therefore, mean "has practical effect."

Mr. Megarry relied, and relied particularly, upon a later subsection in the section, namely, subsection (5), which provides: "The preceding provisions of this section, and the provisions of "the Fifth Schedule to this Act, shall have effect, with the "necessary modifications, in relation to rates charged for a rate "period forming part of the first year of the new list, or of any "subsequent year, as they have effect in relation to rates charged "for the first year of the new list or for any subsequent year, "as the case may be." I cannot (with all respect to him) get the significance which Mr. Megarry seeks out of that subsection. It is surely only asserting, in language appropriate for the purpose, that if, in consequence of the operation of the provisions of the Fifth Schedule, there is a change in the rates during a given year, be it the first year or a subsequent year, then the various preceding provisions of the section are to operate and "have effect" as regards the relevant part of the year as they otherwise would as regards the whole year. But that does not seem to me to throw any real light on the way in which these words are used in subsection (3); and they are there used (as I interpret them) in a way in which it is common for such words to be used.

If I elaborate the matter further, I should merely be guilty of repetition. I am content—and Mr. Megarry will not, I hope, think I am unappreciative of his argument—to leave it thus, stating my entire concurrence with the view expressed by Wynn-Parry J. But I must just add one qualification or reservation. So far as this case is concerned, the facts being as I have stated them, it suffices to say that, in my judgment, "has "effect" cannot be given the meaning "operative in law"; so that the notice which was here given on March 21, 1956, was a bad notice. A view has been intimated (which Mr. Wilberforce was prepared to support as an alternative in the notice that he

has given upon this appeal) that at any rate an effective notice under subsection (3) could not be given before the first year of the new list had begun. After the first year of the new list had begun—after, that is to say, paragraph (*a*) of subsection (2) had come into practical effect—it then followed that paragraph (*b*) would ensue, in effect, unless the organization ceased to exist or altered its character, or some supervening event of that sort occurred. So it might be said that, although paragraph (*b*) was not in effective operation in this case before April 1, 1957, at any rate after April 1, 1956, its future operation could be forecast with reasonable certainty. In the view that I take, it is unnecessary to express any opinion upon that point; and I therefore desire to leave open for future argument (if it should ever arise) the question whether an effective notice under subsection (3) might be given during the first year of the new list. My present inclination, I confess, is against that view; but I express no final conclusion upon it. So far as this case is concerned it suffices to say that this notice, given, as it was, on March 21, 1956, was premature and invalid.

I therefore would dismiss the appeal.

ROMER L.J. I agree that, notwithstanding our decision in this case, as a matter of theory at least it would be open to a local authority in some other case to submit and contend that a notice, given during the first year of the new list, was a valid and effective notice; because the point is not before us. But subject to that, and on the main point which has been argued before us, I agree so wholly with the judgment of Wynn-Parry J. and with the reasoning and conclusions that the Master of the Rolls has expressed that there is nothing I wish to add.

ORMEROD L.J. I agree also.

Appeal dismissed.

Solicitors: *R. C. E. Austin; Slaughter & May.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

* *In re* A SOLICITOR'S CLERK.

1957
Nov. 8, 22.

Lord Goddard C.J., Barry and Havers JJ.

Solicitor—Discipline—Solicitor's clerk—Convicted of larceny in 1953—*Not connected with money or property of employer or client—Disqualification order of disciplinary committee in* 1957 *made as result of legislation subsequent to conviction—Power of committee to make order—Solicitors Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 46), *s.* 16 (1) (*a*)—*Solicitors* (*Amendment*) *Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 41), *s.* 11 (1) (*a*).

Statute—Retroactive effect—Disqualification order of disciplinary committee—Order based on matters arising prior to Act—Whether Act retrospective—Solicitors (*Amendment*) *Act,* 1956.

1957

A
Solicitor's Clerk,
In re.

On September 20, 1957, the disciplinary committee of the Law Society made an order under section 16 (1) of the Solicitors Act, 1941, as amended by section 11 (1) of the Solicitors (Amendment) Act, 1956,[1] directing that no solicitor should thereafter employ the appellant, an unadmitted solicitor's clerk, who had been convicted of larceny in 1953, without the permission of the Law Society. The appellant's conviction had no connexion with money or property belonging to the solicitor by whom he had been employed or any of his clients, but the committee found that his case was clearly covered by section 16 (1) of the Act of 1941 as amended by section 11 (1) of the amending Act of 1956.

On appeal from the committee's order, the appellant contended that the committee was giving retrospective effect to the Act of 1956 by applying it to a conviction which took place in 1953:—

Held, that as the Act of 1956 enabled a disqualification to be imposed for the future, but did not affect anything done in the past it was not retrospective in operation; accordingly, the committee had jurisdiction to make the order and the appeal failed.

West v. *Gwynne* [1911] 2 Ch. 1; 27 T.L.R. 444 considered.

Reg. v. *Vine* (1875) L.R. 10 Q.B. 195 applied.

Appeal from order of disciplinary committee established under the Solicitors Acts, 1932 to 1941.

On April 23, 1957, an application was made to the disciplinary committee on behalf of the Law Society for an order directing that as from a date to be specified no solicitor should in connexion with his practice as a solicitor take or retain the appellant, a person who was or had been a clerk to a solicitor, into or in his employment or remunerate him without the permission of the Law Society. The allegation made against the appellant was that he had been guilty of such conduct as to justify an order being made in respect of him under section 16 (1) of the Solicitors Act, 1941, as amended by section 11 (1) of the Solicitors (Amendment) Act, 1956.

On July 4, 1957, when the application was heard, the following facts were proved or admitted before the committee. The appellant, who was not a solicitor, had been employed as a clerk by solicitors in London from March, 1941, until May, 1951,

[1] The Solicitors Act, 1941, s. 16 (1): "(*a*) Where a person who is or "was a clerk to a solicitor but is "not himself a solicitor has been "convicted of larceny, embezzle-"ment, fraudulent conversion or any "other criminal offence in respect of "any money or property belonging "to or held or controlled by the "solicitor by whom he is or was "employed or any client of such "solicitor; . . . an application may "be made by or on behalf of the "Society to the Disciplinary Com-"mittee that an order be made "directing that as from a date to be "specified in such order, no solicitor "shall in connexion with his practice "as a solicitor take or retain the "said person into or in his employ-"ment or remunerate the said person "without the written permission of "the Society . . ."

The Solicitors (Amendment) Act, 1956, s. 11 (1): "For paragraph (*a*) "of subsection (1) of section 16 of "the Act of 1941 . . . there shall be "substituted the following:—' (*a*) "'Where a person who is or was a "'clerk to a solicitor but is not "'himself a solicitor has been con-"'victed—(i) of larceny, embezzle-"'ment or fraudulent conversion: or "'(ii) of any other criminal offence "'in respect of any money or pro-"'perty belonging to or held or "'controlled by the solicitor by "'whom he is or was employed or "'any client of that solicitor;' . . ."

and was now employed as a clerk by solicitors in Brighton. At the Central Criminal Court on or about April 14, 1953, he had been convicted (inter alia) on four charges of larceny and was sentenced to five years' imprisonment. There was no appeal pending.

Counsel for the Law Society admitted that the charges of larceny in respect of which the appellant was convicted in 1953 were not concerned with money or property belonging to, or held or controlled by, a solicitor by whom he was employed or any client of such solicitor. He conceded that in the ordinary way a statute was construed as operating only in cases or on facts coming into existence after the passing of the statute unless a retrospective effect was clearly intended either by the terms of the statute or by necessary or distinct implication; and that there was nothing in the amending Act, the Solicitors (Amendment) Act, 1956, which came into force on November 1, 1956, to create the inference of a retrospective effect. He submitted, however, that section 16 of the Act of 1941, amended by section 11 (1) of the Act of 1956, was aimed at protecting the public rather than imposing an additional penalty and it mattered not whether a person was convicted before or after the Act was passed. He referred to the decision of the Divisional Court in *Reg.* v. *Vine* [2] and the judgment of Cockburn C.J. in that case in support of his submission.

It was contended on behalf of the appellant that there was no justification for regarding the amendment to section 16 (1) of the Act of 1941 made by section 11 (1) of the Act of 1956 as in any way retrospective; that the wording of section 11 (1) of the Act of 1956 could only look to the future; and that to take a contrary view would have far-reaching results quite outside the intention of the legislature. It was further submitted that even if it were held that this was a case where the committee had power to make an order in respect of the appellant, in all the circumstances they should exercise their discretion and not make one.

The committee's findings were that the allegation had been substantiated; the wording of section 16 (1) of the Solicitors Act, 1941, as amended by section 11 (1) of the Solicitors (Amendment) Act, 1956, seemed to them clearly to cover the present case since it expressly provided that proceedings might be instituted before them in any case where a person who was or had been a clerk to a solicitor, but was not himself a solicitor, had been convicted of larceny. The appellant had been so convicted. They were fortified in their conclusion by the decision in *Reg.* v. *Vine* [2] and the words used by Lord Cockburn C.J. in his judgment in that case. They therefore ordered that as from September 20, 1957, no solicitor should in connexion with his practice take or retain the appellant into or in his employment or remunerate him without the written permission of

[2] (1875) L.R. 10 Q.B. 195.

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the Law Society and that the appellant pay the costs of the application.

The appellant appealed against the committee's order.

Gabriel Cohen and *James Borders* for the appellant.
J. R. Cumming-Bruce for the Law Society.

The following cases were cited in argument: *Reg.* v. *Vine* *; *Reg.* v. *Guardians of Portsea Union* †; *Lane* v. *Lane.* ‡

Nov. 22. LORD GODDARD C.J. read the following judgment. The appellant, an unadmitted solicitor's clerk, appeals against an order of September 20, 1957, whereby the disciplinary committee directed that no solicitor should in connexion with his practice take or retain the appellant into or in his employment or remunerate him without the written permission of the Law Society. The order was made under section 16 (1) of the Solicitors Act, 1941, as amended by section 11 of the Solicitors (Amendment) Act, 1956.

By the Act of 1941 it was provided that where a solicitor's clerk who was not himself a solicitor has been convicted of larceny, embezzlement, fraudulent conversion or any other criminal offence in respect of any money or property belonging to or held or controlled by the solicitor by whom he is or was employed or any client of that solicitor an application for an order such as was made in this case might be made to the disciplinary committee of the Law Society. The amending Act allowed the society to apply for an order where a clerk had been convicted of larceny, embezzlement or fraudulent conversion of any property irrespective of whether it belonged to his employer or one of his clients. This appellant was convicted of larceny in 1953 of property which belonged neither to his employer nor to a client of his and, accordingly, he contends that to apply the provisions of the Act of 1956 to a person convicted before that Act came into operation would be to make its operation retrospective. In all editions of Maxwell on the Interpretation of Statutes it is stated that it is a fundamental rule of English law that no statute should be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by a necessary or distinct implication and this passage has received judicial approval by the Court of Appeal: see *West* v. *Gwynne*,[1] *per* Kennedy L.J.,[2] and there are other cases to the same effect. But in my opinion this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order, but the order has no retrospective effect. It would

* L.R. 10 Q.B. 195.
† (1880) 7 Q.B.D. 384.
‡ [1896] P. 133; 12 T.L.R. 249.

[1] [1911] 2 Ch. 1; 27 T.L.R. 444.
[2] [1911] 2 Ch. 1, 15.

be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable, or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or before the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past. Accordingly, in our opinion, the committee had jurisdiction to make the order complained of and the appeal fails.

BARRY J. I agree, and have nothing to add.

HAVERS J. I agree.

Appeal dismissed.

Solicitors: *Linsley-Thomas & Joslin; Hempsons.*

E. M. W.

[PRIVY COUNCIL.]

J. C.†
1957
Dec. 2.

*TWIMAHENE ADJEIBI KOJO II . . . APPELLANT;

AND

OPANIN KWADWO BONSIE AND ANOTHER . RESPONDENTS.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa — Land — Evidence — Conflicting traditional evidence — Demeanour of witnesses little guide to truth—Traditional history to be tested by recent facts established by evidence—Duty of appellate court.

Court of Appeal—Fact, question of.

In a suit concerning title to certain land in the Kumasi district of Ashanti traditional evidence was given by each side in support of its claim that the land in dispute had been awarded to his ancestor as a reward for the part played by him in a war. The Supreme Court of the Gold Coast (Land Court), affirmed by the West African Court of Appeal, reversed the decision of the Asantehene's A Court and upheld the decision of the lower Asantehene's B Court in favour of the defendant on the ground, inter alia, that it was a decision of fact depending on the demeanour of the witnesses and almost inviolable on that account:—

Held, that that was not a correct approach. Where there is a conflict of traditional history, which has been handed down by word of mouth, one side or the other must be mistaken, yet both may be honest in their belief. In such a case the demeanour of witnesses is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence, and by seeing which of the two competing histories is the more probable.

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† *Present*: LORD REID, LORD DENNING, THE RT. HON. L. M. D. DE SILVA.

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When, as here, the native courts differ, the Supreme Court must review the evidence and draw its own inferences; it should not start with the presumption that the lower native court (the B Court) is correct because it saw and heard the witnesses, but should rather give weight to the views of the native appeal court (the A Court). In the end, however, it must reach its own conclusion on inferences of fact.

Judgment of the West African Court of Appeal affirmed in the result.

Appeal (No. 4 of 1954) from a judgment of the West African Court of Appeal (January 9, 1953) affirming a judgment of the Supreme Court of the Gold Coast (Land Court), Ashanti (November 15, 1951), which had reversed a majority judgment of the Asantehene's A Court (December 9, 1950), reversing a judgment of the Asantehene's B Court (August 4, 1950), which had dismissed the present appellant's claim for a declaration of title to certain stool land.

The following facts are taken from the judgment of the Judicial Committee: This appeal concerned the title to a piece of land at Bonkwaso in the Kumasi district of Ashanti. It appeared to be a tract of forest land a few square miles in area. The present caretaker was one Kwadwo Bonsie, but he did not live on the land. He lived about 10 miles away at Nerebehi, but he had a cottage at Bonkwaso and visited it from time to time. He took all the profits from the land and handed them to his superior, the Odikro (Chief) of Nerebehi. Those profits consisted of tribute in the shape of rubber, gold dust, snails, big game and cocoa. The Odikro of Nerebehi in turn paid over a share of that tribute to his overlord, the Bantamahene (Head Chief of Bantama) whom he served. Such was the present position and, indeed, for some time past Bonsie and his ancestors had been caretakers who had paid tribute to the Odikro of Nerebehi who in turn had paid a proportion to the Bantamahene.

Despite that long enjoyment by the present occupants, the Atwimahene (Head Chief of Atwima) now laid claim to the land. He lived many miles away at Kumasi: but he said that that piece of land at Bonkwaso was given to his ancestor as a reward for his services in the war against Abrimoro some 200 years ago. The Atwimahene gave evidence by way of traditional history about the war, identifying himself with his ancestors, and speaking as though he himself was present in person. He told how the Bantamahene appointed him with other chiefs to chase Abrimoro and he got as far as Bonkwaso when he was stricken with smallpox and got no further. He was given that land at Bonkwaso as a reward for his services in that campaign. Three other chiefs, the Hiahene, the Akwaboahene, and the Besiasihene, supported his evidence, describing the campaign as if they themselves were there and it only happened yesterday. The Atwimahene said that, after the war, he gave a portion of the land away, but that he kept the rest (the part he claimed in this action) and his hunters brought him venison, snails and fish from it. About 80 years ago, however,

he became in need of money and borrowed £6 in gold dust from one Kwabena Tenteng of Nerebehi—who was not his subject but was staying on the land—and he said that he pledged this piece of land with Kwabena Tenteng to secure repayment, giving to Kwabena Tenteng the right to enjoy the profits of the land until the loan was repaid. When Kwabena Tenteng died, however, nothing was said to his relatives about the pledge. The successors of Kwabena Tenteng had continued to be caretakers on this land until in due course it came to the hands of the present caretaker Kwadwo Bonsie. In 1948 the Atwimahene sent bearers with £6 in money to be paid to Kwadwo Bonsie in redemption of the pledge: but Bonsie denied there was any such pledge. Thereupon the Atwimahene brought this action against Bonsie claiming a declaration of title to the land and an injunction. The Odikro of Nerebehi applied to become a party because he claimed to have an interest in the land and he was made a defendant.

The defendants said that the land never belonged to the plaintiff but was given to the Odikro of Nerebehi at the end of the Abrimoro war. The Odikro of Nerebehi gave evidence, by way of traditional history, saying that he did not go with the first contingent (Hiahene, Akwaboahene and the other warrior chiefs) to chase Abrimoro, but that he was sent later to search for the first contingent. He met them on the Supong stream as they were returning victorious. Afterwards he was given the land up to the Supong stream, which included the land at Bonkwaso now in dispute. The Bantamahene (the head clan chief of both the contestants) supported the traditional history of the Odikro of Nerebehi. He said that at the end of the war "I called Nerebehi "Dikro and told him to take and possess the land up to the "Supong stream where he reached . . . and to bring me any "valuables on the land to be given a share thereof." Kwadjo Bonsie said that he and his ancestors had been caretakers of the land from time immemorial for the Odikro of Nerebehi.

The case was tried at first instance in the Asantehene's B Court, consisting of three chiefs. They heard evidence on several days from February 27, 1950, to July 28, 1950, and eventually on August 4, 1950, found in favour of the defendants in a unanimous judgment delivered by the President, Nana Mensah Yiadom, Amakomhene. The plaintiff appealed to the Native Appeal Court (the Asantehene's A Court), consisting of three head chiefs, who heard the case on several days and examined the parties in person. In the result, on December 9, 1950, the appeal was allowed by a majority of two to one, the Ankobiahene and the Akyempimhene being in favour of the plaintiff; and the Nkwantahene (the President of the court) in favour of the defendants. The defendants appealed to the Supreme Court (Land Court) at Kumasi (Windsor-Aubrey J.), who, on November 15, 1951, allowed the appeal and restored the decision of the Asantehene's B Court in favour of the defendants. The plaintiff then appealed to

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the West African Court of Appeal (Foster Sutton P., Coussey J.A. and Korsah J.), who, on January 9, 1953, dismissed the appeal. The plaintiff now appealed to Her Majesty in Council.

1957. Oct. 10, 14. *Joseph Dean* for the appellant.
The respondents did not appear and were not represented.

The following cases were cited in argument: *Abakah Nthah* v. *Anguah Bennieh* [1]; *Gariba* v. *Ibrahimah* [2]; *Agbo Kofi* v. *Addo Kofi* [3]; *Chief Ebiassah* v. *Ababio* [4]; *Stool of Abinabina* v. *Chief Kojo Enyimadu.* [5]

Dec. 2. The judgment of their Lordships was delivered by Lord Denning, who stated the facts set out above, and continued: It is plain that each side claimed the land to have been awarded to his ancestor by virtue of the part played by him in the Abrimoro war: and the main issue in the case was, who was right about the history of the matter? If the land was originally given to Atwimahene for his part in the war, nothing since would have deprived him of it. He would not lose it by pledging it and doing nothing about the pledge for 80 years. But he had, of course, to account for the fact that he had not received any of the profits for many years, and he did this by saying that he had parted with it by way of pledge only. He sought to refute the case of the defendants by saying that the Odikro of Nerebehi admittedly did not take part in the active campaign but only followed up afterwards, and that would not be a sufficient reason for rewarding him with a grant of land.

Their Lordships notice that the judges in the appeal courts, who were in favour of upholding the decision of the Asantehene's B Court, did so on two grounds: first, that it was a decision of fact depending on the demeanour of the witnesses and almost inviolable on that account: second, that on a review of the evidence it was the correct decision.

So far as the first ground is concerned, their Lordships do not think it was the correct approach to this case. Their Lordships notice that there was no dispute as to the primary facts, that is, the facts which the witnesses actually observed with their own eyes or knew of their own knowledge in their own lifetime. The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard it must be recognized that, in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of

[1] [1931] A.C. 72.
[2] (1951) 13 W.A.C.A. 171, 179.
[3] (1933) 1 W.A.C.A. 284.
[4] (1946) 12 W.A.C.A. 106.
[5] [1953] A.C. 207; [1953] 2 W.L.R. 261.

traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the more probable. That is how both the native courts approached the matter and their Lordships think they were right in so doing. If both the native courts had come to the same conclusion, the Supreme Court would naturally be slow to disturb it. But when the native courts differ, as they did in the present case, the Supreme Court is necessarily called upon to review the evidence and draw its own inferences. It should not start with the presumption that the lowest native court (here the B Court) is correct because it saw and heard the witnesses, but should rather give weight to the views of the native appeal court (here the A Court). In the end, however, it must reach its own conclusion, just as a court of appeal in England must do, on inferences of fact: see *Benmax* v. *Austin Motor Co. Ltd.*[1]

So far as the second ground is concerned, their Lordships have themselves reviewed the evidence. Two facts stand out as established: The first is that the defendants have enjoyed the profits of the land without interruption for 80 years. Three or four generations have passed and no suggestion has been made that it was the subject of a pledge. The evidence shows that, if there had been a pledge, it is customary on the death of the pledgee for a reminder to be given to his successors, whereas none such was given. Even if the custom were the other way round (as was suggested), still no reminder was given: and surely, if no reminder was given, the plaintiff ought to have taken steps long since to draw the defendants' attention to his claim. The failure of the plaintiff and his predecessors to do this goes far to negative his claim.

The second is that in 1919, in the Chief Commissioner's Court for Ashanti, the Odikro of Nerebehi succeeded in an action for trespass to his land next to the Supong stream. This is not the land in dispute, but it is in fact several miles forward beyond Bonkwaso. This is strong support for the defendants' traditional history, for it shows that he did get land as far forward as the Supong. The plaintiff says that the defendant did not take part in the Abrimoro campaign at all, but if that were so, how did he get this piece of land up by the Supong?

Those two facts are so cogent that, in the opinion of their Lordships, they turn the scale in favour of the defendants. Their Lordships appreciate the force of the arguments of the majority of the Asantehene's A Court, but on balance they think the decision of the Asantehene's B Court was correct. In so doing they find themselves, on this second ground, in agreement with the President of the A Court, and the judges of the Supreme

[1] [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.

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Court and the West African Court of Appeal. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed.

Solicitors: *A. L. Bryden & Williams.*

C. C.

[QUEEN'S BENCH DIVISION.]

1957
Oct. 21, 22, 23, 24, 25; *Nov.* 6, 7, 8, 18.
Ashworth J.

* AGRIMPEX HUNGARIAN TRADING COMPANY FOR AGRICULTURAL PRODUCTS *v.* SOCIEDAD FINANCIERA DE BIENES RAICES S.A. THE AELLO.

[1955 A. No. 1170.]

Shipping—Charterparty—Arrived ship—Ship awaiting cargo of maize compelled to wait in Buenos Aires Roads—Ships excluded from dock area unless cargo immediately available—Commercial area of port—Relevance of type of cargo—Roads not place where ships waiting delivery of grain usually lay—Roads not within commercial area of port.

Shipping—Charterparty—Cargo, obligation of charterer to provide—Ship unable to become an arrived ship unless cargo immediately available—Charterers' failure to have cargo available—Liability of charterers for breach of contract.

By a charterparty dated August 27, 1954, the steamship *Aello* was chartered to proceed as ordered by the charterers to receive a cargo of wheat and/or maize and/or rye in bulk "at one or two "safe loading ports or places in the River Parana . . . and the "balance of the cargo in the port of Buenos Aires." The charterers had contracted to buy a quantity of maize and in accordance with their orders the *Aello* loaded a part cargo at Rosario and proceeded to Buenos Aires to load the balance of cargo. The vessel reached Buenos Aires Roads on October 12, 1954, and anchored, and was compelled to wait there until October 29. At all material times in 1954 the sale and export of maize from the Argentine was controlled by the Argentine Government, but, a large quantity having been sold, supplies were coming forward slowly and by August, 1954, vessels awaiting delivery at Buenos Aires were being delayed. For some time waiting vessels were allowed to wait in one of the basins or alongside loading ships, but that led to confusion and delay, and on September 1, 1954, the Grain Board decided that ships for which a cargo of maize was not immediately available at Buenos Aires should wait in the Roads. Before a vessel could proceed further for the purpose of loading, a berthing permit known as a "giro" was required; application for a giro would only be entertained if it was accompanied by a certificate issued by the Grain Board that the required cargo was available, and the shippers were the proper parties to apply to the Grain Board for the certificate. In addition, a vessel was not permitted to take on board any cargo unless a police permit, following on some form of police inspection, had been issued, but in the case of vessels which had already loaded a part cargo at an up-river port the police inspection at Buenos Aires was little more than a formality and compliance with this requirement would not normally hold up loading operations. When the *Aello* reached Buenos Aires on

October 12 there was then no congestion in the dock area but she was compelled to wait because no cargo was immediately available for her, and the charterers did not have the cargo available in time to enable a giro to be issued until October 29.

Buenos Aires Roads were within the legal fiscal and administrative limits of the port of Buenos Aires. The loading of maize could not and did not usually take place in the Roads, and the place where vessels due to load grain usually lay was in the dock area; had the resolution of September 1, 1954, not been passed, such vessels would have continued to enter and lie in the dock area until a cargo became available. The charterers, contending that the *Aello* was not an arrived ship until October 29, claimed the return of demurrage paid by them under protest to the shipowners:—

Held, (1) that under a port charterparty a ship became an arrived ship when she reached the commercial area within the legal, fiscal and administrative limits of the port, irrespective of whether, having reached that area, she could in fact load or discharge at the place where she anchored, but that in a large port the commercial area for one type of cargo might not be the same as that for another type, so that in each case the nature of the cargo to be loaded or discharged was a relevant factor and the test was "where "do vessels awaiting orders for a particular type of cargo usually "lie?" Applying that test, Buenos Aires Roads was not within the commercial area of the port for vessels due to load grain, nor did the resolution of September 1 excluding them from the dock area have the effect of extending the commercial area to the Roads, and, accordingly, the *Aello*, when she anchored in the Roads on October 12, 1954, was not an arrived ship.

Leonis Steamship Co. Ltd. v. *Rank Ltd.* [1908] 1 K.B. 499; 24 T.L.R. 128 applied.

Hudson's Bay Co. v. *Domingo Mumbru Societa Anonyma* (1922) 10 Ll.L.Rep. 476 distinguished.

(2) That since the issue of a police permit was only a formality, its absence did not of itself constitute a bar to the *Aello* being considered an arrived ship on October 12.

Armement Adolf Deppe v. *John Robinson & Co. Ltd.* [1917] 2 K.B. 204 applied.

(3) That since a vessel could not move inwards from the Roads so as to start loading without a "giro," its absence prevented the *Aello* from being an arrived ship before October 29.

(4) That where a cargo had to be available for loading in order to enable the ship to become an arrived ship, the charterer was under an absolute duty to have the cargo available, and if by failing to provide the cargo the charterer prevented a ship from becoming an arrived ship in ordinary course—that was, on arrival when there was room available in the berth or area which constituted the charterparty destination—he was liable to pay damages. Since the *Aello* had arrived in the Roads in ordinary course, and if a cargo had been available would have moved into the commercial area at once and thus become an arrived ship, the charterers' failure to have a cargo ready was the cause of her not being an arrived ship on October 12, and they were liable to the shipowners in damages for breach of contract.

Ardan Steamship Co. Ltd. v. *Andrew Weir & Co.* [1905] A.C. 501; 21 T.L.R. 723 applied.

Jones Ltd. v. *Green & Co.* [1904] 2 K.B. 275 and *Vergottis* v. *William Cory & Son Ltd.* [1926] 2 K.B. 344 considered.

ACTION.

The following statement of facts is taken from the judgment

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of Ashworth J.: The plaintiffs are a Hungarian company which carries on business in Budapest and is responsible for buying in bulk maize and other cereals required by the Hungarian Government. In June, 1954, the plaintiffs entered into a contract under which they agreed to buy from Bunge A. G. Zurich (inter alia) two parcels totalling 27,000 tons of Plate maize to be shipped in September, 1954, at prices expressed to be f.o.b. Argentine port or ports. Under that contract the shippers were stated to be Bunge & Born Ltda. of Buenos Aires but it was for the plaintiffs as buyers to supply tonnage and, accordingly, they entered into the charterparty with which this case is concerned. The document is dated August 27, 1954, and was signed in Hamburg. At all material times the defendants, a company constituted under Panamanian law, were the owners of the s.s. *Aello*, a vessel which flies the Costa Rica flag.

By clause 3 of the charterparty it was provided that the *Aello* "should load as follows, namely, at one or two safe loading ports "or places in the River Parana not higher than San Lorenzo, "always afloat, in proper rotation downwards, quantity at "charterers' option but not more than the steamer in the "master's discretion can safely carry over Martin Garcia Bar "(without lightening) and the balance of the cargo in the Port "of Buenos Aires or Eva Peron or Montevideo at charterers' "option." Eva Peron is now once again named La Plata and that port is referred to by the latter name hereafter.

In pursuance of the charterparty the *Aello* was directed by or on behalf of the plaintiffs to load first at Rosario and she reached that port on September 30, 1954. Loading began on October 5 and was completed on October 11 at 6 p.m., the quantity loaded being 5,750 metric tons. Nothing turns on the events at Rosario, and it is common ground between the parties that 7 days and 16 hours of the charterparty loading time were used at that port.

The *Aello* sailed from Rosario at 7.40 p.m. on October 11 and anchored in Buenos Aires Roads at 1.30 p.m. on the 12th. There she remained until October 29; at 10 a.m. on the last-mentioned date a pilot went on board and she began to move in. By 2 p.m. on the same day she was ready to start loading and in fact began loading at 3.15 p.m.

The *Aello* and other vessels chartered for the purpose of loading maize at Buenos Aires were subjected to delay and compelled to anchor in Buenos Aires Roads for the following reasons. At all material times in 1954 the sale and export of maize from the Argentine were controlled by the Argentine Government authorities; the body controlling sale was known by the short title I.A.P.I., and the body controlling export, including the storage of maize at Buenos Aires and its delivery on board ship, was commonly referred to as the Grain Board. In the early part of 1954 I.A.P.I. had sold a large quantity of maize for export and the purchasers duly chartered vessels for the purpose

of taking delivery. Unfortunately supplies of maize were coming forward very slowly and by the month of August, 1954, vessels awaiting delivery at Buenos Aires were being seriously delayed. For some time waiting vessels were allowed to wait in one of the basins or alongside loading ships, but this method of dealing with the situation proved unsatisfactory and led to confusion and delay. Accordingly, on September 1, 1954, the Grain Board decided that ships for which a cargo of maize was not immediately available at Buenos Aires should wait in the Roads. This decision was still in force in October, 1954, and as there was no cargo immediately available when the *Aello* reached the Roads after loading at Rosario, she was compelled to wait there from October 12 to the 29th.

Before the *Aello* could proceed further for the purpose of loading the remainder of her cargo at Buenos Aires, a berthing permit known as a "giro" was required. This permit was obtainable from the Argentine Customs authorities, but application for it had to be accompanied by a certificate of the Grain Board that the required cargo was available. In the course of the trial before me admissions were made by the parties and incorporated in a formal document which read: "The parties "admit that:—1. The plaintiffs did not have available at Buenos "Aires any completion cargo for the *Aello* in time to enable the "appropriate certificate of the Junta National de Granos and a "'giro' to be issued before they were in fact issued. 2. It was not "possible for the plaintiffs or anyone else on their behalf to obtain "such a cargo except by the issue of that certificate. 3. That at all "material times (i) It was not possible for the plaintiffs, Bunge & "Born Ltda., or (to the extent that they were concerned) Agencia "Maritima Sudocean S.R.L., to have had available at Buenos "Aires a completion cargo of any description, or the certificate "of the Junta Nacional de Granos, or a 'giro,' before these were "in fact procured by them; (ii) That the plaintiffs, Bunge & "Born Ltda., and (to the extent that they were concerned) "Agencia Maritima Sudocean S.R.L. acted reasonably in every "step which they took to procure the issue of a certificate of the "Junta Nacional de Granos and of a 'giro'; (iii) That there "was nothing which the plaintiffs, Bunge & Born Ltda., or (to "the extent that they were concerned) Agencia Maritima "Sudocean S.R.L., could have done which would have resulted "in a certificate of the Junta Nacional de Granos or a 'giro' "being issued before they were in fact issued. 4. Bunge & Born "Ltda. and Agencia Maritima Sudocean S.R.L. at all material "times knew the following facts: (i) No 'giro' could be "obtained for the vessel unless and until a certificate had been "issued by the Junta Nacional de Granos certifying that the "latter body had allotted a parcel of grain (whether maize, wheat "or rye) for loading on the vessel; (ii) Such a certificate could "only be obtained by or on behalf of Bunge & Born Ltda., who "were the purchasers of the intended completion cargo from

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"I.A.P.I. and the proposed shippers and exporters thereof. 5. No "such certificate was obtained by or on behalf of Bunge & Born "Ltda. in time to enable a 'giro' to be issued permitting the "vessel to berth before she did. 6. That the plaintiffs personally "had no knowledge of the system in force in relation to applica-"tions for certificates of the Junta and 'giros' and accordingly "did not know that no 'giro' could be obtained until the "certificate of the Junta Nacional de Granos had been issued, "nor did they know who could apply for such a certificate."

While the certificate of the Grain Board could only be obtained by or on behalf of Bunge & Born Ltda. as intending shippers and exporters, application for the "giro" or berthing permit had to be made by the firm registered as customs agents of the vessel, in this instance the Agencia Maritima Sudocean S.R.L., who acted as official agents of the vessel in pursuance of clause 33 of the charterparty.

Although the legal fiscal and administrative limits of the port of Buenos Aires and the extent of its commercial area were matters of controversy between the parties, certain facts relating to the port were beyond dispute. In the first place, the works and installations constructed for berthing, discharging and loading of vessels at Buenos Aires are situated as shown on exhibit "C" to the affidavit of John Francis Bowen filed on behalf of the plaintiffs. This area is hereinafter referred to as Dock area, but that expression is used solely as a means of identification and has no other significance. Secondly, owing to the character of the river bed, it is necessary to use one of two channels in order to obtain access to the Dock area. These channels are known respectively as the North and the South channel and they meet at a point 9 kilometres from the North basin. A single dredged channel leads outwards from this junction to a position known as Intersection which is 37 kilometres from the North basin. Thirdly, on either side of the dredged channel, slightly up river from Intersection, there are two anchorages, one being known as the Quarantine Anchorage and the other as the Free Anchorage. These two anchorages are included in the area known as Buenos Aires Roads. As its name implies, the Quarantine Anchorage is the place in which vessels may, and generally do, anchor on their arrival in the River Plate, pending examination by the sanitary authorities. If a vessel obtains free pratique as a result of examination on arrival in the river and then proceeds up river, a further examination is not required on her return to Buenos Aires Roads before she is allowed to proceed to the Dock area. The master of a vessel which is due to load first at a port on the River Parana may, however, prefer to postpone examination by the sanitary authorities until he reaches that port, and in that case also, on the vessel's return to Buenos Aires Roads, no further examination is needed. Similar arrangements were at all material times in force in regard to inspection by customs

officers. So far as the *Aello* was concerned, no further examination either by the sanitary authorities or by customs officers was required upon her arrival in Buenos Aires Roads on October 12, 1954.

In addition, a vessel on arrival in the River Plate is of interest to the local police, but in this respect the procedure is not the same as outlined above. Before a vessel is permitted to load part of her cargo at an up-river port she must obtain clearance from the police, but such clearance does not enable her to take on board any cargo at Buenos Aires and for this purpose a further police visit is necessary. It is common ground between the parties that this further police visit did not take place until October 29, and the plaintiffs contend that for this reason, if for no other, the *Aello* was not ready to load and cannot be regarded as being an arrived ship on October 12.

On November 15, 1954, the plaintiffs, under protest and on the defendants undertaking to repay any part thereof which might thereafter be found not to have been due, paid to the defendants £1,887 10s. claimed by them as demurrage, and in this action the plaintiffs, alleging that the *Aello* was not an arrived ship at the port of Buenos Aires until 2 p.m. on October 29, 1954, claimed the sum of £1,887 10s. from the defendants.

The defendants contended that the *Aello* became an arrived ship at Buenos Aires at 1.30 p.m. on October 12, 1954, and that demurrage was therefore due; they further contended that if the vessel was not an arrived ship at 1.30 p.m. on October 12, 1954, she would have become an arrived ship by 4.30 p.m. on that date, by which time she would have reached a berth in the inner harbour but for the plaintiffs' breaches of the charterparty; that if and to the extent that they were held liable to plaintiffs, such liability arose from the plaintiffs' breaches of the charterparty, and they counterclaimed to recover from the plaintiffs the amount of such liability, or, alternatively, that amount less £25 (representing demurrage at the charterparty rate for a period of three hours, the time required for the vessel to proceed from the Roads to a berth in the inner harbour) as damages for the breaches.

Eustace Roskill Q.C. and *John Donaldson* for the plaintiff charterers.

A. A. Mocatta Q.C. and *R. A. MacCrindle* for the defendant shipowners.

The following cases, in addition to those mentioned in the judgment, were referred to in argument: *Brereton* v. *Chapman* [1]; *Kell* v. *Anderson* [2]; *La Cour* v. *George Donaldson & Son* [3]; *Cargo Ex Argos* [4]; *Nelson* v. *Dahl* [5]; *Bremner* v. *Burrell & Son* [6]; *Brown*

[1] (1831) 7 Bing. 559.
[2] (1842) 10 M. & W. 498.
[3] (1874) 1 R. 912.
[4] (1873) L.R. 5 P.C. 134.
[5] (1879) 12 Ch.D. 568.
[6] (1877) 4 R. 934.

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v. *Johnson*[7]; *Michaelinos* v. *Dreyfus & Co.*[8]; *Postlethwaite* v. *Freeland*[9]; *Comptoir Commercial Anversois* v. *Power, Son & Co.*[10]; *Universal Cargo Carriers Corporation* v. *Citati*[11]; *Einar Bugge A/S* v. *W. H. Bowater Ltd.*[12]; *Dawson Line Ltd.* v. *Atkiengesellschaft Adler*[13]; *Compania Naviera Maropam S/A* v. *Bowaters Lloyd Pulp and Paper Mills Ltd.*[14]; *Chandris* v. *Isbrandtsen-Moller Co. Inc.*[15]; *The Barque Quilpue* v. *J. A. Brown*[16]; and *North River Freighters Ltd.* v. *H.E. President of India.*[17]

Cur. adv. vult.

November 18. Ashworth J. read the following judgment: The plaintiffs' claim in this case arises out of a charterparty dated August 27, 1954, made between them as charterers and the defendants as owners of the s.s. *Aello*. I was informed by counsel that the case is a test case, intended by the parties to raise questions which have for some considerable time given rise to difficulty in the trade, and in order to obtain the court's decision without undue delay the parties agreed to waive their right to have the points decided first by arbitration.

[His Lordship stated the facts as set out above and continued:] It is, in my view, clear that Buenos Aires Roads are used as a place where vessels are regularly though not invariably inspected officially upon arrival in the River Plate. What other use is made of them? In particular, are they used for anything which may properly be termed a commercial operation? One type of operation which was undoubtedly carried out in the Roads in 1954 was the discharge of inflammables and explosives if the quantity exceeded 25 tons. Under article 1777 of the Digesto Maritimo and Fluvial de la Republica Argentina (hereinafter called the Digest) such cargo must be discharged into lighters when the vessel arrives in the Roads. The lighters then either carry such cargo to its destination or remain in the Roads until such time as the vessel finishes discharging or loading in the Dock area, when the dangerous cargo is again taken on board. In this connexion reference may conveniently be made to the fact that a scale of dues has been fixed in respect of vessels which anchor in the Roads. The details are exhibited to the affidavit of Rafael de la Vega filed on behalf of the defendants, and they show that certain dues are payable by vessels which anchor in the Roads and "do not carry out any commercial operations" and that dues on the full harbour scale are payable if vessels when anchored in the Roads discharge merchandise for the port, or load merchandise from the port.

[7] (1842) 10 M. & W. 331.
[8] (1924) 131 L.T. 177; 40 T.L.R. 370.
[9] (1880) 5 App.Cas. 599.
[10] [1920] 1 K.B. 898.
[11] [1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70.
[12] (1925) 21 Ll.L.Rep. 80.
[13] [1932] 1 K.B. 433.
[14] [1955] 2 Q.B. 68; [1955] 2 W.L.R. 998; [1955] 2 All E.R. 241.
[15] [1951] 1 K.B. 240; 66 T.L.R. 971; [1950] 1 All E.R. 718.
[16] [1904] 2 K.B. 264.
[17] [1956] 1 Q.B. 333; [1956] 2 W.L.R. 117; [1956] 1 All E.R. 50.

Another type of operation which is carried out in the Roads is the discharge of cargo from a vessel in order to lighten her before she proceeds up river, and in the year 1947 an instance of this type gave rise to a dispute as to the dues payable. The decision of the Finance Ministry was that entrance and light dues were payable on the ground that the "commercial opera-"tion of transhipping cargo was involved." In my view, these facts afford strong support for the contentions that the Roads are within the legal, fiscal and administrative limits of the port of Buenos Aires and, secondly, that at least for some classes of cargo a vessel may be said to have arrived in the commercial area of the port of Buenos Aires when she anchors in the Roads, but they are in no sense conclusive on the question whether a vessel due to load maize at Buenos Aires can be said to have arrived in the commercial area of that port when she anchors in the Roads.

In the search for authoritative guidance as to the limits of the port of Buenos Aires one naturally turns to the Digest, which is an official publication issued by the Argentine Government. In Chapter LIII of the Digest there are set out Regulations of the Port of the Capital and La Plata, and in article 1702 it is provided "Under the denomination of 'Port of the Capital and "'La Plata' are comprised the Docks and Basins built on the "water front of this City, the Riachuelo, entrance channels, "outer anchorages and the Port of La Plata." The next article, 1703, deals with the Ports (in the plural) of the Capital and La Plata, and provides that they are to be considered as divided into two parts and four sections, namely, the Inner Part, comprising (First Section) Basins and Docks, (Second Section) Riachuelo and South Dock, (Third Section) Port of La Plata, and the Outer Part comprising (Fourth Section) Channels and Anchorages. The idea underlying these provisions appears to me to be that of two-ports-in-one: that is to say, there are two separate ports, the Capital, which is of course Buenos Aires, and La Plata, but inasmuch as they are not far apart and to some extent share the advantage of a common anchorage in the shape of the Roads, they are treated for at least some administrative purposes as a single joint port.

In my judgment, under a charterparty such as is involved in the present case, a ship cannot be said to be an arrived ship at a named port unless she is at least within the legal, fiscal and administrative limits of that port. Before me, Mr. Mocatta, on behalf of the defendants, was prepared to accept this principle, but he reserved the right to contend otherwise elsewhere, if necessary.

On the evidence before me I have no hesitation in holding that Buenos Aires Roads are within the legal fiscal and administrative limits of the Port of Buenos Aires. The articles in the Digest to which I have referred, and the facts relating to the collection of dues, seem to me to justify this conclusion, which

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is also supported by the evidence regarding the official inspections carried out in the Roads and (so far as it goes) the MAR Year Book. Although no concession on this point was made on behalf of the plaintiffs, it may be noted that no direct evidence was tendered on their behalf suggesting that the legal fiscal and administrative limits of the port of Buenos Aires are nearer the Dock area than the Roads. It is true that for the purpose of fixing the time when a vessel is to be regarded as having sailed from the port of Buenos Aires the time of her passing a Vanguardia or hailing station situate at the outer edge of the Dock area is taken, and not the time of her passing Intersection, which would normally be some two to three hours later. But I do not regard this piece of evidence as sufficient to displace the conclusion already indicated.

The second condition which, in my judgment, must be satisfied before a ship can be regarded as an arrived ship is that she should be within the commercial area of the port in question. This principle was accepted both by Mr. Roskill, for the plaintiffs, and by Mr. Mocatta, for the defendants, although they were acutely at issue in regard to the meaning to be attached to the expression "commercial area." Moreover, Mr. Roskill contended that even if a ship were within the commercial area of a port, she would not be an arrived ship unless she was at a place where loading can and usually does take place. In regard to this last-mentioned contention, it is right to record that, while vigorously disputing its correctness, Mr. Mocatta was prepared to concede that loading of maize could not and did not usually take place in Buenos Aires Roads.

In the course of the argument on this part of the case reference was made to a considerable number of reported decisions, but the case on which attention was chiefly focused was *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[1] After that case had been argued in the Court of Appeal, reserved judgments were delivered by Buckley and Kennedy L.JJ. respectively, Lord Alverstone C.J. expressing his agreement with both. It was urged before me by Mr. Roskill that although Buckley and Kennedy L.JJ. were in agreement as to the result, namely, that the appeal should be allowed, they were not in agreement in the pronouncements on the question now under discussion. For my part, I am not prepared to accede to the suggestion that there was any difference in principle between the views of the Lords Justices, and having regard to the fact that Lord Alverstone C.J. expressed his agreement with both judgments it is, to say the least of it, unlikely that any such difference existed. I am inclined to think that one reason why some difference between the Lords Justices has been thought to exist is to be found in the choice by Buckley L.J. of the expression[2] "place of discharge" to describe the area to

[1] [1907] 1 K.B. 344; 23 T.L.R. 215; [1908] 1 K.B. 499; 24 T.L.R. 128, C.A.

[2] [1908] 1 K.B. 499, 512; 24 T.L.R. 128.

which Kennedy L.J. referred[3] as the "commercial area." The fact that Buckley L.J. repeatedly uses the word "discharge" has, in my opinion, given rise to the mistaken idea that in order to be in the commercial area of a port a ship must be at a place where discharge is usual or at least possible. When that case was before Channell J.[4] he decided it in favour of the charterers on the ground that the ship did not reach a usual place of loading, but merely reached a place where loading was possible. It seems to me that if the Lords Justices had intended to allow the appeal on the ground that possibility of loading was enough (but was also essential) they would have said so in plain language. In fact, Kennedy L.J. said[5] in terms that the possibility of loading was not an essential factor, and although Buckley L.J. did not say so directly, I think that on a fair reading of his judgment there is nothing inconsistent with that statement. Indeed, in referring to *Pyman* v. *Dreyfus*[6] he said[7]: "The facts were that there "were no practicable means of loading her except at a quay berth, "and that a quay berth could not at the time of her arrival be "obtained. That contingency was one the burden of which falls, "not on the shipowner, but on the charterer."

The main emphasis of the judgments in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[8] appears to me to be directed to the crucial distinction between, on the one hand, a charterparty in which a berth is named or a charterer is expressly given power to designate one, and on the other hand a charterparty in which the destination is a port.

In the former case, a ship is only an arrived ship when she reaches the berth named or designated; in the latter case, subject to certain conditions, she becomes an arrived ship when she reaches an area, conveniently referred to as the commercial area, irrespective of the question whether having reached that area she can in fact load or discharge at the place where she anchors. The conditions in question are those set out in the judgment of Kennedy L.J.,[9] namely, (a) the area must be that area of the port on arrival within which the master can effectively place his ship at the disposal of the charterer; (b) the vessel must be as near as circumstances permit to the actual loading "spot"; and (c) the vessel must be in a place where ships waiting for access to that spot usually lie.

Some fifteen years after the decision in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[9] there came before the court the case of *Hudson's Bay Company* v. *Domingo Mumbru Societa Anonyma.*[10]

It was first heard by Shearman J., then by Bailhache J., and finally by the Court of Appeal consisting of Bankes, Atkin and Younger L.JJ. In that case, as in the present case, the dispute

[3] [1908] 1 K.B. 499, 520.
[4] [1907] 1 K.B. 344; 23 T.L.R. 215.
[5] [1908] 1 K.B. 499, 527; 24 T.L.R. 128, C.A.
[6] (1889) 24 Q.B.D. 152.
[7] [1908] 1 K.B. 499, 517.
[8] [1908] 1 K.B. 499.
[9] [1908] 1 K.B. 499, 521.
[10] (1921) 7 Ll.L.Rep. 5; 9 Ll.L. Rep. 196; (1922) 10 Ll.L.Rep. 476, C.A.

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related to the port of Buenos Aires, and the main issue was whether the ship was an arrived ship when lying in the Roads. In passing, it is worth noting that the Roads were either assumed or admitted to be within the legal fiscal and administrative limits of the port. The charterparty in that case, however, did not provide for the ship to load the balance of her cargo in the port of Buenos Aires; that provision appeared in the original printed form of the charterparty, but had been struck out and the following words substituted: "at one or two safe loading places "always afloat in the port of Buenos Aires." There is thus a clear distinction, which I regard as important, between the charterparty considered in the *Hudson's Bay* case [11] and the charterparty now before me. The alteration in the printed form was plainly deliberate and was no doubt inserted for the purpose of converting what is called a "port charterparty" into something similar to a "berth charterparty." The result was that the ship could not be considered an arrived ship when lying in the Roads, since in that case it was found by the arbitrator that the Roads were not a place where vessels do load or discharge.

It was said on behalf of the plaintiffs that the decision in the *Hudson's Bay* case,[11] coupled with the judgment of Buckley L.J. in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*,[12] establish the proposition that before a vessel can be regarded as arrived she must be at a place within the commercial area of the port where ships can and usually do load and discharge. This argument involves the conclusion that when Kennedy L.J. said in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[13] "It is . . . immaterial "whether she was in a place in which the physical act of loading "was possible or impossible" he was in error. I am quite unable to accept this argument. In the course of his judgment in the *Hudson's Bay* case [14] Atkin L.J. refers to the judgment of Kennedy L.J.[15] as "now the leading judgment on questions of "this kind," and in my view there is no inconsistency between the two decisions, once it is appreciated that the shipowners' obligation under the respective charterparties was not the same. Further support for this conclusion is to be found in *Van Nievelt Goudrian & Co., Stoomvaart Maatschappij* v. *C. A. Forslind & Son Ltd.*,[16] in particular in the judgment of Scrutton L.J.[17]

I do not think it necessary to lengthen this judgment by references to the cases decided in England and Scotland before *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[18] was heard. Many of them were cited to me, but in so far as they contain dicta which cannot be reconciled with that decision I prefer to follow it.

The question still remains unanswered: was the *Aello* when lying in the Roads in the commercial area of the port of Buenos Aires within the meaning of that expression given to it by

[11] 10 Ll.L.Rep. 476.
[12] [1908] 1 K.B. 499, 510.
[13] Ibid. 527.
[14] 10 Ll.L.Rep. 471, 479.
[15] [1908] 1 K.B. 499.
[16] (1925) 30 Com.Cas. 263; 41 T.L.R. 481.
[17] (1925) 30 Com.Cas. 263, 266; 41 T.L.R. 481.
[18] [1908] 1 K.B. 499.

Kennedy L.J.?[19] I agree with the contention that in a large port the commercial area for one type of cargo may not be the same as that for another type. Local custom is no doubt in some cases a deciding factor, but quite apart from custom I see no difficulty in holding that there may be more than one commercial area within the limits of a port. In each case, as it seems to me, the nature of the cargo to be loaded or discharged is a relevant factor.

It was said on behalf of the plaintiffs that if one applies the test "where do vessels awaiting orders for a particular type of "cargo usually lie?" the result is a fluctuating commercial area, the limits of which depend upon the number of waiting vessels. I do not agree. What fluctuates is the extent to which the commercial area is occupied, not the commercial area itself, and if the commercial area is full so that the ship has to wait outside, the result is that the ship is not an arrived ship. This view is, I think, in accord with the decision of Sellers J. in *Roland-Linie Schiffahrt G.m.b.H.* v. *Spillers Ltd.*,[20] where the shipowners only succeeded because of a special provision in the charterparty.

On the other hand, I recognize that a commercial area may shrink or increase in size with the decline or development of a port. But if no such process is taking place, I think that in respect of any port it should be possible to say at any given moment how far the relevant commercial area extends.

In the present case the evidence contained in the affidavits was somewhat conflicting, possibly because the deponents in some instances tended to be advocates rather than witnesses. Of one fact, however, I feel reasonably confident, namely, until September 1, 1954, the place where vessels due to load grain usually lay was in the Dock area and not in the Roads. If the resolution of that date had not been passed, vessels due to load grain would have continued to enter and lie in the Dock area until a cargo became available. Further, I feel equally certain that at least until September 1, 1954, vessels due to load grain did not lie in the Roads awaiting orders. After September 1 such vessels were compelled to lie in the Roads but, in my view, this exclusion of vessels from the Dock area did not have the effect of extending the commercial area to the Roads. The contrary view would indeed involve a fluctuating commercial area, which I regard as inconsistent with the principles laid down by Kennedy L.J.[21] It is not necessary for me to decide the precise limits of the commercial area of the port of Buenos Aires applicable to grain ships, but I do decide that in October, 1954, when the *Aello* anchored in the Roads she was not within the commercial area of the port. She was therefore not an arrived ship on October 12, and the defendants were not entitled to claim demurrage on the footing that she was. Before I leave this issue, I ought to mention that in the course of the argument the

[19] [1908] 1 K.B. 499, 521.
[20] [1957] 1 Q.B. 109; [1956] 3 W.L.R. 620; [1956] 3 All E.R. 383.
[21] [1908] 1 K.B. 499, 521.

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question was raised whether the date of the charterparty is the appropriate date for the purpose of ascertaining the limits of the commercial area or the date of the vessel's arrival within the legal fiscal and administrative limits of the port. In this connexion it is worth repeating that the charterparty was dated August 27, a few days before the resolution prohibiting grain vessels from waiting in the Dock area. Since I have reached the conclusion that the Roads were not within the commercial area for vessels due to load grain either on August 27 or on October 12, 1954, the point does not call for decision and I express no opinion upon it.

The plaintiffs contend further that even if geographically speaking the *Aello* was an arrived ship on October 12, she was not in fact ready to load. Two grounds are relied on in support of this contention: first, no police permit had been issued and, secondly, no "giro" had been obtained. So far as the facts are concerned it is clear that neither a police permit nor a "giro" had been issued, but the defendants deny that either of these facts is fatal to their legal position.

So far as the police permit is concerned, the evidence establishes that before loading could begin a police permit was required, and that some form of police inspection had to take place before a permit would be issued. I am satisfied also that this inspection could have taken place when the *Aello* was anchored in the Roads, although this course would have involved the trouble and expense of arranging for police officers to go out from the Dock area to the Roads. In the affidavits filed on behalf of the defendants there is more than one reference to the point now under consideration, and if that evidence is accepted it would seem that in the case of a vessel which has already loaded part of her cargo at an up-river port, and has therefore satisfied the police authorities there, the police inspection at Buenos Aires when she arrives to load the balance of her cargo is little more than a formality, compliance with which will not normally hold up loading operations. Although this is a point on which the plaintiffs rely, it is perhaps significant that in the affidavits filed on their behalf there is nothing to suggest that the obtaining of a police permit for a vessel which has already loaded part of her cargo up-river is a more serious matter than the defendants suggest. Nevertheless Mr. Roskill pressed upon me the argument that, formality or not, a police permit at Buenos Aires was essential, and that without one a ship was not ready to load and could not be regarded as arrived.

In *Armement Adolf Deppe* v. *John Robinson & Co. Ltd.*,[22] the Court of Appeal held that the owners of an arrived ship for which no berth was immediately available were not obliged to have discharging gear installed and ready for action during the period when the ship was waiting at a buoy. It was held that, notwithstanding the absence of such gear, the ship was ready to

[22] [1917] 2 K.B. 204.

discharge, since the gear could have been installed within three hours of the berth becoming available. It is no doubt true, as Mr. Roskill pointed out, that the missing link, so to speak, in that case was something which the shipowners could by themselves, their servants or agents, put right in a short time, whereas in the present case the issue of a police permit was not within the defendants' control. Relying on the decision in *The Austin Friars*,[23] he argued that, notwithstanding the evidence produced by the defendants to which I have referred, there could be no certainty that the police would be ready and willing to inspect as soon as the *Aello* reached a berth, and accordingly, until the police permit was in fact issued, the ship was not ready to load. Not without some hesitation (which would have been very much greater if the plaintiffs had adduced evidence indicating that in practice the obtaining of a police permit was apt to be a matter involving difficulty or delay) I have come to the conclusion that the principle applied in the *Deppe* case[24] is applicable in this case too. I accept the evidence of the defendants' witnesses to the effect that in the circumstances the issue of a police permit was only a formality, and I hold that the absence of such a permit did not of itself constitute a bar to the *Aello* being considered an arrived ship on October 12.

This brings me to consider what I regard as the most difficult of all the problems in this case, namely, what are the legal consequences which result from the fact that a "giro" or berth permit was not obtained for the *Aello* until October 29, 1954. Although I have stated the problem as a single question, more than one issue is involved, and so far as possible I will try to deal with these issues separately.

In the first place, are the plaintiffs right in contending that in the absence of a "giro" the *Aello* could not be regarded as an arrived ship? The defendants contend that the issue of a "giro" was a formality of no greater importance than the issue of a police permit, and that the *Aello* should be regarded as an arrived ship on October 12 notwithstanding the absence of a "giro." I need not refer to the relevant evidence in detail, and may perhaps confine myself to the opinion that, in the light of that evidence, there seems to me to be a substantial difference between a "giro" and a police permit. The absence of a "giro" would not and did not merely delay the loading; loading was in the circumstances absolutely impossible, and the *Aello* could not move inwards from the Roads until a "giro" was issued. The master of a vessel in the Roads which only lacked a police permit could fairly say: "I am ready to move in and start loading, "subject to a formal inspection which will not take up much "time, and which will be completed by the time you are ready "to start putting cargo on board." But the master could not make such a statement if he had no "giro," and, in my judgment, subject to the further issues about to be considered, the

[23] (1894) 10 T.L.R. 633. [24] [1917] 2 K.B. 204.

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absence of a "giro" prevented the *Aello* from being an arrived ship before October 29. It was argued by the defendants that this conclusion would convert a port charterparty into a berth charterparty, since a "giro" is in effect a berthing permit. I do not agree. I prefer to adopt the expression used by Mr. Roskill that a "giro" is to be regarded as the key which unlocks the door of the port. The fact that this key normally unlocked the door of a berth as well does not, in my view, displace the conclusion that without it a vessel could not enter the port so as to start loading; in other words, without a "giro" the *Aello* was not ready to load.

Faced with this difficulty, the defendants put forward two arguments in answer. Both of them depend upon the admitted facts: (a) that application for a "giro" would only be entertained if it was accompanied by a certificate issued by the Grain Board, and (b) the shippers (Bunge & Born Lda) were the proper parties to apply to the Grain Board for the requisite certificate.

In the first place it was said on behalf of the defendants that inasmuch as the absence of a "giro" between October 12 and 29 resulted inevitably from the absence between those dates of a certificate, the plaintiffs could not be heard to rely on the point that the *Aello* had no "giro," since it was the plaintiffs' responsibility through the shippers nominated in their contract of purchase from Bunge Zurich to apply for and obtain the necessary certificate. As I understood the argument, it was to the effect that quite apart from any contractual duty, express or implied, absolute or qualified, imposed on the plaintiffs by the charterparty, they were precluded from relying on the absence of a document due to be obtained by the defendants, but obtainable only when accompanied by another document obtainable only by the plaintiffs or their agents. No case was cited to me as authority for so wide a proposition, and in my view it is not well founded. There are, no doubt, many cases in which a party has been precluded from relying on the other party's failure to perform some act, when that failure resulted from the first party's own omission; see, for example, *Mackay* v. *Dick*.[25] But in my view the precluded party's own omission must be an omission to do something which he was either expressly or impliedly obliged to do.

The second argument of the defendants was that the plaintiffs were in fact in breach of a duty owed by them under the charterparty, and that by this breach of duty they prevented the *Aello* from being an arrived ship. This contention is to be found in paragraph 3 (a) (ii) of the re-amended rejoinder; as a matter of convenience this paragraph is also made the basis of a counterclaim, so as to enable the defendants to recover by way of damages a sum equal to such sum as may be found payable or repayable to the plaintiffs in respect of their claim. On this issue the kernel of the dispute is the question: What is the nature

[25] (1881) 6 App.Cas. 251.

of the duty owed by a charterer in regard to availability of cargo before the chartered vessel arrives at her charterparty destination? The question may also be expressed, with more specific reference to the facts of this case, as follows: If cargo has to be available for loading in order to enable the ship to become an arrived ship, is the charterer under an absolute duty to have the cargo available or is he merely under a duty to take all reasonable steps for that purpose? In stating these questions I have assumed that some duty is impliedly imposed upon the charterer, and Mr. Roskill did not seriously contend otherwise. As one might expect, the problem is not new, and it has been before the courts in several reported cases, but contrary to one's expectation the answers given or apparently given in those cases seem in some instances to be conflicting.

The problem is of special importance in the present case because it is admitted that if the plaintiffs' duty only extends to what is reasonable, the defendants have no cause for complaint. In other words, it is only if a charterer is under an absolute duty to have cargo available that the defendants can succeed.

I was informed by counsel that in any event the present case will be taken to the Court of Appeal, and for that reason I do not think it necessary to quote at length the passages in the reported cases on which the parties respectively relied. In support of the plaintiffs' contention I was referred to *Little* v. *Stevenson & Co.*,[26] especially the speech of Lord Herschell[27]; *Jones Ltd.* v. *Green & Co.*,[28] especially the judgments of Vaughan Williams L.J.[29] and of Stirling L.J.[30]; *Vergottis* v. *William Cory & Son Ltd.*,[31] *Hogarth* v. *Cory Brothers & Co. Ltd.*[32] For the defendants, reliance was chiefly placed on *Lilly & Co.* v. *D. M. Stevenson & Co.*,[33] *Krog & Co.* v. *Burns and Lindeman*,[34] and *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[35] The headnote in the last-mentioned case states the effect of the decision in the following terms: "the defendants were liable in damages on "the ground that it was their primary duty as charterers to "furnish the stipulated cargo; and there was nothing to be found "in the charterparty or the evidence which qualified this absolute "obligation." In my view the speeches of Lord Halsbury[36] and Lord Davey[37] confirm that headnote, subject to one qualification, namely, that a charterer is only bound[38] "to have his "cargo ready when the ship is ready to receive it in ordinary "course, and that he is not bound to be prepared for a contin-"gency or fortuitous circumstance not contemplated by either of "the parties." This qualification was, in my opinion, required in order to bring the decision into line with the decision given

[26] [1896] A.C. 108.
[27] [1896] A.C. 108, 117–119.
[28] [1904] 2 K.B. 275.
[29] Ibid. 280.
[30] Ibid. 285.
[31] [1926] 2 K.B. 344.
[32] (1926) 32 Com.Cas. 174.
[33] (1895) 22 R. 278.
[34] (1908) 5 F. 1189.
[35] [1905] A.C. 501; 21 T.L.R. 723.
[36] [1905] A.C. 501, 509; 21 T.L.R. 723.
[37] [1905] A.C. 501, 511.
[38] Ibid. 512.

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nine years earlier in *Little* v. *Stevenson & Co.*[39] The words "in ordinary course" seem to me to be contrasted with what may be called extra-ordinary course, an expression which fairly describes the situation involved in *Little* v. *Stevenson & Co.*[39] If one were to attempt to illustrate the principle laid down in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[40] the following might serve as an example: suppose that the destination of a ship is a berth at port X, and that when the ship arrives outside the port there are several berths available; suppose further that the port authorities would not permit a ship to occupy a berth unless she was able to load at once. If in such a case the ship had to wait outside the port because the charterer had no cargo available, the owners would be entitled to claim damages for the charterer's failure to discharge his absolute duty to have cargo available when the ship was ready to receive it in ordinary course. On the other hand, if when the ship arrived outside the port there was no berth available owing to congestion of shipping, the time for the performance of the charterer's duty in relation to availability of cargo would not have arrived. In such a case the cause of the ship not being an arrived ship would be congestion of shipping and not the non-availability of cargo, and in the absence of any special provision in the charterparty (as in the *Roland Linie* case)[41] the loss involved in the delay would fall on the shipowners.

My conclusion is that the decision in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[42] compels me to hold that the charterer's duty in relation to availability of cargo is in its nature absolute, and if by failing to provide cargo he prevents a ship from becoming an arrived ship in ordinary course, by which I mean upon arrival when there is room available in the berth or area which constitutes the charterparty destination, he is liable to pay damages. In my view the only respect in which reasonableness may be a relevant factor is in regard to the amount of cargo which must be available when the ship arrives. Mr. Mocatta was content to limit the charterer's absolute duty to this extent, namely, that he is not bound to have the whole of the cargo ready but only a reasonable amount, and I think that the reported cases support this view. But the point does not arise in the present case, since there was no cargo whatsoever available when the *Aello* arrived in the Roads. I realize that this conclusion differs from that expressed by the Court of Appeal in *Jones Ltd.* v. *Green & Co.*,[43] but that case was cited and distinguished in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*,[44] and in the circumstances can hardly be said to be binding on me. I realize also that in *Vergottis* v. *William Cory & Son Ltd.*[45] Greer J. would have been disinclined to reach this conclusion if he had not felt able to decide in favour of the plaintiff

[39] [1896] A.C. 108.
[40] [1905] A.C. 501.
[41] [1957] 1 Q.B. 109; [1956] 3 W.L.R. 620; [1956] 3 All E.R. 383.
[42] [1905] A.C. 501.
[43] [1904] 2 K.B. 275.
[44] [1905] A.C. 501.
[45] [1926] 2 K.B. 344.

on another ground. This only makes the problem more difficult; it does not supply the answer, and if one is faced with conflicting authorities, there is often no escape from the task of choosing between them.

On the evidence before me I am of opinion that the cause of the *Aello* not being an arrived ship some three hours after her arrival in the Roads (that being the time which she would have taken to reach the Dock area after leaving Intersection) was the plaintiffs' failure to have a cargo available. It seems clear that on October 12, 1954, there was no congestion in the Dock area such as had existed in August; if a cargo had been available, the *Aello* would have moved into the commercial area of the port at once, and thus become an arrived ship, and in all probability loading would have started immediately. Further, I hold that the *Aello* arrived in the Roads in ordinary course, and that there was no "fortuitous circumstance" (to use Lord Davey's expression[46]) which excused the plaintiffs from performance of their otherwise absolute and unqualified obligation.

In an effort to escape the consequences of a conclusion such as I have just indicated, the plaintiffs contended that this was a case in which it has been proved or is to be assumed that there were "particular circumstances known to both the parties, and with "reference to what they may be supposed to contract, which may "affect both the providing and the loading of the cargo" (see *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[47]). It is said that the defendants, either themselves or through their agents, knew the position at Buenos Aires in regard to "giros" and the conditions on which they were issued, and further knew that the *Aello* might have to wait outside the port so that she would not be an arrived ship. In my judgment there are several answers to this contention. In the first place, I am not satisfied that any such knowledge can be attributed to the defendants themselves, and in so far as reliance is placed on the knowledge of agents, I do not think that the Agencia Maritima Sudocean S.R.L. can properly be regarded as agents of the defendants for this purpose. That firm was nominated in clause 33 of the charterparty for the purpose of clearing the *Aello* at Customs Houses, and payment for such services was the defendants' responsibility. But in my view this limited agency, which was only to be performed when the ship reached her destination, is wholly insufficient for the purpose of affecting the defendants at the date of the charterparty with such knowledge as that firm possessed. Taken by itself, the fact that agents, whose duties only arise in the course of the performance of a contract, and who have played no part in its negotiation, possess certain knowledge does not in my view justify the conclusion that the contracting party himself contracted in the light of those agents' knowledge.

Secondly, the charterparty is dated August 27, 1954, and at that date there was nothing to indicate that the ship would be

[46] [1905] A.C. 501, 502. [47] Ibid. 511.

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refused access to the Dock area, although she might well have to wait there. But in such circumstances she would be an arrived ship, and on any view the plaintiffs would then be under an absolute duty to have a cargo available.

Thirdly, at the date of the charterparty, the defendants did not know which of three types of cargo, maize, wheat or rye, the plaintiffs would elect to load and, as I understand it, there was not at any material time any difficulty in providing a cargo of wheat or rye. Similarly, the plaintiffs had an option to complete the cargo either at Buenos Aires or La Plata or Montevideo, and at the date of the charterparty the defendants did not know which port would be selected. I am quite unable to hold that this is a case which comes within the scope of the decision in *Jones Ltd* v. *Green & Co.*[48] On the contrary, I hold that the parties to the charterparty did not enter into it with reference to the special circumstances which eventually prevailed when the *Aello* reached the Roads.

The only other point which I need mention is that in paragraph 3 of the plaintiffs' re-amended points of reply reference is made to clause 30 of the charterparty, which deals with various causes that might render loading impossible. Mr. Roskill conceded before me that the clause did not afford any protection to the plaintiffs in the present case and I say no more about it.

It was agreed by counsel that if I were to hold that the *Aello* was not an arrived ship on October 12, but that the plaintiffs were in breach of contract which prevented her from being an arrived ship, the defendants' counterclaim would succeed. That is the result of this judgment, and I will hear counsel on the question what form the order should take, and on the question of costs.

Judgment for the plaintiffs on the claim. Judgment for the defendants on the counterclaim for the same amount less £25.

Solicitors: *Richards, Butler & Co.; Holman, Fenwick & Willan.*

J. F. L.

[48] [1904] 2 K.B. 275.

[CHANCERY DIVISION.]

* BIRCH v. SULLIVAN AND ANOTHER.

1957
Nov. 26, 27.

Harman J.

[1957 B. No. 2628.]

Company—Shareholder—Bankruptcy—Misfeasance action by minority shareholder—Company as defendant—Allegations to be pleaded in statement of claim—Whether bankrupt shareholder can maintain action while still on the register—R.S.C., Ord. 25, *r.* 4.

Company—Misfeasance action.

Bankruptcy—Company—Bankruptcy of shareholder—Whether entitled to maintain misfeasance action against company.

Where a misfeasance action is brought by a minority shareholder (suing on behalf of himself and other shareholders) in which the company and the remaining shareholders are defendants, it must be proved not only at the trial but also stated in the statement of claim why the action cannot be brought in the name of the company, and the allegations on which that is founded.

Pavlides v. *Jensen* [1956] Ch. 565; [1956] 3 W.L.R. 224; [1956] 2 All E.R. 518 considered.

Semble that a bankrupt minority shareholder can bring an action against the company even after his adjudication while he remains on the register.

PROCEDURE SUMMONS.

The defendants, Michael Sullivan Ltd. and Michael Sullivan, on this procedure summons, asked that the statement of claim be struck out under R.S.C., Ord. 25, r. 4, or alternatively, under the inherent jurisdiction of court, on the grounds, inter alia, that (a) the plaintiff, Albert Ralph Edward Birch, was adjudicated bankrupt on January 5, 1956, and no order having been made since for his discharge he had no right or title to sue and his statement of claim disclosed no reasonable cause of action against the defendants or either of them, and was frivolous and vexatious; (b) the plaintiff's statement of claim disclosed no cause of action, in that in respect of the matters complained of therein the defendant company alone would have had any right or title to sue the defendant Sullivan.

The statement of claim, so far as relevant, alleged: the defendant company was incorporated in 1947 to carry on business as proprietors of concerts, variety agencies and allied objects. The plaintiff and the defendant Sullivan were, and at all material times had both been, shareholders of the defendant company, the £100 issued and authorized capital of the company being held as follows: the plaintiff, 25 preference and 20 ordinary shares; the defendant Sullivan, 25 preference and 24 ordinary shares; one Anne Eileen Birch, five ordinary shares; and one Mildred Simmons, formerly Sullivan, one ordinary share.

The defendant Sullivan was, and at all material times had been, director of the company.

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A second company was incorporated in 1950, in which the plaintiff held 17 shares and the defendant 16 shares of the authorized and issued capital of 100 £1 shares. The defendant was director of that company, which had been promoted by the plaintiff and the defendant Sullivan to act as adjunct to the defendant company. It was dissolved on June 14, 1957.

From about 1951 or 1952 or at some other date, including 1955, of which the plaintiff could not at this stage give particulars, the company acted as agents and managers of one Shirley Bassey, a stage artiste, and for her part in the theatrical entertainments in which she appeared.

The plaintiff could not at this stage give better particulars of the contractual arrangements between Shirley Bassey on the one hand and the company on the other, save by reference to extracts from books of the defendant company and the second company for the year 1955; which showed that from April to September of that year one or other or both of the companies was or were booking engagements for Shirley Bassey in theatres in different parts of England, receiving her salary for the said engagements, taking and splitting commissions, and paying her expenses.

From about 1955 the popularity of Shirley Bassey with the public increased with exceptional rapidity and to an exceptional degree, so that as from such time she became and had (to an ever increasing extent) remained capable of earning large salaries.

In September, 1955, the defendant Sullivan, being then in de facto control both of the defendant and the second company, caused both of them to cease trade with the purpose and effect of acquiring for his own personal benefit, in breach of his duty and trust to the said companies as their director, and in fraud of the plaintiff as a shareholder, the profits to be gained from the continuance of the business of acting as agent and manager for Shirley Bassey. The defendant Sullivan had at all times since, under a contract or arrangement with Shirley Bassey of which the plaintiff could not give particulars at this stage, acted as her agent and manager, and continued so to do, and had in fact thereby diverted ~~to~~ himself ~~to~~ the loss and damage of the defendant company, and (until its dissolution) the second company, and of the plaintiff, very substantial profits and commissions thereby earned. The plaintiff could not at this stage give particulars of the profits or commissions.

Robert Boyd for the applicants, defendants in the action.

Morris Finer for the respondent, plaintiff in the action.

The following cases, not referred to in the judgment, were cited in argument: *Spokes* v. *Grosvenor Hotel Co.*[1]; *Cook* v. *Deeks*[2]; *Morgan* v. *Gray*.[3]

[1] [1897] 2 Q.B. 124; 13 T.L.R. 431.

[2] [1916] 1 A.C. 554.

[3] [1953] Ch. 83; [1953] 2 W.L.R. 140; [1953] 1 All E.R. 213.

HARMAN J. The first ground for the summons is that the plaintiff is an undischarged bankrupt, and was one when the writ was issued and the statement of claim was delivered, the latter being at the same time as the issue of the writ. The allegation here is that any rights of the plaintiff to bring an action are rights of property, or choses in action, which have devolved upon the trustee, and that the plaintiff is not therefore a competent plaintiff. At the date when the writ was issued and the statement of claim delivered, the plaintiff was still a registered holder of shares in the defendant company. Since those events the trustee in bankruptcy has had himself put on the register so that the plaintiff has no longer any interest in the shares, and it is now admitted that if anybody could maintain this action the trustee in bankruptcy alone could do so.

I need not, as things now stand, consider further whether when the writ was issued the plaintiff was entitled to sue. He certainly was not entitled to sue so far as a direct claim in his own favour was concerned, but it is at least possible that he was entitled as the registered holder of shares to complain of a wrong done to the company in which he was a registered shareholder. The circumstances under which a shareholder, if he be in the minority, may in his own name bring such an action, are well settled. Supposing all the conditions be present and the registered shareholder were not bankrupt, he would be in a position to bring an action because of the wrongful act of the director in not paying money to the company, and I am not satisfied that so long as he remains registered he could not maintain such an action even if he be a bankrupt. However that may be, he certainly can no longer maintain it when he has ceased to be a registered holder.

On that part of the claim, therefore, I should certainly stay the action so long as the plaintiff alone remained the plaintiff, giving a reasonable opportunity to the trustee to put the position right if he is minded to adopt the action.

As a second ground, it is said that the statement of claim is demurrable because it does not contain the necessary allegations. The nature of the case is that the individual defendant, in fraud of the rights of the defendant company, either terminated or did not renew a very advantageous contract which the defendant company had to manage or arrange for the services of a music hall actress. That had been done through this company for some time, while the actress was comparatively poor and obscure, but as the plaintiff says, when she began to get into what is called "the big money," the company ceased, in some mysterious way, to act for her or on her behalf, and Michael John Sullivan himself became the only director of her activities. That is said to have been a misfeasance as against the defendant company. Whether any such case can be proved, of course, I need not consider at this stage, but if all those facts could be proved then there would have been misfeasance by Michael John Sullivan. The person

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to complain of that undoubtedly is Michael Sullivan Ltd., but Michael John Sullivan is the only member of the board of that company. It is said that, by reason of his position and because he holds or controls half the shares of that company, he is in a position to prevent the company taking any action against him. If that were true, an action might lie at the suit of a minority or a frustrated shareholder suing on behalf of himself and all other members of the company other than the individual defendant himself. But the statement of claim does not, in my judgment, make any allegation necessary to found such an action. It would be necessary to allege, as well as thereafter to prove, that the plaintiff could not, by reason of the first defendant's opposition, obtain the name of the company to issue proceedings: that he was in the position in which the minority shareholders are in the comparatively rare cases where such actions have been allowed.

There has been a recent case on this subject, a decision of Danckwerts J., called *Pavlides* v. *Jensen*.[1] There Danckwerts J. went carefully into the question: did the law permit such an action? He concluded that as only negligence and not fraud was alleged in that particular case, the action was not within the rule in *Foss* v. *Harbottle*,[2] and could not be maintained. But it is clear enough from such extracts from the pleadings as there are in the report that those facts must not only be proved at the trial but must be alleged in the pleadings. The present pleading is defective in several respects.

I propose, therefore, first of all, to stay the action so long as the plaintiff alone remains the plaintiff, with liberty to apply to dismiss it if the trustee in bankruptcy does not cause himself to be put on record as plaintiff within three months. Secondly, I propose to strike out the statement of claim without prejudice, nevertheless, to the right of the new plaintiff when added to deliver a fresh statement of claim, which he may do within 21 days of his becoming plaintiff.

Order accordingly.

Solicitors: *Arnold & Co.; Henry E. Goodrich.*

I. G. R. M.

[1] [1956] Ch. 565; [1956] 3 W.L.R. 224; [1956] 2 All E.R. 518.

[2] (1843) 2 Hare 461.

[CHANCERY DIVISION.]

* PRACTICE DIRECTION (PATENTS).

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Patent—Action for infringement or proceedings for revocation—Application to amend specification—Advertisement of intention to apply—Reference to pending proceedings—Patents Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 87), *s.* 30—*R.S.C., Ord.* 53A, *r.* 19 (*a*).

In proceedings under section 30 of the Patents Act, 1949, the "suitable advertisement" required by R.S.C., Ord. 53A, r. 19 (*a*),[1] must include identification of the pending proceedings in which leave to amend is proposed to be applied for.

Dated December 9, 1957.
By direction of Lloyd-Jacob J.

W. S. JONES,
Chief Registrar,
Chancery Division.

[1] R.S.C., Ord. 53A, r. 19: "Where "an application is made by a "patentee for leave to amend his "specification under section 30 of the "[Patents Act, 1949] the following "provisions shall apply:—(*a*) The "applicant shall give notice of his "intention to the Comptroller accom- "panied by a copy of a suitable "advertisement of the proposed "amendment and the Comptroller "shall insert the advertisement once "in the Official Journal (Patents)."

END OF VOLUME 1.

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